

# Torture in Kurdistan

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## ABSTRACT

Most human rights instruments in international law are primarily designed to restrain the State from violating human rights. This is not surprising since the State of sovereign, including Federal Governments are usually the institution vested with principal legal authority and power to regulate life and liberty in society. Also, the government is the primary subject of international law.

Accordingly, many human rights, especially civil and political rights, whether guaranteed nationally or internationally, are intended to control the power of the government. They oblige the government, rather than non-state entities, not to interfere unduly with the rights and freedom of individuals.

International legal Rules (ILR) designed to restrain the state are more effective where the state is responsive to political pressure or embarrassment. A government such as of Kurdistan Regional Government (KRG) often acts swiftly to suppress violations of human rights in its '*jurisdiction*', perhaps to avoid further adverse international attention. Violation of human rights is sometimes curtailed in this way.

This document examines aspects of systematic human rights violations in Kurdistan since the formation of the KRG, and in particularly since early 1990's.

In this case, I refer to International Legal Instruments (ILI), not individual cases to analyse these grave violations of human rights, which have been denied by the KRG. Also studied are the Federal Iraqi Government's (FIG) obligations and the enforcement tools of International Law (IL) on Torture. I will also draw your attention to the fact that KRG's systematic violations of human rights are crimes against humanity.

## 1.0 INTRODUCTION

Despite the adoption of the various conventions on international humanitarian and human rights law over the past 50 years, hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture, enforced displacement, and killing of helpless civilians in situations of different conflicts.

Whether it is mutilations in Sierra Leone, genocide in Halabja or disappearances in Latin America, the parties to conflicts have acted with deliberate indifference to those conventions. Government forces continue to target innocent civilians with alarming frequency.

Gross human rights violations are systematically taking place in Kurdistan by the KRG, namely by Asayish. They range from arbitrary arrest and detention, to torture, and unfair summary trials, “disappearances”, on the basis of different political believes agenda, and death penalties.

I will focuses on torture in Kurdistan as grave violations of human rights. Torture is strongly prohibited under national and international law and has been condemned by the United Nations General Assembly (UNGA) as offences against human dignity.

Yet, although Iraq is a party to regional and International Treaties for the prevention and abolition of torture, such inhuman and degrading practices persist, daily throughout Kurdistan Region (KR)

They persist despite the enormous efforts of Human Rights Organizations (HRO), activists and others since early 1990. The FIG and KRG have, however, so far failed to fulfil their obligations by not incorporating these treaties into domestic law.

Much has been accomplished in the fight against torture, but these practices are as prevalent today as when the Universal Declaration of Human Rights

(UDHR), United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted.

The FIG as well as activists within the human rights field must play an important role if changes and improvements are to be carried out. The Special Rapporteur on Torture should take this issue seriously, so that new and urgent approaches can be developed to stop ongoing campaigns of torture by the Asayish apparatus.

Human Rights Watch (HRW), Amnesty International (AI), and many other Non-Governmental Organisations (NGOs) have called for urgent action to stop human rights violation in Kurdistan, by developing suitable regional and national plans and strategies.

The KRG has ignored to live up to its commitment to abolish torture and to stop its campaign. It is time for human rights advocates and workers everywhere to join forces to step up this fight and to hold the KRG accountable.

This document will focus on torture in Kurdistan by examining the legal consequences of the KRG's breach of human rights standards, with an argument that Torture is a crime against humanity.

## 2.0 TORTURE

### 2.1 Introduction

Torture has historically been a method of arriving at the 'truth', and determining responsibility for offences by means of eliciting confessions or other information. Less obviously, it has also become a method of inspiring fear among the population at large, or specific segments of it.<sup>1</sup>

The KRG security forces, namely Asayish regularly torture detainees. The reports of HRW, AI, and other NGO's on KRG support this allegation. Very many allegations of torture come regularly to our attention from all parts of the country. Indeed cruelty appears to be the norm in KRG detention centers.

Documentation published throughout Kurdistan Regional Government (KRG) alleges that the use of torture remains "systematic and commonplace in Asayish torture centers. Torture is outlawed in Iraq, and is forbidden in all circumstances in every country of the world by international law."<sup>2</sup>

There have been effective actions to prevent it.<sup>3</sup> Yet it is still practiced in virtually every country. Some governments such as KRG encourage it.<sup>4</sup> Some

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<sup>1</sup> Nigel Rodley, *The Treatment of Prisoners under International Law*, Second Edition, 1999, p. 7.

<sup>2</sup>Article 22(a) of Iraq's Constitution guarantees against torture, cruel and other inhuman treatment are found in the Iraqi legislation Article 22(a) of the Iraqi Code Criminal procedure, of the Interim Constitution states that "The dignity of man is safeguarded. It is inadmissible to cause any physical or psychological harm., and the Republic of Iraq (Resolution No. 792 of 1971). Prohibits "any form of physical and mental torture". Article 127 of the Judicial Procedures law of 1971 states that "*no illegal methods may be used to extract confession from the accused, including ill-treatment, threats to harm, enticement, psychological methods or the use of drugs.*" However, torture continues to be a widespread and systematic phenomenon and is frighteningly common in Kurdistan, showing no signs of improvement.

<sup>3</sup>The torture of Shidane Arone by members of the Canadian Armed Forces. The torture of Abner Louima by New York City Police happened only ten years ago. Both of these cases are heart-breaking and breath-stopping for anyone who has worked to see torture disappear. Think of the Louima case. Here is the United Nations building in Manhattan, and twenty kilometers away in Brooklyn a police officer is thrusting his billy club into Mr. Louima's anus and waving it in his face. There are no factual disputes in these two cases. There was a guilty plea in one case and convictions in both." See Justice Brent Knazan, Ontario Court of Justice, Constitutional Protection Against Torture, CCVT Annual General Meeting, October 5, 1999.

condone it. Torture is also facilitated by another widespread practice that of allowing people to be convicted solely on the basis of confessions extracted by torture.<sup>5</sup>

## 2.2 DEFINITION

The word 'torture' is often used to describe inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.<sup>6</sup> According to the Convention Against Torture (CAT), torture is defined as:

*Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not*

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<sup>4</sup>Kurdish defence lawyers who raise allegations of torture in court if she\allowed often do so knowing that they risk punishment themselves or in the knowledge that their claims will be dismissed out of hand. Iraq including Kurdistan has also legal obligations under the ICCPR to take measures to prevent torture and to bring perpetrators of torture to justice. See Article 16 of the UN Basic Principles on the Role of Lawyers states: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference... and (c) shall not suffer, or be threatened with recognized professional duties, standards and ethics."

<sup>5</sup>See Comment by Human Rights Committee on Article 7 of the ICCPR, cited in Chapter 1,

Minimum requirements for fair trial - non-admissibility of statements extracted under torture.

<sup>6</sup>The Court of Criminal Appeal of Northern Ireland in *R v. McCormich* adopted this definition [1977] 4 NIJ, 105.

*include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*<sup>7</sup>

CAT has developed a new process for evaluating torture claims and also provides some additional insights on how the process works. It also sets out available protections which can be used most effectively to protect torture victims.

### **2.3 INCIDENCE**

According to reliable sources, torture is practiced systematically in the area under KRG control. It continues to be an aberration in the administration of justice, when interrogations are conducted in Asayish branches and the victim is frequently held incommunicado. This often happens during the first few days of detention. Authorities, especially the security force, use both physical and psychological torture. In many cases, people are said to have died under torture in detention.

Systematic torture in Kurdistan can be divided into physical and psychological forms, usually performed at the same time, and both intended to destroy the physical and psychological well-being of the victim for a long time to come. Torture is used as both a means of interrogation and of forcing victims to renounce their political views. Different methods of torture were noted in HRW Report in 2007, and AI Report 2009.

The Asayish methods of torture include beatings with fists and rubber truncheons, beating with cables, *falaqa* (beating on the soles of the feet),<sup>8</sup> Al-

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<sup>7</sup>See Article 1 (1) Convention Against Torture, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)).

<sup>8</sup>The *Greek* case affords the first and most extensively reasoned formal finding, by a body called upon to apply a human rights treaty, that torture has taken place. In this case the European Commission of Human Rights found a practice of torture *and ill-treatment* by the Athens Security Police, Bouboulinas Street, of persons arrested for political reasons, and that... this torture and ill-treatment has most often consisted in the application of “falaga” or severe beatings of all parts of the body. The Commission described ‘*falaga or bastinado*’ to have been ‘a method of torture known for centuries.

Mangana (clamp-like instrument placed over toes), cigarette burns on various parts of the body, piercing of hands with an electric drill, electric shocks, hanging up with hands tied behind backs,<sup>9</sup> electrical shocks to the genitals and other parts of the body.

Many victims are forced into doing or saying things against their ideology or religious convictions, with the purpose of attacking fundamental parts of their identity. Political and ethical values are particularly vulnerable<sup>10</sup> when victims are forced to sing the praises of everything they have been fighting against.<sup>11</sup>

The most notable alleged violations related to the institution of administrative internment (detention without charge) and to torture or other ill treatment of those suspected of politically motivated violence. The opinion of the European Commission on Human Rights (ECHR) and the subsequent similar judgment of the European Court of Human Rights was that, under the circumstances, administrative internment did not violate the Convention.

There were two categories of alleged violation of Article 3, prohibiting torture and inhuman or degrading treatment or punishment. One related to the use of physical violence, and the second category concerned the use of five

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See Nigel Rodley, *The Treatment of the Prisoners under International Law*, Second edition, 1999, p. 77.

<sup>9</sup>In the Case of the Argentinean pianist, Miguel Angel Estrella, detained in Uruguay in 1977. According to Estrella's unrefuted evidence he and three others were subjected to torture. The tortures consisted of electric shocks, beating with rubber truncheons, punches and kicks, hanging up with hands tied behind their backs etc. The Human Rights Committee found that he had been subjected to severe physical...torture. *Estrella Gilbo v. Uruguay* (147/1983). Report of the Human Rights Committee, supra n.55. AnnexXII, para8.3. See also Nigel Rodley, *The Treatment of Prisoners under International Law*, Second edition, 1999, p. 88.

<sup>10</sup>Estrella case also affords an example of the sort of psychological torture which: "consisted chiefly in threats of torture or violence to relatives or friends, or of dispatch to Argentina to be executed, in threats of making us witness the torture of friends, and in inducing in us a state of hallucination in which we thought we could see and hear things which were not real. In my own case, their point of concentration was my hand. For hours upon end, they put me through a mock amputation with an electric saw, telling me. "We are going to do the same to you as Victor Jara a well-known Chilean singer and guitarist who was found dead and with his hand completely smashed at the end of September 1973. Amongst the effects from which I suffered as a result were a loss of sensitivity in both arms and hands for eleven months, discomfort that still persist in the right thumb, and severe pain in the knees.

<sup>11</sup>13th International Congress of the World Confederation for Physical Therapy 23-28 May 1999, Yokohama, Japan.

interrogation techniques referred to by Court as a form of “interrogation in depth” sometimes involving “disorientation” or “sensory deprivation”. The five techniques are: (1) wall-standing; (2) hooding; (3) subjection to noise; (4) deprivation of sleep; and (5) deprivation of food and drink.<sup>12</sup>

The Commission had stated that the purpose of the ‘five techniques’ was ‘to obtain information’ from the persons subjected to them. The Court agreed that their object was extraction of confessions, the naming of others and/or information.

Finally, the Commission considered that the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been known over the ages. The Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.

All of the methods of torture used by the Asayish are extremely cruel and inhuman treatments, far outweighing the “five techniques” referred to above, and they are incompatible with the development of torture prevention in international law.

### **3.0 THE DEVELOPMENT OF TORTURE PREVENTION IN INTERNATIONAL LAW**

#### **3.1 INTRODUCTION**

The UN and other international organizations have taken action to develop standards for the prevention of torture, including standards involving the obligation of states to investigate allegations of torture. They have established

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<sup>12</sup> For more details see *Ireland v. United Kingdom*, European Court of Human Rights, Series A, No. 25, and 41 para. 96. See also Nigel Rodley, *The Treatment of the Prisoners under International Law*, Second edition, 1999. P. 91.



bodies and mechanisms such as the Committee against Torture (CAT), the Human Rights Committee (HRC), the Commission on Human Rights (CHR), the Special Rapporteur (SR) on Torture, and country-specific Special Rapporteurs appointed by the Commission on Human Rights.

As it became more widely recognized that obtaining confessions and information under duress is unreliable as evidence, and that torture violates fundamental human rights to physical and mental integrity, states gradually abolished torture as an officially sanctioned practice. Nevertheless, torture continues to be one of the most pressing human rights problems of modern times.

While torture is no longer recognized as part of official policy, it continues to be perpetrated systematically in KRG. As documented in numerous reports of various NGO's, there is an alarming discrepancy between official denunciations of torture and its frequency in fact.<sup>13</sup>

The Universal Declaration of Human Rights (UNDHR) states in Article 5 that: *"no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Article 3, common to the Geneva Conventions (GC) of 1949, prohibits parties from committing at any time or in any place acts of

*"violence to life and person, mutilation, cruel treatment, and torture' or outrages against human dignity, in particular humiliating and degrading treatment"*.

Article 7 ICCPR echoes Article 5 of the UDHR and Article 10(1) of the Covenant also provide that: *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."*

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<sup>13</sup>Human Rights Watch, and Amnesty International reports on KRG .

There are many international and regional human rights instruments containing guarantees of the right to be free from torture, I therefore will mention only some of them in detail because of their importance and briefly mention others just to support the analysis.

### **3.2 CONVENTION AGAINST TORTURE (CAT)**

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment contains provisions extending responsibility for torture to individuals and establishes supervisory mechanisms.<sup>14</sup>

CAT is the most effective Convention to prevent torture regardless of justification. One of the key issues that CAT petitioners must face is the necessity, under the terms of the definition of "torture" in the Convention, to prove the involvement or acquiescence of government officials in the circumstances of the "severe pain and suffering" that are being alleged as a basis of the torture claim.<sup>15</sup>

Most significantly CAT offers a completely new set of standards and review mechanisms to prevent torture. In addition, in one important respect these standards are less restrictive than those that must be met, for example, for establishing refugee status.

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<sup>14</sup>Adopted by consensus by the General Assembly, December 10, 1984, opened for signature February 4, 1985, entered into force June 26, 1987. Iraq is not a state party to CAT, but it has acceded to numerous relevant international instruments and conventions, including: The Charter of the United Nations, Articles 1 and 55 of, which affirm the need for respect for the principle of, equal respect for human rights without any distinction as to race, sex, language or religion.

The Universal Declaration of Human Rights.

The International Covenant on Civil and Political Rights.

The International Covenant on Economic, Social and Cultural Rights.

The Discrimination (Employment and Occupation) Convention.

The Convention on the Rights of the Child.

The Convention on the Elimination of All Forms of Discrimination against Women.

<sup>15</sup>Morton Sklar, *Convention Against Torture Remedies*, Article published in Bender's Immigration Bulletin, July 1, 1998 Vol. 3, No.13.

Under CAT it is not necessary to establish the reason for persecution, as is the case for a refugee claim, which must fit within one of the five specified grounds (race, religion, national origin, political opinion or membership in a social group). CAT states it is sufficient to show the presence of torture for whatever reason it is (or was) being imposed.

No exceptional circumstances whatsoever, not even a state of war, internal political instability, or other public emergency, is permitted to be used as justification for torture.<sup>16</sup>

Under Article 16, each State Party shall undertake to prevent in its territory 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 ' where such acts are committed by public officials or other persons acting in an official capacity. Finally, CAT represents a significant step towards general international recognition that rules extending international responsibility to individuals are required to suppress torture.

### **3.3 SPECIAL RAPPORTEUR ON TORTURE (SR)**

The UN Commission on Human Rights appointed a Special Rapporteur on questions relating to torture on 22 May 1985, with a mandate to P. Kooijmans to seek and receive credible and reliable information from governments, as well as specialized agencies, intergovernmental organizations, and non-governmental organizations and to 'respond effectively' to information relating to torture. A well-known UN Special Rapporteur on Torture, Nigel Rodley, has stated:

*The prohibition of torture or other ill treatment could hardly be formulated in more absolute terms. In the words*

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<sup>16</sup>Article 2 (2) In most international human rights instruments, derogation from certain human rights obligations is permitted in exceptional circumstances, see e.g. Articles 4 of the ICCPR, 15(1) of the European Convention of Human Rights, and 27 of the American Convention of Human Rights, where the right not to be tortured is guaranteed as a non-derogable right.

*of the official commentary on the text by the International Committee of the Red Cross (ICRC), "no possible loophole is left; there can be no excuse, no attenuating circumstances."<sup>17</sup>*

In addition, he made a series of recommendations. In paragraph 926 (g) of his report of 12 January 1995. He stated:

*When a detainee or relative or lawyer lodges a torture complaint, an inquiry should always take place...Independent national authorities, such as a national commission or ombudsman with investigator and/or prosecutorial powers, should be established to receive and to investigate complaints. Complaints about torture should be dealt with immediately and should be investigated by an independent authority with no relation to that which is investigating or prosecuting the case against the alleged victim.<sup>18[67]</sup>*

Furthermore, the Special Rapporteur emphasized this recommendation in his Report of 9 January 1996. Discussing his concerns about torture practices, he pointed out that "both under general international law and under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States are obliged to investigate allegations of torture."<sup>19</sup>

The Special Rapporteur on Torture referred to the interim report to the General Assembly, reflecting concerns on the scope of the problem of torture and the key measures to address it. He cited corporal punishment including amputation, lashing, flogging and stoning, the Laws of Quesas (retribution);

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<sup>17</sup>Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol) Submitted to the United Nations Office of the High Commissioner for Human Rights August 9, 1999.

<sup>18</sup>Ibid.

<sup>19</sup>Report of 9 January, 1996 at paragraph 136.

police ill-treatment of prisoners through insults, psychological intimidation and intense verbal abuse; verbal abuse of a racial and sexually discriminatory nature; and the sentencing of convicts to corporal punishment such as flogging.

Finally, the Special Rapporteur on Torture concluded that where systematic perpetration of torture is still officially part of State practice, there is usually an absence of democracy and the rule of law.<sup>20</sup> Even if Kurdistan\Iraq is not a state party to some international treaties, the above legal tools and statements give us a clear picture about Iraq's including KRG's legal obligations to prevent torture. In addition, the main human rights instruments of regional organizations also contain guarantees of the right to be free from torture.

### **3.4 EUROPEAN CONVENTION ON HUMAN RIGHT (ECHR) & EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE & INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

A significant development concerning implementation of international norms against torture is the adoption of the ECHR and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>21</sup> This sets up an extensive non-judicial supervisory system to prevent torture as prohibited by Article 3 of the European Convention on Human Rights.

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<sup>20</sup>The Commission at its 1991 session established the mandate of the Special Rapporteur. Report by the first Special Rapporteur on Torture P. Kooijmans, E/CN.4/1986/15, 19 February. paras. 97-8. See also the 1994 report on rule of law in Iraq by the International commission on Jurists remarks that the Iraqi government has established special security, revolutionary and emergency courts. These courts reportedly continue to be used as "an instrument designed to protect the existing regime rather than to defend the safety and security of society". February 1994, p.113-14.

<sup>21</sup>*Done* at Strasbourg, November 26, 1987, 27 I.L.M. 1152 (1988).

On 4 November 1950, the Council of Europe adopted ECHR, which came into force on 3 September 1953.<sup>22</sup> Article 3 of the European Convention states that:

*“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*

The Convention established a judiciary mechanism: the European Court of Human Rights. Since the reform that came into force on 1st of November 1998, a new permanent Court replaced the former Court and Commission on Human Rights. **The right of individual applications is now mandatory and all victims have direct access to the Court.**

ECPT established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), which is authorized by each party to ECPT to make visits to any place of detention within the State’s jurisdiction.<sup>23</sup>

Parties to ECPT are obliged to provide to a visiting Committee access to its territory, right to travel without restriction, full information on the whereabouts of persons deprived of their liberty, and other information necessary for the Committee to carry out its task.<sup>24</sup> The Committee takes certain follow-up actions to report and make public statements on the matter in question.<sup>25</sup>

The European Court of Human Rights has had occasion to consider the necessity of investigating allegations of torture as a way of ensuring the rights guaranteed by Article 3. The first judgment on this issue was the decision in

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<sup>22</sup>Open to acceptance by and, since 1982, binding on, all 40 members of the Council of Europe, a regional organization originally of western European states, now expanded to become pan-European.

<sup>23</sup>Article 2.

<sup>24</sup>Article 8. By Article 9 parties may make representation to the Committee against a visit ‘on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress.’

<sup>25</sup>Ibid.

the Case of *Aksoy v. Turkey*, delivered on 18 December 1996. In this case, the Court considered that:

*“Where an individual is taken into Police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the cause of the injury, failing which a clear issue arises under Article 3 of the Convention.”*<sup>26</sup>

The Court went on to hold that the injuries inflicted on the applicant resulted from torture and that Article 3 had been violated. Furthermore, the Court interpreted Article 13 of the Convention, which provides for the right to an effective remedy before a national authority, as imposing an obligation to thoroughly investigate claims of torture.

Considering the "fundamental importance of the prohibition of torture," and the vulnerability of torture victims, the Court held that "Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture."

According to the Court's interpretation, the notion of an effective remedy in Article 13 entails a thorough investigation of every "*arguable claim*" of torture. The Court noted that although ECHR has no express provision such as Article 12 of the CAT, "such a requirement is implicit in the notion of an 'effective remedy' under Article 13." The Court then found that the State had violated Article 13 by failing to investigate the applicant's allegation of torture.

In a judgment of 28 October 1998 in the Case of *Assenov and others vs. Bulgaria*, the Court went even further in recognizing an obligation for the State to investigate allegations of torture not only under Article 13 but also under

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<sup>26</sup>See the *Tomasi v. France* judgment of 27 August 1992, Series A no. 241-A, pp. 40-41 §§ 108-11, and the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, p. 26, § 34.

Article 3. In this case, a young Roma arrested by the police showed medical evidence of beatings, but it was impossible to assess, on the basis of available evidence, whether these injuries were caused by his father or by the police.

The Court recognized that "the degree of bruising found by the doctor who examined Mr. Assenov indicates that the latter's injuries, whether caused by his father or by the police, were sufficiently serious to amount to ill-treatment within the scope of Article 3. Contrary to the Commission, that held that there was no violation of Article 3, the Court did not stop there. It went on and considered that the facts *"raised a reasonable suspicion that these injuries may have been caused by the police."*

Hence the Court held that:

*"In these circumstances, where an individual raises an arguable claim that he has been seriously ill treated by the police or other such agents of the State, unlawfully and in breach of Article 3, that provision, read in conjunction with Article 1 of the Convention "to secure everyone within their jurisdiction the rights and freedoms in the Convention," requires by implication that there should be an effective official investigation. This obligation...should be capable of leading to the identification and punishment of those responsible. If this is not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."<sup>27</sup>*

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<sup>27</sup> Assenov v. Bulgaria , 28 October 1990, (90/1997/874/1086).



For the first time, the Court concluded that a violation of Article 3 had occurred, not for ill-treatment *per se* but for a failure to carry out effective official investigation on the allegation of ill-treatment. In addition, the Court reiterated its position in the *Aksoy Case* and concluded that there had also been a violation of Article 13. The Court considered that:

*“Where an individual has an arguable claim that he has been ill treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation as required also by Article 3, effective access for complainant to investigator procedure and payment of compensation where appropriate.”<sup>28</sup>*

The above two cases are in direct contrast to the situation in Iraq and shows very clearly that Iraq has violated most relevant international standards by practicing systematic torture in the cruelest way (particularly as in amputation and branding) as it has admitted in hundreds of reports and other reliable sources.<sup>29</sup>

There are also other regional instruments **which** prevent torture such as the Inter-American Convention, and African Commission on Human and Peoples’ Rights.

### **3.4 AMERICAN CONVENTION ON HUMAN RIGHTS**

On 22 November 1969. The Organization of American States (OAS) adopted the American Convention on Human Rights, which came into force on 18 July 1978.<sup>30</sup> Article 5 of the Convention which states:

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<sup>28</sup>Ibid.

<sup>29</sup>See all Amnesty International, and Human Rights Watch reports on human rights in Kurdistan,

<sup>30</sup>Open to acceptance by the 36 members of the Organisation of American States, 25 of which are presently parties to the Convention. The Inter-American Convention to Prevent and Punish Torture, was adopted by the OAS on 9 December 1985, and entered into force on 28 February 1987.

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Article 33 of the Convention provides for the establishment of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. As stated in its regulations, the Commission's principal function is to promote the observance and defence of human rights and to serve as an advisory body to the OAS in this area.

In fulfilling this function, the Commission has looked to the Inter-American Convention to Prevent and Punish Torture to guide its interpretation of what is meant by torture under Article 5.

Article 2 of the Inter-American Convention defines torture as:

*“any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”*

### **3.5 AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

In comparison to the European and the Inter-American systems, Africa does not have a convention on torture and its prevention. The question of torture is examined on the same level as are other human rights violations. It is primarily dealt with in the African (Banjul) Charter of Human and Peoples'

Rights which was adopted by the Organization of African Unity (OAU) on 27 June 1981 and came into force on 21 October 1986.<sup>31[85]</sup> Article 5 of the African Charter states:

*“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”*

In accordance with Article 30 of the African Charter, the African Commission on Human and Peoples' Rights was established in June 1987, and charged to "promote human and peoples' rights and ensure their protection in Africa." In its periodic sessions, the African Commission has passed some resolutions on matters concerning human rights, dealing with torture among other violations. In some of its resolutions, the African Commission has raised its concerns about the degradation of human rights situations, including the practice of torture.

The Commission has established new mechanisms such as various Special Rapporteurs which have opened opportunities to victims and NGOs who can send information directly to Special Rapporteurs. At the same time, a victim or an NGO can make a complaint to the Commission regarding acts of torture as defined by Article 5 of the Charter.

### **3.6 TORTURE AS CRIMES AGAINST HUMANITY**

The systematic or large scale practice of torture and other crucial treatments by the KRG are crimes against humanity. It is listed as a treaty crime in the Annex referred to in Article 20 (e) of the International Law Commission draft

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<sup>31</sup>It was pen to acceptance by all 53 members of the Organisation of African Unity, all but several are

statute on torture.<sup>32</sup> Torture has been recognized as a crime against humanity since the First World War.<sup>33</sup>

Although it was not expressly listed in the Nuremberg and Tokyo Charters, defendants were convicted of crimes against humanity for acts of torture. It was expressly recognized as a crime against humanity in Allied Control Council Law (ACCL) No. 10, and the Yugoslavia and Rwanda Statutes.<sup>34</sup> Torture is also considered a crime against humanity in the draft Code of Crimes.<sup>35</sup>

The definition of torture should be based on, but not limited to, the definition of torture in the CAT.<sup>36</sup> Although the definition for purposes of the Convention is limited to acts “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”, the definition “is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application”.<sup>37</sup>

In addition, the Geneva Conventions (GC) and their Additional Protocol are today considered part of customary law and, as their underlying principles derive from peremptory norms of international law “from which no derogation is permitted”, any extraneous conditionality affixed to the performance of these treaties is legally null and void. In the *Barcelona TRACTION* case, the

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<sup>32</sup>International Law Commission Report, 1996, Draft Code of Crimes against the Peace and Security of Mankind., Art. 18 (b).

<sup>33</sup>1919 Peace Conference Commission Report, supra, n. 6, p. 114 (torture of civilians).

<sup>34</sup>Allied Control Council Law No. 10, Art. II (1) (c); Yugoslavia Statute, Art. 5 (f); Rwanda Statute, Art. 3 (f).

<sup>35</sup>International Law Commission Report, 1996, Draft Code of Crimes against the Peace and Security of Mankind. Art. 18 (c).

<sup>36</sup>See Convention against Torture, Art. 1 (1).

<sup>37</sup>Ibid. Art. 1 (2). See also J. Herman Burgers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers 1988), p. 122 (“ . . . insofar as other international instruments or national laws give the individual a better protection, he shall be entitled to benefit from it; however, other international instruments or national law can never restrict the protection which the individual enjoys under the Convention”).

majority judgment of the International Court of Justice (ICJ) referred to *jus cogens*-obligations.<sup>38</sup>

*"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of torture, cruel and inhuman treatment, as also from the principles and rules concerning the basic rights of the human person, including protection from racial discrimination."*

Finally, to make respect for the "basic rights of the Kurdish human person" conditional upon the carrying out of KRG policies would thus appear contrary to the non-derogable character of *jus cogens* obligations.

The principle *jus cogens* (peremptory norm of general international law) is incorporated into Article 53 of the Vienna Convention on the Laws of Treaties, recognized by the UN International Law Commission (UNILC) and constitutes an important legal source in evaluating cases not specifically covered by treaty obligations.

### **3.7 CONCLUSION**

The international instruments cited above shows establishment of certain obligations that the KRG must respect to ensure protection against torture. These include:

1. Taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions.<sup>39</sup>

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<sup>38</sup>The ICJ opinion in the Barcelona Traction Case *Belgium v. Spain*, 1970 ICJ Report, 3 para. 34, recognized that the basic human rights of all persons constitute obligations *erga omnes*.

<sup>39</sup>Article 2 of the Convention Against Torture; Article 3 of the Declaration on the Protection Against Torture.

2. Criminalizing acts of torture, including complicity or participation therein;<sup>40</sup>
3. Limiting the use of incommunicado detention; ensuring that detainees are held in places officially recognized as places of detention, as well as for the names of persons responsible for their detention to be kept in registers readily available and accessible to those concerned, including relatives and friends; recording the time and place of all interrogations, together with the names of those present; and, granting doctors, lawyers and family members access to detainees;<sup>41</sup>
4. Ensuring that education and information regarding the prohibition of torture is included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other appropriate persons;<sup>42</sup>
5. Ensuring that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made;<sup>43</sup>
6. Ensuring that the competent authorities undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed;<sup>44</sup>

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<sup>40</sup>Article 4 of the Convention Against Torture; Principle 7 of the Body of Principles on Detention; Article 7 of the Declaration on the Protection Against Torture; paragraphs 31, 32 and 33 of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>41</sup>Article 11 of the Convention Against Torture; Principles 11, 12, 13, 15, 16, 17, 18, 19 and 23 of the Body of Principles on Detention; paragraphs 7, 22 and 37 of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>42</sup>Article 10 of the Convention Against Torture; Article 5 of the Declaration on the Protection Against Torture; paragraph 54 of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>43</sup>Article 15 of the Convention Against Torture; Article 12 of the Declaration on the Protection Against Torture.

<sup>44</sup>Article 12 of the Convention Against Torture; Principles 33 and 34 of the Body of Principles on Detention; Article 9 of the Declaration on the Protection Against Torture.

7. Ensuring that victims of torture have the right to redress and adequate compensation;<sup>45</sup>
8. Ensuring that the alleged offender or offenders shall be subject to criminal proceedings if an investigation establishes that an act of torture appears to have been committed. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well-founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.<sup>46</sup>

#### **4.0 GENERAL CONCLUSION**

The human rights issue in Kurdistan has remained in contention for over thirty years. Any reasonable human being has to ask: "for what legitimate reason does the gross violation of human rights in Kurdistan continue?" International mechanisms that could have prevented, even subsequently remedied the atrocity, were not employed, and for no justifiable reason. The only point made is the failure of human integrity and rationality - the very essence of human intelligence.

The human rights issue in Kurdistan spans a generation of human evolution. If the international instruments are so weak, unable to resolve this tragedy, then the evolution of human intelligence appears invalidated. Validity is about effectiveness. Human evolution is about developing effective intelligence that preserves humanity.

Is the United Nations moving in this direction? Of course it is, but a human crisis that remains unsolved, allowing thousands of innocent Kurdish people to be daily tortured, is a holocaust of the worst kind. We know that the KRG is responsible, but still the Kurdish people are subject to torture to this day.

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<sup>45</sup>Articles 13 and 14 of the Convention Against Torture; Article 11 of the Declaration on the Protection against Torture; paragraphs 35 and 36 of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>46</sup>Article 7 of the Convention Against Torture; Article 10 of the Declaration on the Protection Against Torture.

Many years ago, there was silence about what really happened under torture. At that time, we were unaware that the torture victims were reluctant to break this silence because of the torture-induced shame, guilt, personality changes, low self-esteem, anxiety, and depression. Because the torture victims were suffering so much psychologically, they could not explain. But now this knowledge, and the fact that we can explain it as professionals, is a weapon in our hands. Today we can break the silence.

Given the KRG's full responsibility for failing to prohibit torture in practice, it should take some steps toward respect for human rights, such as:

1. The KRG should permit legal representatives and human rights organizations to investigate for the establishment of human rights monitors throughout the region to provide a safeguard for the general population.
2. There is need to bring Iraqi\Kurdish 'law' into line with accepted international standards regarding protection of physical integrity rights, including prohibition of torture, cruel, inhuman or degrading treatment

Finally, I call individual Human Rights Activists, Human Rights Organisations, Human rights Lawyers in Kurdistan and abroad to support breach the silence and form a campaign against torture and inhuman treatments in Kurdistan.



