24-27 April, 2012

International Students Symposium on Law and Global Issues

With Collaboration of Koç University Law School,
Law Club, Office of International Programs:

JUSTITIA ET FIDES

SPECIAL EDITION

KOÇ UNIVERSITY

JUSTITIA ET FIDES

Special Edition

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Licence Holder
Prof. Dr. Bertil Emrah Oder

Managing Editor
Zeynep Kılavuz

Design
Gökhan Demirhan

Cover Design
Caner Aydoğan

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INTERNATIONAL STUDENTS SYMPOSIUM ON LAW AND GLOBAL ISSUES

WITH COLLABORATION OF KOÇ UNIVERSITY LAW SCHOOL, LAW CLUB, OFFICE OF INTERNATIONAL PROGRAMS:

ON 24 - 27 APRIL, 2012

In the last decade, cross-border developments in law and legal education made necessary to discuss all kinds of legal issues from global perspectives in the classroom, workshops, seminars and conferences. Through rise of human rights concerns vis-à-vis security measures, humanitarian law, injustices and ramifications for rule of law, international business transactions or regional economic actors, legal scholars and students are obliged to find legal solutions globally applicable at different levels, i.e. local, national, regional or international. Global perspectives for law are now indispensible to develop a common understanding aiming at preserving universal legal values and consolidating real sense rule of law in different legal cultures. Affirming its dedication to global studies of law both in comparative, regional and international sense, Koç University Law School strongly encourages law students to participate in "International Students Symposium on Law and Global Issues". We believe that an international student conference will contribute to raise academic awareness as regards universal values of law and their conflict resolving effect. Please come and join us in Istanbul where this time not only the continents, but also global aspects of public and private law with law students meet.

Prof. Dr.
Bertil Emrah Oder
Dean

SYMPOSIUM PROGRAM

1st Day: April 24, 2012

TIME	ACTIVITY	LOCATION
		ENG Auditorium
10.00- 10.45:	Coffee & Registration	
10.45- 11.15:	Welcome Speech and Opening Remarks	
	Prof. Dr. Selçuk Karabatı	
	Vice President for Accedemic Affairs, Koç University	
	Prof. Dr. Bertil Emrah Oder	
	Dean, Koç University Law School	
11.15- 11.45:	Koç University Movie and Presentation	
	Ayşe İnan, Director of Office of International Programs	
11.45- 13.15:	Lunch break	
13.30- 15.30:	Panel: **"Legal Insights for Global Challenges Public and Private Law at Crossroads"**	
	Asst.Prof. Zeynep Oya Usal, Koç University Law School	
	"COE Convention on Preventing and Combating Violence Against Women and Domestic Violence: Will It Pave the Way to Eradicate the Structural Violence as the First Legally Binding Instrument in the World?"	
	Asst.Prof. R.Murat Önok, Koç University Law School	
	"A Vital Step towards the Realization of Humanity's Aspiration to Fight Impunity for Mass Atrocities: the Development of International Criminal Tribunals."	
	Asst.Prof. Zeynep Derya Tarman, Koç University Law School	
	"Arbitration as a Dispute Resolution: How to Draft an Arbitration Clause?"	
	Asst.Prof. Yiğit Sayın, Koç University Law School	
	"The Human, The Clone and The Person: Analyzing the International Legal Framework for 'Human Cloning' and Making Sense of the Teological, Philosophical, Commercial and Legal Approaches to the Problem."	
15.30- 16.30:	Discussion Session	

2nd Day: April 25, 2012

TIME	ACTIVITY	LOCATION
10.00- 10.15:	Coffee & Registration	**ENG Auditorium**
10.15- 10.30:	Opening Speech	
10.30- 12.15:	Presentations of Call for Papers	
12.30- 13.45:	Lunch Break	
14.00- 16.00:	Presentations of Call for Papers	
19.00- 21.00:	Boat Tour* in Bosphorus	**Sarıyer**

3th Day: April 26, 2012

TIME	ACTIVITY	LOCATION
10.00- 10.15:	Coffee & Registration	**Founders' Hall/ Student Council Room**
10.15- 11.15:	1st Workshop: **"Extraterritorial Use of Force to Vindicate Human Rights and Democracy: A New Humanitarian Hypothesis or Old Imperialist Hypocrisy?"**	
11.15- 12.15:	Discussions about subjects of the 1st Workshop	
12.15- 13.45:	Barbeque Party	
14.00- 15.00:	2nd Workshop: **"Prevailing Interest of Truth and the Right to a Fair Trial: Is There a Contradiction?"**	
15.00- 16.00:	Discussions about subjects of the 2nd Workshop	
21.00- 02.00:	Party*	**Cafe Pi, Taksim**

4th Day: April 27, 2012

TIME	ACTIVITY	LOCATION
10.45- 11.00:	Coffee & Registration	**Founders' Hall**
11.00- 12.30	Initial Discussion of the Fictional Scenario by Each Group	
12.30- 13.30:	Lunch Break	
13.45- 14.45:	Second Discussion Session in Combined Groups	
15.00- 17.00:	Presentation of the Outcomes	
17:00- 17.30:	Evaluation of Presentations and Concluding Remarks	
19.00- 23.00:	Symposium Gala*	Koç University, RumeliFener Campus
*OPTIONAL		

OPENING AND WELCOME REMARKS

PROF. DR. BERTIL EMRAH ODER, DEAN, KOÇ UNIVERSITY LAW SCHOOL

Dear participants and colleagues,

Good morning. I am delighted to offer a happy welcome on behalf of Koç University College of Law. We are excited and pleased to host the International Symposium on Law and Global Issues. It is with equal pleasure that I note the attendance of law students from different universities and most importantly different legal cultures. The Symposium is a joint project of Law Club –our student organization at the College of Law, Office of International Programs and College of Law. Without the generosity of Office of International Programs, this event would not be possible. However, its success will be the end result of joint efforts and meaningful contributions of the participants. We are extremely happy for having you here and observing that law students have concerns and views to express as regards fragile, but needed relationship of law and global issues.

We, the participants of the Symposium, acknowledge the impact of law across national boundaries and the need to deepen inquiry into comparative and international approaches to law and legal study. Many years after the School of Athens, which was known as the school of Aristotle, and Plato on comparative approach of law and political institutions we gather here for focusing on global trajectories.

Beginning from today we will be discussing "hot potatoes" of international and comparative law, such as violence against women, mass atrocities and international criminal courts, humanitarian interventions, human cloning, Uludere incident, supremacy of fair trial principle, constitutional adjudication or international business transactions as well as commercial arbitration.

Here, I have two basic assumptions:

I assume:

We are resolved that global perspectives for law are indispensible to develop a common understanding of universal legal values and to promote real sense rule of law in different legal cultures.

We are resolved that global markets must be balanced by global values such as respect for human rights and international law, democracy, security and sustainable economic and environmental development.

In 1947, under the ashes of World War II, a prominent Turkish poet Nazım Hikmet, wrote a poem on mankind of which meaning is still vivid:

Strangest Creature in the World

You're like a scorpion, my brother and sister,
you live in cowardly darkness like a scorpion.
You're like a sparrow, my brother and sister,
always in a sparrow's flutter.
You're like a clam, my brother and sister,
closed like a clam, content,
and you're frightening, my brother and sister,
like the mouth of an extinct volcano.
Not one, not five- unfortunately, you number billions.
You're like a sheep, my brother and sister,
when the cloaked drover raises his stick,
you quickly join the flock and run, almost proudly, to the slaughterhouse.
I mean you're strangest creature on earth
- stranger than the fish that couldn't realize the ocean
though it lives in the ocean.
The oppression in this world is thanks to you,
and if we're hungry, tired, covered with blood,
and still being crushed like grapes for our wine, the fault is yours
- I can hardly bring myself to say it,
but most of the fault, my dear brother and sister, is yours.

1947, Nazım Hikmet

I hope we point out the faults preventing global justice, raise our awareness and show the effective ways and remedies to correct them. I wish the participants a very fruitful and productive symposium.

COUNCIL OF EUROPE (COE) CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (ISTANBUL CONVENTION): WILL IT PAVE THE WAY TO ERADICATE THE STRUCTURAL VIOLENCE AS THE FIRST LEGALLY BINDING INSTRUMENT IN THE WORLD?

ASST. PROF. ZEYNEP OYA USAL, KOÇ UNIVERSITY LAW SCHOOL

Every day women all around the world are stalked, harassed, raped, mutilated, forced by their family to enter into a marriage, sterilised against their will or psychologically and physically abused in the "safety" of their own homes. The examples of violence against women are endless, its victims countless. Many women are too afraid or ashamed to seek help, often paying for their silence with their lives. Those that do speak out are not always heard. Domestic violence is another form of violence that is far too common and that affects not only women, but men, children and the elderly as well.

Aiming to tackle this world-wide human rights violation, Council of Europe adopted a convention which was opened for signature in May 2011, namely Council of Europe (COE) Convention on preventing and combating violence against women and domestic violence (İstanbul Convention). The Istanbul Convention is the first legally binding international human rights law instrument in Europe to prevent and combat violence against women and domestic violence and in terms of scope it is the most far-reaching international treaty . It aims at zero tolerance for violence against women and domestic violence and is a major step forward in making Europe and beyond a safer place. Preventing violence, protecting its victims and prosecuting the perpetrators are the cornerstones of the Convention, as is the requirement to co-ordinate any such measures through comprehensive policies. In essence, it is a renewed call for greater equality between women and men, because violence against women is deeply rooted in women's inequality in society and is perpetuated by a culture of tolerance and denial. The Convention covers victims from any background, regardless of their age, race, religion, social origin, migrant status or sexual orientation and calls for the criminalisation of psychological violence, stalking, sexual harassment, forced marriage, female genital mutilation, forced abortion and forced sterilisation. In this presentation, the scope and the implementation of the İstanbul Convention will be thoroughly addressed.

Many women are too afraid or ashamed to seek help, often paying for their silence with their lives. Those that do speak out are not always heard. Domestic violence is another form of violence that is far too common and that affects not only women, but men, children and the elderly as well.

A VITAL STEP TOWARDS THE REALIZATION OF HUMANITY'S ASPIRATION TO FIGHT IMPUNITY FOR MASS ATROCITIES: THE DEVELOPMENT OF INTERNATIONAL CRIMINAL TRIBUNALS

ASST. PROF. R.MURAT ÖNOK, KOÇ UNIVERSITY LAW SCHOOL

In this paper, the development of international criminal tribunals was evaluated. The preventive effect of international criminal law was highlighted, as it is widely believed that the "culture of impunity" for large-scale human rights violations, which has reigned until very, recently was a major factor for their persistent recurrence. Then, the need for the establishment of an international criminal tribunal was explained. The truth is that, despite the existence of various rules prohibiting war crimes, crimes against humanity and genocide, the missing link so far was a system or a control mechanism, which could implement these norms and try those who violate the relevant rules. In that sense, experience has proved that the reliability of national organs to prosecute serious violations of ICL is limited. There are two basic reasons for this: 1) National courts may be UNABLE to start or continue the trial, or 2) a state, which has jurisdiction over the crime, may be UNWILLING to exercise it. These concepts of inability and unwillingness were analyzed with some examples. The benefits of establishing such a tribunal were discussed. The major benefit of having an int'l. Criminal tribunal is that, at last, perpetrators of large-scale human rights violations will be under "individual criminal responsibility". Then, drawing from the experience of the ad hoc tribunals established after WWII, and explaining the criticisms directed to such courts and their shortcomings, the need for a permanent institution was highlighted. In this framework, the work of the Nuremberg and Tokyo Military Tribunals, and the legacy of the ICTY and the ICTR were assessed. Finally, the permanent International Criminal Court established through the Rome Statute was studied. The jurisdiction of the Court, its recent activity, some of the challenges it faces, and the potential it promises were evaluated.

The truth is that, despite the existence of various rules prohibiting war crimes, crimes against humanity and genocide, the missing link so far was a system or a control mechanism, which could implement these norms and try those who violate the relevant rules.

ARBITRATION AS A DISPUTE RESOLUTION: HOW TO DRAFT AN ARBITRATION CLAUSE?

ASST. PROF. ZEYNEP DERYA TARMAN,
KOÇ UNIVERSITY LAW SCHOOL

It is generally acknowledged today that arbitration is a means of dispute settlement that stands on an equal footing with adjudication before domestic courts. Arbitration is a resolution of a dispute by an independent and impartial third party (arbitral tribunal) chosen by the parties. Arbitration begins as a private agreement. It is based on party autonomy and continues as a private proceeding as planned by the parties. Arbitration can only be initiated if the parties have concluded an arbitration agreement. This makes arbitration different from litigation before domestic courts. The competence of domestic courts does not require an agreement of the parties. Since the parties need a valid arbitration agreement in order to proceed with arbitration, the drafting of such a clause is significantly important.

An arbitration agreement must express a clear intention of the parties to submit the dispute(s) to arbitration. Two basic principles that should guide any drafter of an arbitration clause are: Simplicity and Precision. A contract that is drafted in clear and simple terms will be more easily performed than a contract drafted in ambiguous and vague terms. Parties often tend to draft very long and complicated arbitration clauses with vague terms that lead to invalidity. Parties should be extremely careful not to narrow inadvertently the scope of the arbitration clause by restricting the clause simply to disputes "related to execution or performance" of the contract. Difficulties also arise from incorrect references to arbitral institutions. It is a great help for the parties to incorporate the standard or model arbitration clause of the chosen institution into their contract to avoid mistakes by drafting. These clauses are simple, but contain the key elements to any effective arbitration clause. Many of the difficulties that most often complicate and delay an arbitral proceeding and the possible enforcement of an arbitral award can be removed or diminished by a well-drafted arbitration clause.

An arbitration agreement must express a clear intention of the parties to submit the dispute(s) to arbitration.

THE HUMAN, THE CLONE AND THE PERSON: ANALYZING THE INTERNATIONAL LEGAL FRAMEWORK FOR 'HUMAN CLONING' AND MAKING SENSE OF THE THEOLOGICAL, PHILOSOPHICAL, COMMERCIAL AND LEGAL APPROACHES TO THE PROBLEM

ASST. PROF. YIĞIT SAYIN, KOÇ UNIVERSITY LAW SCHOOL

Cloning is a number of different processes that can be used to produce genetically identical copies of a biological entity. And a clone is the copied material, which has the same genetic makeup as the original. Cloning is not solely an artificial occurrence. Cloning also is an occurrence in nature such in the case of bacterias and identical twins. When we talk about artificial cloning though, there are three main methods of it: gene cloning- therapeutic cloning- reproductive cloning. Gene cloning is the method where copies of genes or segments of DNA are produced. The method of therapeutic cloning is the production of embryonic stem cells. And lastly, the most controversial amongst all is the method of reproductive cloning which produces copies of whole animals (and humans?).

The problem of human cloning can be approached from many perspectives, including legal, social, ethical, religious and economical although the scope of my presentation today will not allow me to dwell on the problem from every possible angel. I will try to address the issues and ascertain the relevant problems that can arise.

Now let's move on to look from the legal perspective and accordingly examine the current international legal framework on human cloning. The European Union, with its 'Charter Of Fundamental Rights Of The European Union' explicitly prohibits the practice of human cloning. 'Right to the integrity of the person Article 3.2 (d)': "In the fields of medicine and biology, the following must be respected in particular: the prohibition of the reproductive cloning of human beings". In United States; there is no federal law that bans human cloning however by 2012; 13 U.S states have banned human cloning while some other states have legislated on certain restrictions or circumventions on reproductive cloning. In United Kingdom "Human Fertilisation and Embryology Act 2008" prohibits its reproductive cloning. There is also the 2005 dated 'United Nations Declaration on Human Cloning' with which the "Member States are called upon to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life". Such examples of international and national legislations banning reproductive cloning are not limited to the ones mentioned above. Therefore, in the light of all those acts, legislations and declarations it is not wrong to hold that 'human cloning is forbidden internationally'.

Human cloning is being objected by various religious movements, scholars and academics from a variety of fields and a growing number of civil society organizations. The most common objections against human cloning are that "cloning is an offence against god (the 'playing god' argument)"; "cloning is against nature"; "clones will lack individuality & identity" and that "cloning is against human dignity." So as I mentioned before, human cloning is forbidden on an international scale but what if a clone is cloned against all thoso prohibitions. We, as legal academics, are historically familiar with the concept of an 'illegitimate child' but this notion of 'illegal child' is alien to us nonetheless. Provided that sometime in the future, somewhere in the world a clone is cloned than will this clone be considered as a human and more importantly (for us) a person? Will the clone have rights and duties? Will the clone incur liabilities? Will the clone be granted a legal personality (personhood)? Such questions will lead us to the following problem: Is there a difference between a human and a person? Are all humans persons and all persons humans?

In ancient Greece and Rome not every human had rights. The women and slaves were considered as humans but not as persons. Both lacked personhood, they were not capable of sustaining legal rights and duties. Therefore, although they were humans, they lacked personality. Actually, early law regarded all human beings (and them alone) as possessing personality. The development of law necessitated changes. Some human beings (such as slaves, war captives or in early times women and in some cultures foreigners) ceased to have a personhood whereas some things and groups started to acquire one. The Romans were the first to extend rights and duties to inanimate objects other humans. In Roman

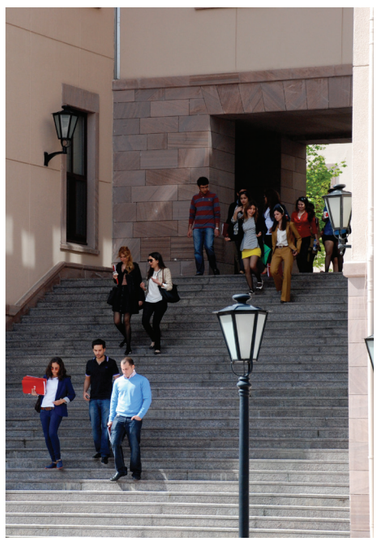
personality. The development of law necessitated changes. Some human beings (such as slaves, war captives or in early times women and in some cultures foreigners) ceased to have a personhood whereas some things and groups started to acquire one. The Romans were the first to extend rights and duties to inanimate objects other humans. In Roman law: an inheritance into which the heir had not yet entered was considered to be capable of sustaining legal rights and duties. It can also be argued that the Roman imperial treasury (fiscus) was also personified as well. The municipalities outside Rome (municipia) were bearer of private rights and could sue and be sued. In ancient Greece, animals and trees were tried for offences against humans that meant that although they were not granted rights, they were considered capable of having duties. Trials of animals were also well known during middle ages.

In modern law legal persons may be divided into two main groups: natural persons and juristic persons. Natural persons are humans. On the other hand, juristic persons are the things or groups of persons which the law deem capable of holding rights and duties. Historically there are exceptions to this definition such as the inheritance and the treasury in Roman law; also a Hindu idol was recognized as possessing legal personality by the privy council in 1925. in 2007, the parliament of Balaeric Islands in Spain had granted great apes legal personhood rights.

The well-known jurist Hans Kelsen says that legal personality is nothing but a fiction and the concept of 'legal personality' imply no more than that a legal person is simply a complex of legal rights and duties. The legal system can personify whatever being or objects it pleases. If the legal system wishes to personify things or groups ; it can do so, if the legal system wishes to deprive classes of human beings of legal personality, it can do so. This reasoning brings us to other questions such as: "Can a legal system deprive a clone of legal personality on the grounds that he/she is cloned illegally?", "Will it matter if clones are considered as humans or not?", and "What should be the legal reasoning while approaching the problem?". These are all valid questions the answers of which will guide our (the humanity's) approach to the cloning problem of the –not that too distant- future. Before I finish my speech I would like to quote John Stuart Mill: "Each time there is a movement to confer rights upon some new 'entity,' the proposal is bound to sound odd or frightening or laughable. Until the rightless thing receives its rights, we can not see it anything but a thing as the 'use' for us – those who are holding rights at the time." I sincerely hope Mill is wrong and we will not make the 'clones' wait for their rights until they outlive their usefulness for us and when I say us, I mean the ones who are holding the rights and have the authority to decide who or what can join us in holding them.

> The most common objections against human cloning are that "cloning is an offence against god (the 'playing god' argument)"; "cloning is against nature"; "clones will lack individuality & identity" and that "cloning is against human dignity."

OPENING CEREMONY



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COMPARISON BETWEEN "COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE" AND TURKISH "LAW ON PROTECTING FAMILY AND PREVENTING VIOLENCE AGAINST WOMEN"

AYŞEGÜL KULA, KOÇ UNIVERSITY LAW SCHOOL

Abstract

Violence against women is gender-based violence including physical, sexual, psychological or economic harm. In Turkey, there were more than 26.000 women who faced with murder, physical injury, attack and threat of men in the first half of 2011. Turkey signed "Council of European Convention on Preventing and Combating Violence against Women and Domestic Violence" on 11.05.2011 and promulgated "Law on Protecting Family and Preventing Violence against Women" on 08.03.2012 taking the convention as its base. The subject matter of this paper is to compare and contrast the law and the convention within the framework of gender equality. Is this law consistent with convention and will it accomplish protection of women? This paper advances critical perspective to analyze whether law understands same problems, aims similar objectives and takes efficient measures to compete with women rights issue. Having been enhanced with respect to previous "Law on Protection of Family", the current law still doesn't see gender mainstreaming as a problem and fails to strengthen women and provide equality in society. In addition, the solution mechanisms are not concrete enough in terms of stopping further violence and including women's points of views. To present a more detailed response to the question, all of the articles will be scrutinized carefully in this paper.

Key words: Law, Gender Equality, Violence, and Protection of Women

Violence against women is gender-based violence including physical, sexual, psychological or economic harm. In Turkey, 4 in every 10 women face with violence and %48.5 of them cannot share this with anyone. These statistics occur just because women are seen inferior compared to men. Bearing in mind that women and men share the same human dignity, the violence problem and the protection of women should be achieved to equalize men and women both at home and in social life. Turkey signed "Council of European Convention on Preventing and Combating Violence against Women and Domestic Violence/ Istanbul Convention" on 11.05.2011 as an important step. The convention was open for signature by the member states of Council of Europe, and the non-member states in Istanbul on May 2011. This convention aims to create a legal framework to protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence and Turkey is first to ratify it. Having taken a significant step, Turkey also promulgated "Law on Protecting Family and Preventing Violence against Women" on 08.03.2012 by taking the convention as its base. This law aims to protect family, women and to combat with the violence against women. In this paper, the consistency of law with Istanbul Convention will be analyzed in three main points; how does law see the problem, what does law aim and what are the solutions for problems.

Solving the violence against women within the framework of gender equality requires the realization of the existence and severity of this problem. Law is consistent with the convention in terms of the definition of the domestic violence which is any physical, sexual, psychological and economical violence between the victim of violence and the perpetrator of violence. Turkish law and Istanbul Convention also see threat, pressure, and prevention of freedom as a problem. This similarity indicates that Turkey has realized the domestic violation against women and also widened the understanding of this violation by including both physical and psychological integrities. Moreover, law also achieves a better criterion in terms of the environment by not requiring perpetrator and the victim to be close or to live in the same environment; so violence is more important than the degree of relationship or closeness. In addition, it is clear that the violence against women is a special issue and law publicizes it by pointing out that violence occurs due to gender-based discrimination. This recognition may be interpreted as recognition of gender mainstreaming. These similarities emphasize that Turkey clearly recognizes the reality of the violence against women, which derives from the inequality between men and women, no matter what their relation is and covers every aspect of violence and individual. On the other hand, Turkey is not very successful in terms of including non-family partners probably because society's not recognizing non-married couples as partners. However, non-married couples should be mentioned in order to protect these women from the violence that is tried to be justified due to the type of relation. Furthermore, even though there is a reference to gender mainstreaming; it is not exactly defined; so law doesn't see gender roles; constructed behavior as a problem. However, these behavior and roles justify the domination of men over women and this point of view is one of the reasons of violence against women. Unlike the convention, female under 18 years old are not seen as women, but in Turkey most of the girls who face with violence of their fathers, friends, and partners were exposed to violence just because they are female. This absence is a problem in Turkey due to the special need of protection of young women. Another important thing is that law doesn't mention to honor and forced marriages. In Turkey, irrational and forced marriages are widespread and the weakness of women also derives from these marriages. Besides, honor issues justify the use and the continuation of violence. All of these show that even Turkey realizes that there is a special and serious gender problem; she fails to face with her realities which are in fact the causes of violence.

Signing a convention and taking it as a base to create a law are important steps; however law's objective also matters in terms of being compatible with the convention. Both of them aim to protect the women, the children, the family members and the victims of stalking, who have been subject to the violence or at the risk of violence while regulating procedures and principles with regard to the measures of preventing the violence against those people. Moreover, it is an important improvement that there is the aim of fast and just application of policies, which should be compatible with human dignity. Not just defining aims but also being sensitive to equality of men and women and providing support to organizations and law enforcement agencies emphasize that state have strong tendency to take special measures to solve the problem of violence against women. Highlighting that the measures should not be counted as positive discrimination supports this tendency of the state. These similarities indicate that law is compatible with the convention in terms of aiming to solve violence, bearing in mind the further aim of equality. However, in aims, there is no attribution of special importance to women especially in the first article where we see the main aim of the law. It includes all individuals regardless of their gender even though some parts directly refer to women. The title also puts protection of family first and this shows that saving family is much more important than protecting women. However, to really solve the violence against women, women should be at the center. This law may be seen as a law that just strengthens the family based structure of Turkish society. In addition, although it is good that this law takes Istanbul Convention and other laws as its base; however to increase the significance of this law, the other laws about this issue should take this law as a reference point. Moreover, being sensitive to the equality doesn't mean that the articles will derive from the aim of equality; so there is no strong aim of providing gender equality and this damages the general aim of this law; since inequality is one of the bases of violence against women. Furthermore, there is no aim of strengthening the women and it is not possible to solve the violence problem without increasing the power of women. This may be achieved with other laws; however this law also should include this aim to create integrity within the law in terms of dealing with violence. Besides of strengthening, this law doesn't mention removing the discrimination against women in social life to deal with gender mainstreaming; but discrimination in social life is also one of the main supporters of the violence against women, so there should be an article, which at least refers to solution of discrimination. Even though this law aims to solve the violence against women and protect the victims of violence, it fails to strengthen the significance of this law and solve the main reasons that are society based gender mainstreaming and weakness of women in the society.

Law includes a very detailed catalogue for solutions and policies that can be analyzed in three parts: preventing violence, protecting the victim of violence, and prosecuting. Both the law and the convention tries to prevent violence by the help of education about equality in schools, media with the aim of informing people, call centers which operate on 7/24 basis and with educated professionals to protect any risk of violence. These measures help to familiarize people with the violence against women to prevent use of force against women especially in long run. On the other hand, the law doesn't give particularized information about the content of the education and media programs. To solve the problem, law should have aimed to teach

the violence against women to prevent use of force against women especially in long run. On the other hand, the law doesn't give particularized information about the content of the education and media programs. To solve the problem, law should have aimed to teach that men and women are equal and should have broken the constructed beliefs about the roles of women. Moreover, law doesn't include men and boys to work for prevention of violence and even chooses women to work in help centers. Nevertheless, to solve the problem immediately, men should be included in the process of understanding women better and of being an example for other men. Law also doesn't provide any measures to remove the traditions that legitimize violence by humiliating women. In order to prevent violence to occur, state should change the negative point of views towards women. However, law doesn't focus on preemptive measures; but if the main aim is to protect women, law should prevent the first attempts of violence more.

Law is very successful in terms of protecting the victim of violence and protects the women by ensuring safety; high security and helping them to self-actualize themselves after the results of violence. Monetary help; sheltering, health and rehabilitation opportunities; women's chance of hiding themselves are efficacious measures. Moreover, law provides continuity by deterring the perpetrators by making them to pay ancillary relief while also providing opportunities for children. Violence Prevention and Monitoring Centers, which include professionals and call centers, also help to protect women within a short period of time. Besides of these, changes in reporting and cautionary decisions are important steps. According to the law, reporting can be done by everyone and to take cautionary decision there is no need for evidence. These will bring more hidden violence issues on the table while preventing the arbitrary decisions of authorities about searching for evidences. The convention and the law also deter the perpetrator by giving imprisonment to perpetrator if he does not apply decisions. Although the law is very good at protecting the victim, there are no special measures to solve violence caused by honor or forced marriages. These are the justification of further violence and this cycle should be broken down in order to protect the victim. Moreover, not mentioning what will happen to people who aided to violence also creates problem because in Turkey, to protect victim, people supporting violence should also be deterred. Furthermore, law does not mention to aggravating circumstances which increase the effects of violence such as using violence constantly, in front of children… but these require more punishments to deter people. Other important missing aspect is prevention of mandatory alternative dispute resolution processes or sentencing. In Turkey, women are directed to reconcile with their husbands due to social pressures about the importance of family and gender roles; but state should leave women to think by themselves and be neutral about the reconciliation of partners in order to protect them. Moreover, law doesn't give any incentive for notification that may prevent continuity of the effects of the damage by supporting people or victims to inform authorities and to lighten the violence issue. This law is perfectly compatible with the convention in terms of starting the prosecution and providing continuation of it. The law includes Violence Preventing and Monitoring Centers, call centers and controls the reports that these centers will publish. Law also promotes the fast solutions especially by supporting inter-agency coordination which agencies are obliged to do. Additionally, removing the necessity of complaint in order to start prosecution and providing free judicial assistance enables prosecution to be fast. Giving importance to cautionary decisions and punishment to perpetrator if he does not obey them also indicate that this law aims prosecution to be well developed. However, the explanations about investigation, prosecution and procedural law are weak in some parts. First of all, there is no information about what will happen if woman withdraws her complaint. Even though prosecution does not depend on complaint, there should be further explanation that says even women withdraw their complaints; state will continue to work for criminal investigation. Moreover, there is no binding force on civilian authorities and law enforcement agencies. Being fast and cooperating are very effective measures but in Turkey, the bureaucratic slowness should be considered, so there should be special checks and balances mechanisms on them. In addition, law does not mention to lapse of time; but women may not say the violence directly due to social pressure, so the idea that women will always be supported should be created.

In conclusion, "Law on Protecting Family and Preventing Violence against Women" takes important measures which are compatible with the "Council of European Convention on Preventing and Combating Violence against Women and Domestic Violence" to solve the violence against women, although she fails to highlight some important aspects. Law understands same problems with convention; however it is not strong in terms of recognizing the Turkish realities' effects on the occurrence of violence. In terms of aiming similar objectives, law is also consistent with the convention with the main aim of solving the violence against women. However, Turkey does not endeavor to solve gender mainstreaming and continues to ignore the weakness of women while sometimes draws the picture of protecting family instead of focusing on the protection of women. Besides, when we analyze whether law takes efficient measures to compete with violence issue, we see that law is not as successful as the convention in terms of preventing the occurrence of violence. Even though law mentions long run solutions as preemptive measures; they are not explained in detail. On the other hand, the measures about protecting the victim are very efficient in terms of stopping further violence and relieving the negative effects on women. It would be better if these measures also include details like aggravating circumstances, preventing alternative dispute resolutions or supporting more notification; but the protection part of the law makes law consistent with the convention. Moreover, even though there are missing parts, law is compatible with the convention in terms of investigation, prosecution and procedural law and will be effective if Turkey achieves to create control mechanisms on the agencies. To conclude, although gender mainstreaming problems and Turkey's realities that cause violence exists and preemptive measures are not very effective, this law is promising in terms of protecting the victim and creating the state's position of supporting women. When it is compared to the previous "Law on Protecting Family", it is seen that Turkey gives importance to the "Council of European Convention on Preventing and Combating Violence against Women and Domestic Violence" and tries to be compatible with the convention

Law is very successful in terms of protecting the victim of violence and protects the women by ensuring safety; high security and helping them to self-actualize themselves after the results of violence. Monetary help; sheltering, health and rehabilitation opportunities; women's chance of hiding themselves are efficacious measures. Moreover, law provides continuity by deterring the perpetrators by making them to pay ancillary relief while also providing opportunities for children.

THE ANALYSIS OF THE INCIDENT AT ULUDERE IN THE LIGHT OF CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS ON RIGHT TO LIFE

UĞURCAN ÖZTÜRK, GALATASARAY UNIVERSITY FACULTY OF LAW

The purpose of this research paper is the examination of the recent incident at Uludere (Şırnak, Turkey) -in which 34 residents died as a result of an air strike of Turkish armed forces- under the light of the case-law of ECtHR on the subject of "right to life" that is provided by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The jurisprudence of the ECtHR shows us that the obligation of a Member-State consists of three different branches, which are negative (as cited in the principal decision of ECtHR, McCann v. UK), positive (Dink v. Turkey) and procedural (Amirov v. Russia) obligations.

The negative obligation of the State is determined by the ECtHR as the "legitimate use of force" in which we find the indispensable conditions of "absolute necessity", "proportionality" and "gradual use of force".

Regarding the positive obligations of the State, we observe that ECtHR identifies two different aspects; 1) the protection of residents under the jurisdiction of the concerned State from "clear and imminent threats" of 3rd parties; 2) on the occasion of a violation of Article 2, the presence of an effective investigation conducted by the State, i.e. the procedural obligation.

In our case, we, the authors, approached the responsibility of the Turkish State by three points of view –before, during and after the incident at Uludere- and in accordance with the aforementioned basis and principles.

The negative obligation of the State is determined by the ECtHR as the "legitimate use of force" in which we find the indispensable conditions of "absolute necessity", "proportionality" and "gradual use of force".

CONSTITUTIONAL REVIEW: A COMPRASION BETWEEN THE SUPREME COURT OF UNITED STATES AND THE CONSTITUTIONAL COURT OF TURKEY

AYŞE GIZEM YAŞAR, BILKENT UNIVERSITY FACULTY OF LAW

1. Preface

Judicial review, although has been practiced by many countries for centuries, still remains a controversial subject, as a consequent of the variation in constitutional regulations and its practice, e.g. what kind of courts are given the right to practice, to what extent it can be applied. Turkey and the United States are two different ends to the matter of judicial review, therefore the examination of the practice in those two countries demonstrate the vast differences of the formation and appliance of judicial review in today's world.

2. Foundation of Constitutional Review

a. Supreme Court of the United States

The United States Supreme Court, previously set forth by the Constitution in 1787, was founded with the Judiciary Act of 1789; but the constitution didn't explicitly include an article empowering the Court with the authority of judicial review. It wasn't until 1801 that the court officially assigned itself the duty of constitutional review with the landmark case of Marbury v. Madison. William Marbury had been commissioned justice of the peace in the District of Columbia by President John Adams in the "midnight appointments" at the very end of his administration. When the new administration did not deliver the commission, Marbury sued James Madison, Jefferson's Secretary of State. (At that time the Secretary of State was charged with certain domestic duties as well as with conducting foreign affairs.) Chief Justice John Marshall held that, although Marbury was entitled to the commission, the statute that was the basis of the particular remedy sought was unconstitutional because it gave the Supreme Court authority that was implicitly denied by Article 3 of the U.S. Constitution. The decision was the first by the Supreme Court to declare an act that had been passed by the Congress unconstitutional and void, and that the Court considered in violation of the Constitution. The decision established the doctrine of judicial review, which recognizes the authority of the Court to declare statutes unconstitutional.

b. The Constitutional Court of Turkey

However, in Turkey, no court had the authority of constitutional review until the Constitution of 1961. The previous constitutions did not include any provisions about constitutional review; but there were debates in the legal world about whether the normal courts could review the statutes under the Article no.103 of the Constitution of 1924 ("no statute may set rules opposing the Constitution"), since there were no legal organizations assigned this specific duty. However, these discussions were impractical due to the attitude of the high appellate courts towards the matter: the Council of State and the Court of Cassation tended to annul any verdict that resembled judicial review; therefore, before the official foundation of the Constitutional Court in 1961, constitutional review wasn't subject to practice in Turkish courts.

Moreover, the foundation of the Court was rather a political action in the Turkish Republic: After the elections of 1945, Turkey stepped out of the "one-party democracy" system it was in with the new and the second political party of the Republic that took the power from Ataturk's party; and it was then the violations of the Constitution started to become more apparent, a fact denied by the parliament. Eventually, the opposition party argued that there should be an independent judicial organ that controlled and examined the compliance of the laws-made by the single power holding political party- with the Constitution. Therefore, the foundation of the Court was a matter of protecting the civil rights against the potential violations by the parliament.

3. The Authority of the Courts and the Practice of Constitutional Review

a. Supreme Court of the United States

In the Constitution of United States, there are two articles that vest the power of judicial review in the Supreme Court; and other than those

, there are two articles that vest the power of judicial review in the Supreme Court; and other than those articles, the Supreme Court's authority of judicial review does not have any constitutional grounds.

Article 3 of the Constitution states:

Section 1: The judicial Power of the United States shall be vested in one Supreme Court; and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article 6 of the Constitution states (known as the Supremacy Clause):

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; **and the Judges in every State shall be bound thereby,** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The court, when claiming its right to judicial review in Marbury v. Madison, had taken the Supremacy Clause, which lists the Constitution before the laws of the United States and binds all the judges under the duty of applying it, as the basis of the judicial review. Therefore, the right to constitutional review was, and has been, a matter of interpretation of the Constitution rather than a solid right given to the Court; which also resulted in the Court setting up several guidelines for the review, guidelines that are not written but brought out in and shaped by the Court's verdicts. As a result, the Court's authority and workings of the constitutional review along with its self-limiting rules may be stated under seven titles:

i. The solutions to the problem of constitutional interpretation

In a system such as the one in the United States in which there is a written constitution, which is law and is binding on government, and there are no strict guidelines to the practice of judicial review, the relationship between constitutional interpretation and the Constitution becomes a significant problem. Furthermore, in the case of United States where politics are based on power shifting between two major political parties, the legitimacy of judicial review by an unelected entity in a republican or democratic system is likely to become a dispute between the two sides whenever the review (accordingly the interpretation) is controversial, as it was most recently in the 1960s to the present.

Scholars have identified six forms of constitutional argument that may be used by courts in deciding a constitutional issue. These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. The historical argument is generally associated with the theory of original "intent" or original understanding, under which constitutional and legal interpretation is limited to trying to find out the original meaning of the words being associated with the intentions of those who the constitutional norm in question. The textual argument, again linked closely to the theory of original intent, deals with whether the Court is bound by the text of the Constitution in that particular case and the intentions revealed by that language or whether it may go beyond the strict form of the constitutional document to figure out the meaning. The use of the structural argument serves to draw structural rules from the constitutional orders. The remaining three arguments are not necessarily tied to original intent, text, or structure, although they may have some relationship. Doctrinal arguments proceed from the application of the previous Courts; prudential arguments seek to balance the costs and benefits of a particular rule; and ethical arguments derive rules from the moral concepts of the American society that are reflected in the Constitution.

In this large variety of arguments, in the Court, it is hard to see one judge devoting himself to only one of those methods. Generally, the application of those limitations depends on the case; and they are usually applied when the text needs to be adapted to the modern-day conditions of the particular situation.

ii. Prudential Considerations

This is basically the thought that with regard to cases meeting jurisdictional standards, the Court is obligated to take and decide them. As chief Justice Marshall expressed this thought in Cohens v. Virginia: ''It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." According to Marshall, the Court should see a case when it is brought to it, no matter how much it approaches to the boundaries of the Constitution; thus the Court does not have the power of discretion in the matter of choosing which case to try.

However, this was the approach of the Court in its early years; the Court has now been adhering to several rules and concepts of restraint in the exercise of judicial review; furthermore, the Court holds a vast discretionary power in whether to grant or deny review of judgments of lower courts, a power that has been established by its jurisdiction.

iii. The Doctrine of ''Strict Necessity"

The Court has repeatedly declared that it will decide constitutional issues only if strict necessity forces it to do so. Thus, constitutional conflicts will not be decided in broader terms than are required by the exact facts to which the ruling is to be applied, nor if the record presents some other ground on which to decide the case.

Speaking of the rule (policy) of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: ''The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system."

iv. The Doctrine of Clear Mistake

One of the rules/restraints that are early formulated and have now become traditional bases to the judicial review is that a statute could be voided as unconstitutional only when the law maker has not made a mistake, but made a very clear one; so clear is that it could rationally be questioned, meaning that it is unconstitutional beyond all reasonable doubt.

Although applied by the Court, the rule is subject to two influences, which seriously damage its efficacy as a limitation. First, since the conclusions are reached by the majority vote, if five Justices are convinced that a statute is invalid and if four others of equal learning and attachment to the Constitution are convinced it is valid, the convictions of the five overcome the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain types of cases. Statutory interferences with ''liberty of contract" were once presumed to be unconstitutional until proved to be valid; and more recently, presumptions of invalidity have expressly or impliedly been applied against statutes claimed to interfere with freedom of expression and of religious freedom, which have been said to occupy a rather preferred position in the constitutional order of things.

v. Exclusion of Extra-Constitutional Tests

Another limitation of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives, policy, or wisdom, or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution. This mean has been practiced so many times that although not written, it now has been established as a concrete limitation to the Court's authority. However, it should be noted that especially in some cases in the late 19th and early 20th centuries, the Court has been able to relate some natural rights doctrines to the Constitutional articles, therefore applied such rules during its process of decision making.

vi. Presumption of Constitutionality

''It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any

law is passed," wrote Justice Bushrod Washington, ''to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.'' The natural result of this mean is that if there is a constitutional question against a legislation, courts will presume the existence of a state of facts which would justify the legislation that is tried. However, in the actual practice, in cases of claims of unconstitutionality of laws against the First Amendment freedoms and other rights guaranteed by the Bill of Rights, such acceptance is far less than it is towards those of, for instance, statutory regulations of economic matters; showing the acknowledgment of importance of the Court towards the civil liberties.

vii. Disallowance by Statutory Interpretation

According to this last rule, if it is possible to interpret a statute so that its validity can be sustained against a constitutional attack, it should be interpreted in that manner, even when this interpretation doesn't truly reflect the purpose of the legislation. Consequently, the rule is not followed if the provision would survive constitutional attack or if the text is clear. Closely related to this principle is the approach that when part of a statute is valid and part is void, the Court will separate the valid from the invalid and save as much as possible.

b. The Constitutional Court of Turkey

On the other hand, the Turkish Constitutional Court's authority of constitutional review is clearly stated in the Constitution; therefore, the limits to the constitutional review are also presented in the Constitution, making the interpretation of the Constitution clearer for the Constitutional Court; but whether it is easier or not is a controversial matter.

First of all, the Constitutional Court of Turkey has the right to review the norms not only according to the Constitution, but also to the international legal rules and regulations, the general rules of law, and Ataturk's principles; giving the court a broader set of norms to do the review accordingly.

In the Constitution of 1982, the Article 148 states that "The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form." Therefore, the constitutional review in Turkey covers two different kinds of review: In respect of form and in respect of substance.

i. Review in respect of substance:

This kind of review deals with the competence of the content of the norm with the Constitution. The discordance of substance may arise in different areas, the main three being:

a. According to the cause: The cause of a norm constitutes of the factors that play a role in the passing of the norm. There are articles in the constitution that set forth some specific causes for passing the laws; but these articles are rather unusual; therefore, the cause of passing a norm is up to the discretionary power of the law maker. The Constitutional Court does not have the authority to examine the cause of the norms; since it only has the right to examine the "legality" of the norms, not the "suitability"- which would be dealing with the discretionary power of the law maker.

b. According to the purpose: The purpose of a norm is defined to be the ultimate result of the norm that the law maker aims to have. The main purpose of every law is to maintain the "public welfare"; although some constitutional articles set out the purpose beforehand. Similar to the cause, the purpose of a norm is again very subjective; therefore, unless the violation of the public welfare or the specific purpose of the norm is significantly evident, the Court does not examine it according to its purpose, supposing the will of the law maker is always the public welfare.c. According to the subject: The subject of a norm may be defined as the result of the norm. The Constitution of Turkey has not set any limitations to the subject factor of the norms. Unless it violates the Constitution, the law maker is free to pass norms in any subject. Therefore, in the matter of subject, the only limitation to the law maker is accordance to the constitution.

ii. Review in respect of form:

This kind of review deals with the accordance of the manner and the order of making norms to the constitutional law/norm making rules. Compared to the review of substance, form is easier to examine since the appliance of methodology requires no interpretation to be understood.

iii. The limitations to the constitutional review:

Furthermore, in the Turkish Constitutional system, the Court only has the right to examine a certain group of legislation; and some laws and regulations are left out of its scoop of judicial review. The Article 148 states those as "The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly. Constitutional amendments shall be examined and verified only with regard to their form. However, no action shall be brought before the Constitutional Court alleging unconstitutionality as to the form or substance of decrees having the force of law issued during a state of emergency, martial law or in time of war." Therefore, the Court can only examine the constitutionality of the laws, the decree laws, the Standing Order of the Turkish Grand National Assembly, the amendments in the Constitution; furthermore, given the authority by the Article 85 ("If the parliamentary immunity of a deputy has been waived or if the loss of membership has been decided according to the first, third or fourth paragraphs of Article 84, the deputy in question or another deputy may, within seven days from the day of the decision of the Grand National Assembly of Turkey, appeal to the Constitutional Court, for the decision to be annulled on the grounds that it is contrary to the Constitution, law or the rules or procedure of the Turkish Grand National Assembly. The Constitutional Court shall decide on the appeal within fifteen days"), the waiving of the parliamentary immunities and the loss of membership. Therefore, the international agreements, the decrees having the force of law issued during a state of emergency, martial law or in time of war, the Revolution Laws (stated in the Article 174 and concerning Ataturk's revolutions), and the parliamentary decisions (except for the Standing Order, the waiving of immunities or the loss of membership) are left out of the constitutional review by the Constitution.

iv. The presumption of compatibility/constitutionality:

Another significant feature of the Turkish constitutional review is the "presumption of compatibility", which is the assumption that until proving the incompatibility of a norm to the Constitution, the norm is presumed to be in accordance with the Constitution. Consequently, the members of the Court who believe that a certain norm is not violating the Constitution, they do not need to support this with any kind of evidence; this task is left to the ones who believe the opposite. Likewise, the Court's duty is to examine and explain why a norm is violating the Constitution, not its accordance with it.

viii. Judicial Activism:

An idea that is endorsed by a group of Turkish constitutionalists claims the Court to have a "judicial activist" approach towards the cases rather than a self restraining one; which means, the Court broaden the limits to its authority. According to Ergun Özbudun , the Court's judicial activism is particularly explicit in cases on secularism and the unitary state; causing the parliament to attempt to legitimize the annulled laws by passing the same rules as articles in the Constitution.

4. Comparison

Taking all into account, what can we say about the difference between the constitutional review of the Supreme Court and the Constitutional Court?

First of all, demonstrating a set of guidelines for the Supreme Court is easier than doing so for the Constitutional Court; since it is older than the Constitutional Court and it now has more or less a specific path of jurisprudence, at least concerning the matters stated above, whereas the young Constitutional Court of Turkey has not established such a path.

But on the other hand, many of the limitations to the constitutional review in Turkey are stated in the Constitution, therefore the need to set up some ground rules for the review is not as crucial in Turkey as in the United States where not even the authority of judicial review is clearly expressed by the Constitution. As a consequence, the rules established by the Supreme Court itself can be seen as the equivalence of the regulation of limitations set by the Constitution in Turkey.

One major similarity between the practice of American Supreme Court and the Turkish Constitutional Court is the presumption of constitutionality, as both courts accept the constitutionality of norms unless the norms are proven to be violating the Constitution. Furthermore, both in the case of United States and Turkey, the Courts seem to approach to the civil rights more carefully that the rest of the matters brought in, as the foundation of the Turkish Court is a consequence of civil rights violations and the Supreme Court's practice of not accepting the constitutionality of the norms claimed to be violating the civil rights as easily as it accepts the others.

Apart from that, both the foundation and the practice of constitutional review in these two courts do not seem similar. The major factor separating the understanding of constitutional review in the two courts is their approach to their own authority The Supreme Court, as explained above, tries to limit itself as much as possible when it comes to constitutional review; whereas the Constitutional Court, as accepted by Turkish constitutionalists, follows judicial activism and tries to extend the boundaries of his authority. Moreover, the Supreme Court sees itself strictly attached to the Constitution and uses no other means of rules or concepts while reviewing the norms, whereas the Constitutional Court has many other means of review such as the general rules of law while revising the cases.

Furthermore, since the regulations of the review are already set up by the Turkish Constitution, the methods of review are rather systematic; whereas in the American system, there are no regulations such as the review in respect of form, at least not deliberately set.

5. Conclusion

Taking all into account, it is seen that the practice of constitutional review in the United States Supreme Court and the Constitutional Court of Turkey are very different than each other, although there are basic similarities. The difference between the constitutions, the maturity of the practice and the approach of the courts towards the matter of authority can be listed as the main reasons causing this diversion.

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But on the other hand, many of the limitations to the constitutional review in Turkey are stated in the Constitution, therefore the need to set up some ground rules for the review is not as crucial in Turkey as in the United States where not even the authority of judicial review is clearly expressed by the Constitution. As a consequence, the rules established by the Supreme Court itself can be seen as the equivalence of the regulation of limitations set by the Constitution in Turkey.

ENSURING INTERNATIONAL JUDICIAL INDEPENDENCE: "A CRITICAL ANALYSIS OF THE INTERNATIONAL JUDICIARY AND THE CASE FOR REFORM"

YIĞIT KAYNAR, DURHAM LAW SCHOOL

Undoubtedly a controversial issue, judicial independence has been the subject of much debate and research. However, as vast as the literature dealing with judicial independence is, an overwhelming majority of it focuses on judicial independence in the national sphere, while discussion of the independence of the international judiciary remains fairly limited in scope. This is somewhat understandable, seeing as international judicial institutions have developed much later than their national counterparts. Yet, the fact remains that the 20th century has witnessed the creation, evolution and even the dissolution of numerous international tribunals, with jurisdictions spanning many different areas of international law, and which are quite diverse not only in terms of form and institutional structure, but also in terms of their workload, efficiency and influence on state behavior.

The idea of creating an international court dates back to the 1300s, but it has taken a while for states to actually take steps towards bringing that idea to life. The creation of the Permanent Court of Arbitration (PCA) during the first Hague Peace Conference of 1899 could be regarded as the first step taken by states towards laying down the foundations of the international judiciary. There is, however, an obvious problem with that finding; namely that the Court's name refers to arbitration, whereas we are looking for adjudication to replace arbitration in international dispute settlement. The way around this dilemma is to consider arbitration and adjudication as the two ends of a spectrum on which a range of different levels and combinations of the two methods of judicial dispute settlement exist. Thus, an arbitral panel may have characteristics resembling a permanent court, such as a permanent pool of candidates from which arbitrators may be chosen by parties to a dispute (as is the case with the PCA); similarly, an international court may have characteristics seen more common in arbitral panels, such as having ad hoc jurisdiction over a single category of disputes (such as the ICTY and the ICTR).

The PCA represented the international community's efforts to move along this spectrum, from arbitration to adjudication, but it still remained at a peculiar point on that spectrum. Although it is named a "court of arbitration", the PCA is not really a court, as it does not have a permanent judiciary in the true sense of the term, and it is not really a body of arbitration in the traditional sense, as it is not created on an ad hoc basis from dispute to dispute. Yet, the fact that the PCA was established by an international legal instrument, with the intention of creating a permanent body which would hear disputes arising between those states who signed up to its authority, places the PCA closer towards adjudication as opposed to arbitration on the spectrum of judicial dispute resolution methods. Delegates at the 1899 Conference may have named the body a "court of arbitration", but what they intended to do appears to be to create the first international court with some level of adjudicative capacity.

One important difference between arbitration and adjudication is that with arbitration, parties usually do not need to either accept an arbitral panel's jurisdiction, nor do they need to comply with its judgment. One result of this is that arbitral panels tend to enjoy much lower levels of judicial independence in comparison to fully fledged international courts. The structure devised for the PCA suggests, however, that there wasn't too much of an effort to address this vulnerability inherent in arbitral panels, and that the independence of the institution they were creating was not among states' priorities. For instance, there was no requirement in the 1899 Convention that the arbitrators perform their duties with independence or impartiality, though this might have been implied by the rather vague requirement that the arbitrators be of "the highest moral reputation". It is also worth noting that the creation of a court with compulsory jurisdiction was actually proposed during the 1899 peace talks, but the idea was rejected because some states, led by Germany, believed the idea of a permanent arbitral panel such as the proposed PCA was innovative enough, and that anything more would simply be unacceptable at that stage. It can therefore be said that states chose to pass on their very first opportunity to deal with a problem they had to consider for the first time in history; namely, the independence of the international judiciary.

The PCA may have been a courageous leap, but it was far from a success. It was not utilized as often as expected and eventually fell into disuse. The next attempt at creating an international court was the Central American Court of Justice (CACJ) established by treaty at the end of the Central American Peace Conference held in 1907. Fortunately, the CACJ was not as bad a case of misnomer as the PCA. Having both a permanent judiciary made up of judges who had fixed salaries and terms, as well as compulsory jurisdiction for disputes arising between the Central American states that signed up to its authority, the CACJ lived up to its name as a "court" much better than the PCA did. Those who drafted its establishing treaty appeared to pay more attention to safeguarding the independence of the institution they were creating, than those who had created the PCA just several years ago. It is, however, somewhat difficult to categorize the CACJ as a proper "international court", as it was rather regional, as opposed to global: It had jurisdiction over only the 5 Central American states that were signatories to its establishing treaty. Unfortunately, similar to the PCA, the CACJ was not utilized as often as expected. It was closed 10 years after its creation in 12 March 1918.

The next international court to be established was the Permanent Court of International Justice (PCIJ), created a few years after the dissolution of the CACJ. Considering the bizarre structure of the PCA and the fact that the CACJ was rather regional, the PCIJ has a relatively better claim than its predecessors to the title of "first international court", with a permanent judiciary and a large number of states signing up to its jurisdiction. Most importantly, the requirement that the judges sitting at the Court should be independent and impartial was not merely "implied", as was the case with the PCA. The PCIJ statute provided that

> The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law.

The PCIJ - which later became the ICJ with the creation of the UN institutional framework - went on to remain as the primary judicial organ of the international community for a long period of time, until the creation of the European Court of Justice (ECJ) and the ECtHR. These European Courts were then followed later into the 20th century by other international courts, the most important ones being the ICTY and the ICTR, and the beginning of the 21st century saw the creation of the world's first permanent international criminal court, the ICC. The establishing treaties and statutes of all these international courts and tribunals include, in some form, statements that express – though usually in rather vague terms – the impartiality and independence of that court or tribunal, and the content of such statements usually resemble to a large extent the statement formulated almost a decade ago for the PCIJ in Article 2 of its statute. However, the trend seems to have remained the same: such statements of independence and impartiality do not appear to be successful in ensuring the actual independence and impartiality of these institutions in practice. Therefore, seeing as what we now refer to as the international judiciary consists of numerous international judicial institutions, all with different structures and different areas and forms of jurisdiction, international judicial independence has become a more controversial topic today than it ever was.

What, then, can we expect from a young but rapidly growing culture of international judicial independence? In the context of domestic judicial independence, Russell argues that we need a theory of judicial independence, whilst acknowledging the fact that national systems differ in their treatment of judicial independence, and questions

> …whether there is a common 'it' in all of this. Can we talk about 'judicial independence' in terms that are sufficiently universal to enable us to compare how different polities treat 'it'? Or is the concept so fundamentally variable that there is really no basis for comparative analysis in this field?

Although Russell raises this query in the context of a discussion on national legal systems, the difficulty with settling on one universal understanding of judicial independence is equally present in the context of international law and the international judiciary. His question has to be addressed at some point prior to any discussion of international judicial independence, for its answer, whatever it may be, defines the limits of the sphere within which any discussion of international judicial independence can take place. The content of any proposal aiming to improve standards of international judicial independence depends very much on whether or not the proposer makes the assumption that it is actually possible to reach a common universal understanding of judicial independence in an extremely diverse international legal culture. Such theoretical debates are often difficult - if not impossible - to conclude, so it is rather fortunate that the contemporary debate on international judicial independence seems to focus much more on practical considerations as opposed to theoretical ones. Much of the literature that deals with international judicial independence seems to emphasize certain key issues, including, among others; nominations and appointments, professional qualifications required for judicial office, impartiality of judges sitting in international courts (and in particular, their activities outside the courtroom) and lately, the relationship between a court's independence and its effectiveness. The fact remains, however, that a great deal of the discussion in this area revolves around ensuring the independence and impartiality of the individual judge, while studies looking at the "larger picture", i.e. the institutional independence of the international judiciary remain relatively fewer in number. Any critique of the international judiciary in this regard usually focuses on the current state of affairs and how governments do or may influence the independence of the judiciary through the executive and legislative organs of major international bodies such as the UN, without stepping outside that common territory and looking at how the present institutional framework and standards on judicial independence could possibly be improved. There is, arguably, a need for a more progressive approach, and this study aims to contribute to such an approach by the two reform proposals that will be examined below. These two reform proposals are namely (1) drafting a new international legal document setting out clear standards of international judicial independence, and (2) establishing a new international body that would enforce these standards and oversee the administration of the international judiciary.

With regards to the first of these proposals it is important to note that there already exist numerous international documents dealing with the independence of the judiciary. These include the Mount Scopus International Standards of Judicial Independence, the IBA Code of Minimum Standards of Judicial Independence, UN Basic Principles on the Independence of the Judiciary, Burgh House Principles on the Independence of the International Judiciary, Latimer House Principles on the Three Branches of Government, Montreal Universal Declaration on the Independence of Justice, Bangalore Principles of Judicial Independence, Tokyo Principles of the Independence of the Judiciary in the LAWASIA Region, and Kiev Recommendations on Judicial Independence. It is worth highlighting three issues that become apparent by simply looking at the titles of these documents. Firstly, while these are all international documents dealing with judicial independence, it is only the Burgh House Principles that deals specifically with the independence of the international judiciary. Secondly, some of these documents, albeit international in nature, deal with the independence of the judiciary in a specific region. Thirdly, and most importantly, a majority of these documents are titled "principles" and "guidelines", therefore suggesting their drafters did not intend them to be treated as binding and enforceable standards. These observations on their own may not justify the drafting of a new document dealing with the independence of the international judiciary, but they do suggest that the idea is worth consideration. However, new standards of international judicial independence would not be able to achieve anything further than what their predecessors achieved, unless they are implemented in an effective manner. This is the drawback from which all the aforementioned legal documents dealing with international judicial independence suffer: They lack any clear indication as to how the standards they set out should be enforced. This is where the second reform proposal to be examined in this study comes into play. The establishment of an international body tasked with overseeing the administration of the international judiciary could arguably facilitate the enforcement of existing or prospective international standards on international judicial independence.

The next international court to be established was the Permanent Court of International Justice (PCIJ), created a few years after the dissolution of the CACJ.

There are, of course, numerous issues that will need to be addressed with regards to this proposal. Establishing an international institution with powers as broad as those suggested here is obviously not an easy task. As such, there needs to be a strong rationale for such a drastic measure. What improvements over existing mechanisms of judicial administration could this new institution introduce in theory? Is it necessary to create a new institution in order to enforce standards of international judicial independence, or could other mechanisms ensure their enforcement just as well? Another key issue to be addressed is feasibility. Even if the establishment of such a new international institution is justified on a theoretical level, the possibility remains that it may be deemed too unfeasible due to the costs associated with it, both economic and political. This leads to the important question of scope of authority. Ideally, an institution set up to overview the administration of international judicial institutions with a view to ensuring their independence should have the widest possible scope of authority: authority over all aspects of judicial administration, for all international courts and tribunals. The political feasibility of such a proposal is of course questionable. It would be unrealistic to expect states to willingly confer such wide powers of administration to a single institution. Finally, with regards to the structure and management of this body, questions that need to be addressed include: By whom would this institution be run; people with judicial backgrounds, such as judges (most likely retired or otherwise inactive) or more politically motivated actors such as bureaucrats nominated by states? That discussion would lead to the question of management on a larger scale: Within which institutional framework would this institution be placed? To which other international bodies (be it judicial, or less preferably, executive or legislative) would this institution be connected, or more importantly, answerable to?

...whether there is a common 'it' in all of this. Can we talk about 'judicial independence' in terms that are sufficiently universal to enable us to compare how different polities treat 'it'? Or is the concept so fundamentally variable that there is really no basis for comparative analysis in this field?

EXCLUSION OF EX-KHAD/WAD MEMBERS IN THE NETHERLANDS

ZARIF BAHTIYAR , TILBURG LAW SCHOOL

1. Introduction

The United Nations Convention Relating to the Status of Refugees (Refugee Convention) which became known as the 'Magna Carta for Refugees' defines who is a refugee, states the rights of the persons who are granted asylum and specifies the legal obligations of states. The Convention also explicitly spells out circumstances in which refugee status may be denied. This can be by reason of protection accorded by other states or international agencies and in the case of criminals or other undeserving cases.

At the time when the Refugee Convention was drafted, memories of the trials of major war criminals were still vivid and States agreed that war criminals should not be protected. Article 1F of the Refugee Convention expresses this reluctance: it excludes persons with respect to whom there are serious reasons for considering that they have committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee, or acts contrary to the purposes and principles of the United Nations.

The list of exclusion grounds in Article 1F is exhaustive and the competence to decide whether someone falls within its scope lies with the State in whose territory they seek recognition as refugees. These grounds are subject to interpretation but cannot be supplemented by additional criteria in the absence of an international convention to that effect.

It is possible that one country will consider certain information as drawn up in a country report as sufficient to declare a person a war criminal while another will not. Within this context, the official report of the Dutch Ministry of Foreign Affairs of 2000 on former KhAD/WAD members in Afghanistan will play a central role in this paper. Since its publication, this report has been the determinant document for Dutch policy on the application of Article 1F to ex-Khad/WAD members seeking asylum in the Netherlands. Though over the years, its conclusions it drafting procedure have been criticised, the Ministry of Foreign Affairs has so far seen no reason to revise it.

In this paper, section 2 will deal with the drafting procedure of an official report and the relevant passages of the report on the KhAD/WAD. Hereafter, the question what this report means for Article 1F procedures in the Netherlands will be discussed in section 3. Section 4 will address the UNHCR's 'Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992' and other doubts concerning the reliability of the 2000 report. In section 5, the arguments of the Dutch Ministry of Foreign Affairs to stand by its opinion will be discussed after which a conclusion will be drawn.

Given the mutual interest of Anton and I in issues concerning aliens, it needs no explaining why is chosen for this topic. Anton is the person who has inspired me to gain more knowledge and work in this field. What I admire in him is that regardless of the background of a person, he always keeps in mind that aliens are first and foremost fellow human beings.

2. Official report on the secret services in communist Afghanistan

2.1 Draft of a report

There are two kinds of official reports issued by the Dutch Ministry of Foreign Affairs: individual and general ones. When the State Secretary for Justice requests a general country based on 'the Terms of Reference', the Ministry of Foreign Affairs is responsible for writing it. Such a report is an independent expert report which has to be set up in accordance with the Ministry's operational instructions and gives a description of the situation in a particular country as far as this is relevant to the assessment of asylum requests from persons originating from that country and to decisions on the return of rejected asylum seekers. The report is used by the Immigration and Naturalization Service (IND) for deciding on asylum requests and by the State Secretary for Justice to adopt an immigration policy. According to the operational instructions, a general report is based on information from public and confidential sources. When it is being drawn up, information provided by UN bodies, (non-) governmental organizations, specialist literature and media reports are used. The reports are also founded on findings and confidential communications of Dutch representatives in the country concerned.

The instructions state that to be recognized as trustworthy sources have to be well-informed, independent and diverse.

From the case law of the Administrative Jurisdiction Department (Afdeling Bestuursrechtspraak) of the Council of State (Raad van State), which is the highest court in immigration cases in the Netherlands, it is apparent that the Ministry of Justice may rely on the correctness of a country report when the report gives insight into impartial and objective information and states as far as possible its sources, unless there are concrete leads which cast doubt on its correctness and completeness. The Department thus considers a country report to be an expert communication and the deciding factor in a case, subject to proof to the contrary.

Official reports have great authority, yet they have also been criticized. In 2006, the Advisory Committee on Alien Affairs (Adviescommissie voor Vreemdelingenzaken) issued a report on general official reports in which it recommended that the drawing process be made more transparent and that European official reports be created. In the Salah Sheekh judgment, the European Court of Human Rights condemned the Netherlands and criticized the way in which official reports were drawn up and used in asylum cases. In response the Ministry of Foreign Affairs has organized a number of meetings for interested parties to discuss the official reports used in asylum cases and has been willing to consider suggestions for their improvement.

2.2 Conclusions of the report on the KhAD/WAD

When the Mujahidin and later the Taliban came to power in Afghanistan, persons who had served in the secret services of Afghanistan under the communist regime, which had a reputation for ruthlessness, fled the country to several countries in Europe, including the Netherlands. In the 1990's, the Netherlands was confronted with asylum applications from Afghan men suspected of war crimes or violations of human rights. To be able to define a policy regarding these persons, the Ministry of Justice had to understand the nature and activities of the secret services and for that reason the State Secretary requested the Ministry of Foreign Affairs to submit an official report on these services.

The focus in the report is on the KhAD, which was set up in 1980 and transformed into a Ministry in 1986, the WAD which remained operational until the fall of the communist regime in 1992. The central question to be answered in the report was if and if so, which former Afghan secret services members, particularly those from the KhAD and the WAD, had violated human rights.

According to the report, "all non-commissioned officers and officers were active in the macabre divisions of the KhAD/WAD and were personally involved in the arrest, interrogation and sometimes execution of suspected persons". More specifically, the report states:

As already mentioned, all non-commissioned officers and officers violated human rights. Non-commissioned officers and officers could not function within the KhAD and the WAD when they did not demonstrate in concrete their unconditional loyalty to the communist regime. […] The first placement of non-commissioned officers and officers was in divisions of the KhAD/WAD which were specifically engaged in tracking down 'elements that posed a threat to the State'. The rotation system ensured that operatives changed divisions frequently. A promotion or placement in a division or board with a more administrative or technical character was only attainable for those who had sufficiently proved their mettle during the first placement(s). In practice, this means that all non-commissioned officers and officers of the KhAD and the WAD took part in interrogating and torturing of opponents of the communist regime whether alleged or not.

The report also mentions that it is based on communications from the Dutch Embassy in Islamabad and that reports from the UN Special Rapporteur for Afghanistan, Amnesty International, Human Rights Watch and literature on Afghanistan under the communist regime were also used.

3. Situation in the Netherlands after the publication of the report

The current Dutch policy on Article 1F of the Refugee Convention originates from a letter of the State Secretary for Justice formulating certain principles concerning the application of the Article. One of these principles was that Article 1F has to be interpreted restrictively, as it has far-reaching consequences for the person involved. The State Secretary prescribes that for the application of Article 1F 'serious reasons for considering' that the person has committed a crime as referred to in he provisions suffice and that the perpetration does not need to be proved according to standards of criminal procedure. For determining whether Article 1F applies, the State Secretary introduced the 'personal and knowing participation test', which was developed in Canadian case law. In order to determine whether a person can be held individually liable for acts within the scope of Article 1F, it is investigated whether they knew or should have known about the commitment of the crime(s) in question and if they in any way personally participated. If so, Article 1F can be invoked against that person.

As a result of the official report of 2000, the current rule regarding Article 1F is that all former non-commissioned officers and officers of the KhAD/WAD are assumed to have personally and knowingly participated, unless they can show that a significant exception applies in their individual case. The burden of proof is reversed and in practice the person to whom Article 1F is applied is hard-pressed to meet it as it rarely happens that a person can comply with the burden of proof formulated by the Administrative Jurisdiction Department of the Council of State.

Several organisations, such as Amnesty International, the UNHCR and the Dutch Section of the International Jurists have criticized the far-reaching reversal of burden of proof arguing that the Dutch policy is contrary to the principle that examination has to be conducted on an individual basis and that the burden of proof lies with the authorities. Despite this criticism and the fact that the person on whom Article 1F is applied has virtually no chance of advancing proof to the contrary, the Dutch government insists that individual examinations are carried out.

In practical terms, the application of Article 1F means that the asylum claim will be rejected and that the applicant is not eligible for a residence permit based on any other ground. In addition, the applicant will be declared persona non grata which makes his or her residence punishable by law (Article 197 of the Criminal Code). While the government's aim is to have persons to whom 1F applies return to their country of origin, a great number of them cannot leave the Netherlands due to, inter alia, the non-refoulement principle laid down in Article 3 of the European Convention on Human Rights. Family members will not be granted a residence permit either, unless they have claims based on independent asylum grounds. These persons who are illegal residents yet cannot be expelled do not have the right to stay in a reception centre or to make use of other basic facilities, which leads to distressing situations for prolonged periods of time. Very few suspects are criminally prosecuted, as it is difficult for the authorities to collect evidence. In 2007, the Dutch government issues a general pardon for persons who had claimed asylum before 1 April 2001, but those to whom Article 1F was applied were excluded from this pardon, and their dead-end situation continued.

For many Afghans who are currently in this situation the official report of the Ministry of Foreign Affairs is the source of their predicament. This report, which is criticized by the UNHCR in its 'Note on the KhAD/WAD' will be discussed in the following section.

4. Criticism against the report

4.1 The UNHCR's 'Note on the KhAD/WAD'

In May 2008, the UNHCR published its 'Note on the Structure and Operation of the KhAD/WAD in Afghanistan 1978-1992'. The purpose of the Note was to provide information in the context of the need to assess the eligibility for international protection for Afghan asylum-seekers who were members of the KhAD/WAD. The Note was prepared by the UNHCR using information gathered through research over the years 2001-2008, including interviews with persons who were associated with the KhAD/WAD at the time and discussions with Dr. Giustozzi, who is a leading expert on Afghanistan and the KhAD/WAD in particular.

Section V, titled 'Rotation and promotion within the KhAD/WAD', includes the following conclusions:

The Netherlands Ministry of Foreign Affairs report on the security services in Afghanistan during 1978-1992 states that "As a first assignment, NCOs and officers were posted to KhAD and WAD sections actively engaged in tracking down 'elements that posed a threat to the State'." Other sources affirm that this practice was limited to KhAD/WAD officers and NCOs of the Operational Directorates listed in paragraph 16 above, and that the term "tracking down", when translated from Dari, means surveillance, information collection and investigation. The tasks of KhAD/WAD officers and NCOs in practice included these aspects, in as far as preliminary investigations were concerned. However, beyond preliminary investigations, interrogations and further prosecutions were the responsibility of officers working at the Directorate of Interrogation and in Provincial interrogation units, and the Attorney General's office.

UNHCR is not able to confirm that there was a systematic rotation policy inside KhAD/WAD. Sources consulted by UNHCR affirmed that rotations within the KhAD/WAD structures were largely based on expertise and experience. In emergency situations, staff may have been shifted to work on a given operation, but within its area of expertise. Military personnel operated within its rank and levels of expertise. One expert stated that, in his view, there was no mandatory rotation; he believes that people could change jobs within the KhAD/WAD, but that it was not a rule or requirement. In the view of that source, such a rotation policy would have gone against any sense of professionalism within the institution. Other sources state that the activities of KhAD/WAD officers were regulated by a number of principles, one of which was confidentiality. For this reason, they believe that the KhAD/WAD could not resort to a general rotation policy, as this would have risked disclosure of information from one Directorate to another.

These conclusions are at odds with the conclusions in the report of the Ministry of Foreign Affairs with regard to the rotation system within the KhAD and the WAD, and this made several organizations and Dutch District Courts in the Netherlands doubt the correctness of the Ministry's report. Other organizations also levelled criticism at the sources of the report. 4.2 Other critical arguments

Organizations such as the Dutch Section of the International Jurists, the Refugee Council in the Netherlands and Amnesty International argue for the revision of the official report of 2000. Amnesty International asserts that it has extensively reported on human rights violations in Afghanistan during

the period 1978-1992, but that it could not demonstrate the guilt of all officers and non-commissioned officers in the KhAD and the WAD or the existence of a rotation system as described in the Ministry's report. Amnesty also commented on the fact that the Ministry's report is based on anonymous sources. The sources used by of the Ministry are also subject to other criticism: the public sources mentioned in the report do not contain information supporting the conclusions of the report and the anonymous sources are not made public.

The current Afghan parliament also involved itself in this issue and advised the Dutch government that the conclusions in its report were unreliable and incorrect, as the main sources classified as confidential originated from communications from the Dutch Embassy in Pakistan and were based on false statements issued by the Pakistani military intelligence, the Inter-Services Intelligence (ISI), which had political reasons for doing so. According to the Afghan authorities the Netherlands could not hear people on their own authority, which gave Pakistan the chance to select and instruct the sources in such a way that made the Dutch Ministry of Foreign Affairs unambiguously declare the guilt of all non-commissioned officers and officers.

Although the Dutch authorities still believe their report is correct and the Administrative Jurisdiction Department of the Council of State supports this position , the UNHCR Note prompted the Ministry of Foreign Affairs to consult with the UNHCR and its sources. The arguments of the Ministry to stand firm will be addressed in the next section.

5. Opinion of the Netherlands after the UNHCR Note on the KhAD/ WAD

In his letter to the House of Representatives of 2 October 2009, the Minister of Foreign Affairs states that there have been consultations with the UNHCR-Netherlands, Brussels and Kabul since June 2008. During the meetings in Kabul, the UNHCR referred to its Note as a collection of knowledge accumulated over years (since 1990), which includes interviews with experts on the KhAD and the WAD, such as former KhAD and WAD members, academics and Russian advisors who helped establish the organization. The Minister mentions that the consultations in Kabul made clear that these interviews did not aim to discuss the rotation system and that on being asked, the UNHCR stated that a specific research on the rotation system was not conducted, but that it simply had not come across in its contacts with the KhAD/WAD. The reaction of the UNHCR to the Minister was that such a specific investigation was carried out, to which the Minister answered that his conclusion regarding the UNHCR research concerned the relevant period up to the issuance of the official report on 29 February 2000. According to the Minister, in that period, the Ministry did conduct a specific research into the rotation system and the UNHCR did not.

The Minister considers the sources consulted after the publication of the official report to be unreliable or less reliable, as due to the public nature of the Dutch 1F policy new sources which are to be consulted must be assumed to have a reason for and/or interest in presenting a certain impression of things, which entails the risk of using politically or otherwise motivated statements. The concluding statement of the Minister in his letter of 2 October 2009 is that neither the UNHCR, nor the Ministry has been able to find reliable additional information regarding the rotation system. This makes him question whether it is still possible to obtain such information. He believes it is not and the Ministry therefore sticks to the official report of 2000.

6. Conclusion

Official reports drawn up by the Dutch Ministry of Foreign Affairs carry great authority as they are considered to be expert communications. The European Court of Human Rights has ruled that the authorities cannot mainly rely on the reports of the Ministry of Foreign Affairs when deciding on asylum claims but that other objective and reliable sources of UN offices or non-governmental organizations also have to be considered and equally so.

> When the State Secretary for Justice requests a general country based on 'the Terms of Reference', the Ministry of Foreign Affairs is responsible for writing it. Such a report is an independent expert report which has to be set up in accordance with the Ministry's operational instructions and gives a description of the situation in a particular country as far as this is relevant to the assessment of asylum requests from persons originating from that country and to decisions on the return of rejected asylum seekers.

The 2000 report on the KhAD and the WAD on the basis of which hundreds of Afghans have been denied refugee status seems to be at the heart of an unsolvable issue in the Netherlands. The report states that all non-commissioned officers and officers of the KhAD and the WAD violated human rights based on a rotation system within the organization. This statement is based on anonymous sources and is not supported by any of the public sources used. This situation has attracted much criticism from several authoritative organizations and prompted the UNHCR to issue its 'Note on the KhAD/WAD' in which it states that there is no proof to confirm the conclusions of the Ministry's report.

The Ministry has put aside the Note of the UNHCR and has declined to revise the report. It considers the sources to be unreliable as they carry the risk of introducing politically or otherwise motivated statements. Interestingly, the same is argued against the confidential sources of the Ministry based on communications from Islamabad. Even though the Minister insists on the reliability of these sources, he states in his letter of 2 October 2009 that his Ministry has not been able to find reliable additional information regarding the rotation system. He also believes it will not be possible to obtain such information in the future. While it would be reasonable to except that this finding would discourage the authorities from continuing to adhere in full to the conclusions of its report, unfortunately for the many Afghans in the Netherlands, the opposite is the case. The Minister of Foreign Affairs maintains the report and in this is it is supported by the highest administrative court in the Netherlands. Whether or not all former KhAD and WAD members are war criminals, given the position of the Dutch authorities, a solution to their plight seems a long time in coming.

> The current Afghan parliament also involved itself in this issue and advised the Dutch government that the conclusions in its report were unreliable and incorrect, as the main sources classified as confidential originated from communications from the Dutch Embassy in Pakistan and were based on false statements issued by the Pakistani military intelligence, the Inter-Services Intelligence (ISI), which had political reasons for doing so.

INTERNATIONAL CRIMES AND STATE IMMUNITY

ZEYNEP TEKIN, KOÇ UNIVERSITY LAW SCHOOL

International law is an area of law highly criticized as being ineffective and open to manipulation of politics. It is true that international law faces with problems regarding enforcement, yet the importance of it as an instrument to maintain international peace and security is undisputable. To function as such an instrument international criminal law is essential. Especially in the today's globalized world international criminal law is needed more than ever to provide global justice. However, this fundamental area of law faces procedural but effective bars that hamper enforcement. Although the concept of international crimes was created due to the need for distinguishing certain crimes affecting international community from others, the adjudication of these crimes of major gravity is considerably more difficult than others. The quality that gives these crimes their international character, also obstructs them from being punished. Just as international crimes, State immunity is embodied in international law and serves to protect States and their officials from adjudication. As a result, it is a great challenge to exercise jurisdiction over many crimes having international character no matter how serious they are. On the other hand, the doctrine of universal jurisdiction and international criminal tribunals are developments in international law aiming to overcome impediments and provide justice to victims. However, although some crimes are being punished, there is still a large amount of violations of human rights that remain unpunished due to immunity and political agenda. Thus, despite of some alternatives international crimes are still far from being punished on a large and unified scale.

Firstly, immunity of a State in a civil suit for damages in respect of international crimes should be examined. Foreign sovereign immunity proclaims that national courts cannot exercise jurisdiction over foreign states. The customary nature of immunity is based and justified on various general principles of international law including par in parem non habet imperium , ensuring an orderly allocation and exercise of jurisdiction and the effective performance of functions of persons acting on behalf of States, reciprocal courtesies, international comity, and independence and dignity of states. Inherent in this doctrine is also the presumption that States should not interfere with any public acts of foreign sovereign States and nor should they intervene in the conduct of foreign policy out of respect of the States sovereign equality . As wide State practice reflecting opinio juris and current regulations support, jure imperii acts, which represent acts of sovereign nature , are not subject to foreign jurisdiction under customary law. Since governments and their officials, State immunity commit many international crimes is the greatest challenge in the way of compensating the victims of international crimes. The general principle of State immunity is well established under customary law without meeting any significant challenge. On the other hand there is an emerging claim of a jus cogens exception to jurisdictional immunity. This suggested exception constitutes a possible opportunity for international crimes to be punishable under international law. Accepting this view would transform international law vastly and open a new era of international justice. Jus cogens norms are peremptory norms from which no derogation is permitted as instructed by Article 53 of the Vienna Convention on the Law of Treaties; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order. Jus cogens norms are accordingly granted a higher status than other international norms including State immunity, and according to the claim they must override them because of their hierarchical superiority. This doctrine has some amount of but weak support in State practice. The most important relevant judgment is Ferrini v. Federal Republic of Germany delivered by the Italian Supreme Court in 2004. The case concerned the compensation for forced labor imposed by the German military upon Italian nationals during the Second World War. The Court found that Germany had violated the jus cogens norm of the prohibition on forced labor. Considering that jus cogens norms have a higher status in relation to other norms, State immunity was removed. Therefore although military operations were an expression of sovereign authority, immunity could not be pleaded when such operations amounted to international crimes. The Court held that forced labor was a war crime and stated that international crimes are serious violations of jus cogens norms that take priority over other international rules including jurisdictional immunities. Supportive of this case, the Prefecture of Voiotia judgment delivered by the Greek Supreme Court also removed immunity when a jus cogens norm was violated. This case as well concerned compensation for forced labor and the Court stated that forced labor constituted an abuse of sovereign power in breach of peremptory norms and not jure imperii. Therefore again, it was reasoned that jus cogens norms possess a higher status and therefore immunity must be denied if a jure imperii act was in breach of such a norm.

However, it is fair to consider these examples as standing alone in international State practice and contradicting the law. Thus they may not qualify as creating a new custom based on a jus cogens exception. First of all, the Voiotia judgment was declared as breaching international law and it was nullified in practice. When the plaintiffs of the judgment could not be compensated due to the failure of enforcement, they brought the issue before the European Court of Human Rights. However the Court concluded that civil suits brought against a State for crimes against humanity which were perpetrated in a territory other than that of the forum State, may not be upheld because such crimes were covered by State immunity . Furthermore the most recent and important judgment regarding State immunity is ICJ's decision regarding Germany's complaint about the Ferrini judgment. After the Italian court exercised jurisdiction over Germany and gave its verdict, Germany claimed that its immunity was unlawfully removed and Italy breached international law, and brought this claim before the International Court of Justice. The ICJ considered Italy's claim regarding the jus cogens exception and held that such exception did not exist and State immunity was to be upheld even in breaches of jus cogens norms . Therefore with this judgment the current position of international customary law regarding State immunity was clearly demonstrated and it was proven that an exception to immunity was not yet established.

Another leading authority on State immunity in respect of criminal acts tried under civil proceedings against a State is Al-Adsani v. UK . In this case a joint British and Kuwait citizen was abducted and tortured while serving in the Kuwait military. When he returned to UK, he attempted to sue the government of Kuwait for the torture committed. On appeal to the European Court of Human Rights the court dismissed the claim and rejected the argument that the higher-ranking jus cogens norms triumphed over other norms including State immunity. The Court did not establish that there was yet acceptance in international law of such argument. Respective of the aforementioned judgments, Canadian, English and French courts have also upheld immunity even in breaches of jus cogens norms. Therefore, although a jus cogens exception would fit as a solution to jurisdictional problems regarding international crimes, even the gravity of these crimes does not suffice to create an exception to immunity and as a result victims of international crimes are deprived of compensation through civil suits.

Other than preventing civil suits, immunity is also a major obstacle for individual criminal liability. Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities, and it is predominately defined within the limits of of the Vienna Convention on Diplomatic Relations 1961. This type of immunity is categorized as i. functional immunities relating to the conduct of state agents acting in their official capacity and ii. personal immunities applying to the person of certain state officials. As suggested by the ICTY Appeals Chamber during Blaskic (subpoena) case , State officials 'cannot suffer the consequence of wrongful acts which are not attributable to them personally but to the State on whose behalf they Act' – so called by the Court 'functional immunities' which draw more weight than personal immunities . Although diplomatic immunity of State officials prevents adjudication, there are considerable cases in which immunity was removed in case of international crimes. As illustrated in the Rainbow Warrior case , if the conduct performed by a diplomatic agent is a serious crime in breach of public international law, the agent can be held personally liable for the action regardless of whether they were ordered to do so by their sovereign. Furthermore ICTY in the Blaskic case, the Court held that there could be exceptions to immunity for those responsible for war crimes, crimes against humanity and genocide, as those could not invoke immunity even if they perpetrated such crimes while acting in their official capacity. Therefore, it is evident that while personal immunities aim to shield State officials from prosecution of international crimes while they are in an office, they cease immediately from the moment the agent leaves their official post. The Pinochet case is the leading authority regarding the removal of diplomatic immunity. House of Lords was required to consider whether it had jurisdiction to extradite Pinochet and determine whether he was entitled to hold immunity as a former Head of State. The majority concluded that international crimes limited the functional immunity of a Head of State.

The majority concluded that international crimes limited the functional immunity of a Head of State. It was held that 'The exercise of extraterritorial jurisdiction overrides the principle that one State will not intervene in the internal affairs of another' . However, it would be correct to say that such exception is not well established under international law. In The Arrest Warrant Case , ICJ made it clear that an incumbent State official enjoys immunity even in the case of international crimes. The case concerned the issue of an international warrant by a Belgian magistrate for the arrest of the presently serving Congolese Foreign minister for his alleged involvement in Crimes against Humanity and war crimes. The Court concluded that the arrest warrant was a violation of the Minister's immunity from criminal jurisdiction. ICJ based its decision on the functional immunity that is required for a Foreign Minister to adequate perform his duties, and ruled that only acts conducted in a private capacity would circumvent the Minister's immunity after leaving office.

In this regard the doctrine of universal jurisdiction holds great significance. It is a principle whereby states claim criminal jurisdiction over persons accused of international crimes regardless of an existing link with the forum state. Originally applied to hold pirates and slave traders accountable for their crimes, the principle of universal jurisdiction today extends to all human rights abusers. The International Military Tribunal (IMT) at Nuremberg extended the principle to include war crimes and crimes against humanity. The idea of universal jurisdiction was key in establishing accountability in several post-World War II trials. While the number of states applying the principle in practice is increasing, it still remains low. The most famous case regarding universal jurisdiction is the Eichmann case in which the Israeli Supreme Court adjudicated a Nazi criminal. Furthermore The Nuremberg tribunal concluded that State immunity does not apply to crimes under international law. However the fact that universal jurisdiction may exist with regard to a crime does not mean that this disentitles State officials, including Heads of State, from the jurisdictional immunities obtainable in international law. ICJ has asserted that 'jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction' and although various international conventions require universal jurisdiction, 'such extension of jurisdiction in no way affects immunities under customary international law' . Furthermore it was stated that there has been no clear instance of an assertion of universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium, hence it cannot be said that there is an established practice of the exercise of universal jurisdiction by States in international law . The Court concluded that the 'assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom' and that there is no established practice in which States exercise pure universal jurisdiction . It should also be born in mind that after the Arrest Warrant decision and due to political pressure from the United States, the controversial universal jurisdiction legislation of Belgium has been amended . Consequently although universal jurisdiction was exercised in a significant number of cases, the prevailing opinion and custom is that the serving State officials still enjoy immunity under international law. Moreover, though universal jurisdiction aims provide justice to victims and make sure that there is no place safe for perpetrators of the most serious crimes, there are still considerable drawbacks of such principle. It is criticized as being dangerous, even accused of "substituting the tyranny of judges for that of governments" and compared to witch-hunts. It is stated that universal jurisdiction must not allow legal principles to be used as weapons to settle political scores. Some consider Pinochet example as a dangerous precedent. If such precedent were to be literally applied, it would allow both sides of the conflicts, for example the Arab-Israeli conflict to project their battles into national courts of other countries with extradition requests. In such a situation it would be nearly impossible to separate political motives and actions from legal treatments. When the national prosecutors have the discretion to determine the scope of crimes subject to universal jurisdiction and whom to prosecute, the possibility for arbitrariness is wide. Therefore universal jurisdiction is a principle that must be handled with great care and must be balanced with the doctrine of State immunity.

The most effective way to adjudicate international crimes in conformance with international law is the International Criminal Court established in 2002 and Ad Hoc criminal tribunals such as the ICTY and ICTR. As stated in the ICC Statute, States retain the primary responsibility in the prosecution of international crimes. In that sense, the ICC may only exercise a complementary jurisdiction in respect of international crimes, meaning it may only take up a case when a State is unable or unwilling to prosecute the suspects. It may also initiate proceedings when requested by the UN Security Council. The ICC has jurisdiction over war crimes, crimes against humanity and genocide. This includes most of the serious violations of international humanitarian law. Contrary to other international courts, the ICC may take action against individuals but not States. However, diplomatic immunities are not invokable against the Court, thus adjudication of international crimes are guaranteed.

Ad hoc tribunals dealing with criminal cases against individuals have been created to deal with the core international crimes, namely genocide, war crimes and crimes against humanity. Ever since the Nuremberg and Tokyo trials, the first international criminal tribunals were established in the 1990's. The International Criminal Tribunal for the former Yugoslavia (ICTY) and its sister court for Rwanda (ICTR) were both created by the UN Security Council. Since then, special courts have also been set up to prosecute domestic and international crimes. Examples of such mixed tribunals can be found in Kosovo, Bosnia Herzegovina, East Timor, Sierra Leone, Cambodia, and most recently Lebanon. Ad hoc tribunals have also assured justice to victims since the perpetrators could not hide behind their official capacity anymore. Although these tribunals constitute an effective solution to the enforcement issues of international crimes, the crimes covered by these tribunals are limited. Thus, immunity still stands as an obstacle for providing justice with regards international crimes.

Despite the positive developments, international law must come with a solution that would ensure the enforcement of international crimes, bring justice to victims and maintain the sovereign equality of States and effective performance of official functions at the same time. The challenge for the international community is to ratify a Statute, which can be agreed upon by all States, and one, which holds both State sand their agents accountable for serious crimes.

The most effective way to adjudicate international crimes in conformance with international law is the International Criminal Court established in 2002 and Ad Hoc criminal tribunals such as the ICTY and ICTR.

PUBLIC POLICY: A BARRIER FOR INTERNATIONAL COMMERCIAL ARBITRATION

G.SZABÓ DÁNIEL, ELTE UNIVERSITY FACULTY OF LAW

The aim of my paper is to examine the current international practice of annulment or refusal of enforcement of arbitral awards based on the violation of public policy. This question has a major importance, being the only basis for a state court to set aside or refuse to enforce an arbitral award based on substantive reasons instead of procedural reasons.

The paper deals at the same time with both of the question of setting aside and refusal of enforcement, since both are barriers of the prevalence of the award. The problem is more difficult when international arbitration is at stake, particularly when two different cultures are meeting (e.g. between European and Muslim countries, relevant for Turkey, being at the meeting point of these two cultures).

The paper summarizes the general meaning of international public policy, which is accepted among the countries. Later it compares this international meaning to several national interpretations. The paper draws attention to the fact, that there are important differences between interpretations, which are to be taken into consideration in international commercial arbitration. The paper concludes, that despite the differences, there is a substantial part of public policy, which prevail all over the jurisdictions and this is very close to the general principles of law.

The problem is more difficult when international arbitration is at stake, particularly when two different cultures are meeting

INTERNATIONAL DISPUTE RESOLUTION IN TURKEY AND RUSSIA: SOME PROBLEM ISSUES

MARYANA BATALOVA, NATIONAL RESEARCH UNIVERSITY – HIGHER SCHOOL OF ECONOMICS, MOSCOW, RUSSIA; LAW FACULTY, PRIVATE INTERNATIONAL LAW DEPARTMENT

As our world becomes more interconnected, the need for international standards and cooperation in business and legal standards is becoming increasingly evident. As more companies and businessmen from all over the world enter into contracts with foreign counterparties the question immediately arises of how disputes on such contracts may be settled ("disputes containing a foreign element").

It goes without saying that when parties enter into agreement they do not usually think of possible problems or conflicts that may arise. However it is highly recommended for the parties to bear in mind such possibility in order to be prepared to take part in resolving a dispute and be ready for the difficulties provided by the fact their dispute is international.

It is worth mentioning the parallel that the clearer is the procedure of international dispute settlement in a state, including recognition and enforcement of decisions on such a dispute, the friendlier is the general environment for foreign investments. If course due to increase if the turnover in general the number of international disputes has also risen dramatically during the last decade both in Turkey and Russia.

That is why while considering some issues of international dispute resolution it would be wise to pay attention to the following aspects:

- application of foreign law
- enforcement of the decision/ award

However prior to that we need to characterize shortly the legal base of international dispute resolution in Russian and Turkey.

I.International Dispute Resolution Legal Base

While speaking about international dispute resolution we need to pay attention to the legal framework of this issue.

Turkish legislation in the sphere of private international law ("PIL") is codified. Thus Turkish Code on Private International Law and International Civil Procedure ("Turkish PIL Code") was adopted in 2007 with Law No. 5718 . Prior to that Law on Private International Law and International Civil Procedure as of 1982 in Law No. 2675 was in force .

Unlike the Turkish codified system of PIL regulation, Russia does not have a separate law on PIL equivalent to Turkish one. Russian PIL provisions are contained in few federal laws, including among others the Civil Code of the Russian Federation ("Russian Civil Code") which regulates material PIL issues and the Arbitrazh Procedure Code which regulates PIL procedural issues while considering disputes between entrepreneurs.

Part Three of the current Russian Civil Code which covers most of PIL issues was enacted in November 2001 .

II.The application of foreign legislation

While considering disputes containing foreign elements, courts may face the need to apply foreign law. This might be a challenging situation for a judge (even an experienced and professional one) as far as being qualified and practicing law in his/her "national" jurisdiction he/she is likely not to have knowledge of foreign law institutes and specific features. And surely judge is not familiar with the court practice of application of foreign law.

There are different ways of establishing foreign legislative content. Below is the description of how that is organized in Russia and Turkey.

A.The application of foreign legislation by Russian courts

According to Article 1191 of Russian Civil Code (Establishing the Content of Foreign Law Norms), when applying foreign law, a court shall establish the content of its rules in accordance with their official interpretation, enforcement practice and doctrine in the relevant foreign state.

For the purposes of establishing the norms of the foreign law, the court may request assistance and clarifications, in the established manner, from the Ministry of Justice of the Russian Federation and any other competent bodies or organizations in the Russian Federation and abroad, or invite experts. The persons to the dispute may present documents confirming the content of the foreign law provisions to which they refer to substantiate their claims or statements of defense and otherwise assist the court in establish-

establishing the content of such provisions.

It is important to mention that as when considering claims relating to the pursuance of entrepreneurial activity by parties, the burden of proving the content of foreign law norms may be vested by a court in the parties. That means that in disputes between entrepreneurs it might be an obligation of the latter to provide the court with the foreign legislative acts and all the supporting documents in order to apply foreign law.

If, despite measures taken in compliance with Russian Civil Code, the content of foreign law norms fails to be established within a reasonable term, the Russian law shall apply. So, in case of failure, the Russian court may apply Russian material legislation even in cases where the contract stipulated the application of foreign law. It is necessary to note that the procedure for dispute settlement in Russian courts is guided by national law (lex fori).

However it shall be noted that nowadays it is not rare for the Russian commercial court to apply foreign law in transnational cases.

B.The application of foreign legislation by Turkish courts

Article 2 of Turkish PIL Code (Application of Foreign Law) stipulates that the judge shall ex officio apply the Turkish conflict of law rules and the applicable foreign law pursuant to these rules. The judge may demand the assistance of the parties in determining the content of the applicable foreign law.

As well as Russian law it is stipulated that where the provisions of the foreign law relating to the case may not be determined despite all investigations, Turkish law shall apply. However unlike Russian law Turkish law unfortunately does not stipulate the sources of law that may be used while establishing the content of foreign law.

It is interesting to mention that under Turkish PIL Code where the choice of applicable law is allowed, the substantive law provisions of the chosen law shall apply, unless it is clearly determined to the contrary by the parties.

Turkish law seems to be more specific providing the rule that where the state whose law shall be applied comprises two or more regional units and has different legal regimes within these units, the law of the region to be applied shall be determined pursuant to the laws of that state. Where there are no determining provisions in the law of that state, the law of the region most closely connected with the dispute shall apply.

As we see both Russian and Turkish jurisdictions provide the possibility to apply national law in case foreign law rules are not determined as well as both jurisdictions allow the judge to demand the assistance of the parties in determining the content of the applicable foreign law. However it shall be noted that under Russian law such assistance may be requested only while considering commercial disputes.

Unfortunately both jurisdictions do not contain **clear procedure of assistance request in their legislation.** As described above even despite Russian law prescribes the possibility to apply to the Ministry of Justice of the Russian Federation and other competent bodies or organizations with an assistance request the mechanism of such assistance in not quite clear.

In such case we come to conclusion that implementing such procedures into national law would make the process of determining the content of foreign law much easier.

III.Recognition and enforcement of foreign decisions and arbitral awards

If a dispute was settled by a foreign court or an arbitration institution for a variety of reasons (the assets, object of the dispute, infringed rights are located in a different country) the issue of enforcing the award may arise. It shall be noted that enforcement is a final and probably the most important step in the whole procedure of dispute settling. Usually this is the stage where real actions with parties' assets or rights are taken. In such satiation, the following are the most topical issues to be considered:

A.The grounds for recognition and enforcement

Decisions on commercial disputes made by a national court of one country may be enforceable in another country when there is (i) a suitable international agreement or (ii) the principle of mutuality is present (a situation when at least of the home countries of the party to a dispute has precedent in recognising the decision of the other country). Such situation generally seriously restrict the number of jurisdictions whose decisions would be recognised and enforced either in Russia or in Turkey.

In contrast, decisions rendered by international commercial arbitration cannot be appealed on merits both in Russia and Turkey. This means that no appeal procedure for international arbitration awards is provided; the only possibility is a cancellation action. Thus arbitral awards are enforceable in more than 130 countries pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("the New York Convention"). Below we will generally speak about arbitral awards enforcement.

As for applicable legislation in the sphere of arbitral awards enforcement we need to say that both Russian and Turkey have mostly the same system of regulation. Thus both are parties to the New York Convention; both countries have special laws regulation international commercial arbitration adopted on the base of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration dated June 21, 1985 (the "Model Law") ") (thus based on the Model Law Russia has adopted Federal Law No. 5338-1 on International Commercial Arbitration in 1993 , Turkey enacted Law No. 4686 on International Commercial Arbitration few years later – in 2001) ; and both regulate the procedure of recognition and enforcement of foreign arbitral awards through national codes (Turkish PIL Code in Turkey; Arbitrazh Procedure Code and Civil Procedure Code in Russia).

It should be mentioned that the court practice shows that possible problems of enforcement of an arbitral award are basically the same in both jurisdictions. Here are the most typical reasons for refusal:

- Non-arbitrability of the dispute
- Procedural defects
- Insufficient notification of the party
- Violation of public order
- Enforcement of intermediate arbitral awards

The abovementioned shows that there are for the decisions claiming to be recognised and enforced

B.The requirements for the decisions claiming to be recognised and enforced

Foreign decision and awards that are rendered in another jurisdiction shall be final and binding on the parties in cases when claiming to be recognised and enforced. For example under Article 60 of Turkish PIL Code (The Enforcement of Foreign Arbitral Awards) foreign arbitral awards that have become final and executable or that are binding for the parties may be enforced. This means that intermediate decisions may not be recognized. In this respect it shall be noted that the Supreme Arbitrazh Court of the Russian Federation has considered such decisions, like the decision on granting interim measures as intermediate ones, so they may not be enforced. Unfortunately, such position is quite negative with respect to establishing a friendly environment for foreign investors.

IV.Conclusion

Foreign businessmen (investors, claimants) who are often unfamiliar with the details of foreign legislation, may face far more adverse consequences in settling disputes in another country, e.g., resulting in the failure to recognise the validity of the applicable law chosen by the parties to the contract or invalidation of material terms of the contract. The result may be either denial of action or dismissal of the claim.

It follows that the role of harmonizing, unifying and clarifying the legal regulation with respect to the procedure for international dispute settlement is extremely high in terms of increasing commodities turnover. Thus, some further steps shall be taken like rescribing the procedure of assistance request in their legislation and providing the possibility to recognise and enforce partial arbitral awards. Countries shall communicate and share their experience while considering and working out solutions to provide the most effective legal regulations in the sphere of settling international disputes.

Unfortunately both jurisdictions do not contain clear procedure of assistance request in their legislation.

USING INTERNATIONAL HUMAN RIGHTS TO COMBAT HOMELESSNESS

SO YOUNG CHANG, KOÇ UNIVERSITY LAW SCHOOL
ERASMUS STUDENT

My paper tries to provide an international context for homelessness in cities. Coming from Vancouver where homelessness is a hot-button political issue, I am interested in investigating a connection between international human rights laws and urban poverty for the purpose of holding governments accountable for their commitments and also formulating more humane social strategies. Homelessness is an issue that is hugely affected by public perception and opinion - I will try to argue that a more globalized approach towards the worldwide phenomenon could bring about a paradigm shift in the collective consciousness and dismantle unfounded prejudices against the homeless population. When homelessness exists virtually everywhere around the world, we cannot deny that it is rooted in modern processes that societies have mutually undergone. To contextualize this further, I am hoping to include a fieldwork component to the paper where I conduct interviews with individuals who are involved in this cause in Istanbul.
I'm very passionate about this issue and I was involved in a homeless outreach initiative back in Vancouver. I would like to include some personal experiences from my encounters with the homeless population. I thought it would be a unique research project to bring an international perspective to a seemingly localized issue.

CAN ISTANBUL BECOME A GLOBAL FINANCIAL CENTER?

SAAKSHI DULANI, GEORGETOWN LAW SCHOOL

In order for Istanbul to become a global financial center, it must first become a secondary economic capital that feeds on the resources of the leading cities, and in turn contributes specialized services. The key to this transformation lies in Turkey's ability to secure long-term foreign direct investment to induce knowledge spillover and spur the formation of a financial cluster.
The first section of the paper will analyze why Turkey currently attracts low levels of FDI relative to other emerging markets. Istanbul suffers from two major deterrents to FDI: a family-dominated culture of corporate governance, and institutionalized corruption. In McKinsey's 2001 Emerging Market Investor Opinion Survey, institutional investors rated the divergence between company and family interests as the most important corporate-level factor for deciding in which companies to invest. Moreover, they rated the enforceability of legal rights as the most important external factor for selecting emerging markets.

The next section of the paper will offer political recommendations to help Turkey attract higher levels of FDI. First, I will discuss what steps the government can take to reform the corporate-governance structure to encourage a rule-based instead of a relationship-based system that also protects property/shareholder rights. Additionally, I will discuss ways Turkey can tackle corruption, namely by harmonizing national business standards with E.U./ international standards, and strengthening the legal system.
In conclusion, Turkey serves as a lesson for all emerging markets concerning the importance of a stable legal environment in financial maturation. Once Turkey improves corporate governance practices to reflect global standards, it will be able to facilitate international business transactions, attract long-term FDI, and enable cities such as Istanbul to support sophisticated financial operations.

HUMAN RIGHTS AND BUSINESSES

MEERIM TALANTBEK, AMERICAN UNIVERSITY OF CENTRAL ASIA

Nike, being a leading company in its industry and contracting with private manufacturers and factories in developing countries mostly are implicated in human rights abuse of its workers. The employees are subjects of physical abuse: long working hours as well as very low wage such as 50 cent per hour, and the conditions of work are not always safe and healthy. Could Nike be held accountable in this case? The answer is disputable. Indeed there have been a lot of human rights violations that have taken place recently.

Nowadays we have certain instruments that regulate the responsibility of businesses regarding the human rights violations. The problem, however, is that those all are not of binding character; they sort of summarize international practice and bear recommendation character, which means that States are not obliged to follow them.

Considering the significance of the issue, there is a need to set clear global standards on corporate responsibility that would be based on internationally recognized principles (principles of human rights law, humanitarian law etc.) Those standards shall apply to all companies in the world irrespective of its location, brand, in other words, irrespective of anything.
Moreover, international community should never forget that promotion and protection of human rights is, first of all, the responsibility of a State where such violations take place. However many States fail to do so because of many different reasons, one of which is the weakness of enforcement measures of the national legislature, especially in developing countries.


Jus Cogens Exception
Jure imperii acts are not subject to foreign jurisdiction under customary law
A newly emerging claim:
Normative Hierarchy Theory→ Jus cogens Exception
Jus Cogens norms: hierarchically superior than other norms including State Immunity.
Thus they must override State immunity…


INTERNATIONAL DISPUTE RESOLUTION
IN TURKEY AND RUSSIA:
PROBLEM ISSUES
Maryana Batalova
National Research University –
Higher School of economics
Moscow, Russia

BOAT TOUR

3RD DAY

WORKSHOPS DAY

BARBEQUE PARTY

PARTY

4TH DAY

FICTIONAL CONTROVERSY

NOTE: (R)antania is a UN member, and is party to the European Convention on Human Rights, and the Rome Statute establishing the ICC.

(R)antania is a small State in Europe, ruled by Prime Minister (G)eneralix. An armed struggle has been ongoing for almost ten years between State (R)'s army and the members of a terrorist organization, the (T), which declare to be acting on behalf of an allegedly oppressed ethnical minority group, the (M), residing within (R). This armed struggle has led to the killing of thousands of civilians of State (R)'s nationality, and even more members of the (T).

On account of the terrorist threat, and serious civil unrest in part of the territory, a state of emergency is declared. Pursuant to state of emergency laws, the State (R) has adopted numerous restrictions with respect to civil and political rights. Particularly, the Law concerning Press and Broadcasting has been significantly amended. In this respect, the police forces have conducted operations in the premises of newspapers of which were allegedly acting as the propaganda tool of the (M) through imparting information in favour of its activities. In the course of operations, the police has seized the computers and confiscated a lot of published and unpublished material at the premises. The newspapers were closed down accordingly.

In response to the problem, State (R) sends troops to the northern part of the neighbouring State (I)ndigo in order to target the (T) hideouts and (I)'s military objects in the zone, accusing State (I) of hosting the members of (T), and of providing them with shelter and weapons.

Within (R), in the framework of an operation conducted against journalists who are allegedly acting on behalf of the terrorist group (T), the house of (J)ournalis, a very famous columnist, is raided early in the morning by the police. (J) is taken out of his house in his pyjamas and handcuffed in the presence of family members and dozens of reporters. (J) is taken to the police station where he is kept under custody. Before the interrogation he is only informed that "he is under custody on charges of leading a terrorist organisation". At the end of the custody period, (J) is taken before the court, and is placed under pre-trial detention. The reasoning for the decision only states that "the content of the file, the gravity of the alleged crime, the state of the evidence" require such measure. Immediately after his detention, the content of the investigation file is leaked to the media, as a result of which certain journals describe (J) as a member of the terrorist organisation.

On the same day, the police receives an anonymous call concerning the fact that 'two terrorists' are living in a residential block at the heart of the capital city. Three police teams composed of unexperienced officers rush to the flat where the alleged terrorists reside. The police lack any operational plan, and they are also not in contact with their headquarters during the event. As they reach the suspected flat, an officer knocks on the door and pulls back. As he hears quick footsteps approaching, in fear and panic, he immediately opens fire with automatic guns towards the door, and all the other officers do the same. In total, 50-55 bullets are fired. As the police break in, they recover the dead bodies of two unarmed children aged 16.

As a reaction to the growing oppression by the government, demonstrators stage massive protests in various cities asking for its resignation. In response to these protests, governmental forces open fire against the demonstrators, killing many of them. In addition, the Government orders the armed forces to attack two cities which are thought to support the demonstrators. At least 300 civilians are killed during the attacks. (G)eneralix declares that his forces will not stop until "all traitors are eliminated".

As tension escalates, and the increase in the scale of governmental violence leads to widespread atrocities being committed against the civilian population, international public opinion starts to pressurize national governments to intervene in (R) by using military force against the government. Some States start considering whether there is a legal basis authorizing military intervention against the government of (R) in order to protect the civilian population. (Z)urziba, which is one of the neighbours, further considers whether it is possible to launch a unilateral military intervention into (R)antania in order to replace the (G)eneralix government with a democratic one.

As the media reports on the possibility of a military attack by (Z)urziba, (G)eneralix decides to strike first, and bombs many military installations in (Z)urziba. The (R)antanian Government reports its action to the UN SC by stating that they acted under self-defence as they "could not be expected to stand idle when faced with the prospect of being attacked at any moment".

In response to the bombing, (Z)urziba launches a land operation into (R)antania, causing military casualties on both sides. Some members of the armed forces of (Z)urziba are captured by (R)antanian forces, and put to trial for murdering (R)antanian soldiers. (Z)urziba protests against such action, by arguing that its soldiers can not be treated as criminals under the Geneva Conventions of 1949.

In addition, State (R) is also sending covert 'special operation teams' to States where persons allegedly affiliated with the (T) group are living, in order to kill those persons. A few of such alleged terrorists are also captured, taken back to (R), and placed under administrative detention for an indefinite period. State (R) argues that such persons are 'unprivileged combatants', therefore they do not enjoy the rights deriving from combatant status, and they also do not benefit from the rights guaranteed in the ECHR as they are not civilians.

Meanwhile, in Africa, State (S) has been torn apart throughout its recent history by a civil war fought between different ethnic and religious groups. Since 2003, the fighting has extended to the western region of (D), mainly due to growing animosity caused by ethnic tensions and the fight over scarse resources. As a consequence, two rebel armed resistance groups consisting of men drawn from the (F), (M) and (Z) tribes, which are composed of African farmers of Muslim religion, attack facilities belonging to the central government. In response, the State recruits and arms outlaws (the "J"s) amongst landless Arab nomadic tribes also of Muslim religion. Forces belonging to the Arab-ruled central government, assisted by the "J"s, then target the (F), (M), (Z) civilian population. As a result, thousands of persons are estimated to have been killed, wounded and raped, and millions are held at camps where living standards are extremely low. In response to the crimes committed by the government and government-sponsored groups against part of the population, many NGOs send reports to the Prosecutor of the ICC hoping that an investigation will be launched, asking the Prosecutor to analyse whether the ICC has jurisdiction over the crimes in question. On the other hand, some States declare their willingness to put to trial before their national courts, if captured, Mr. B, the incumbent President of (S).

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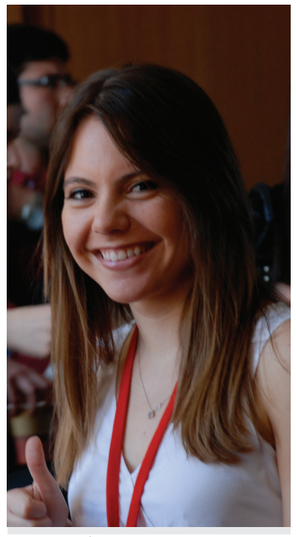

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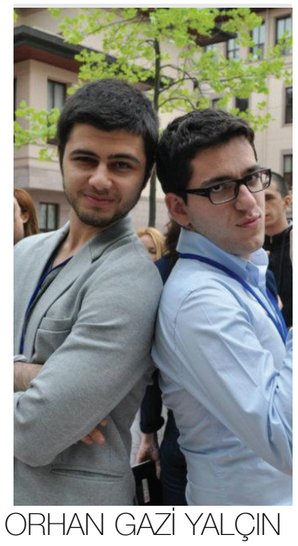

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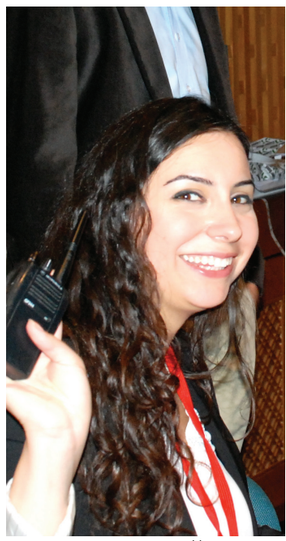

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