COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF ÖCALAN v. TURKEY

(Application no. 46221/99)

JUDGMENT

STRASBOURG

12 March 2003

THIS CASE WAS REFERRED TO THE GRAND CHAMBER,
WHICH DELIVERED JUDGMENT IN THE CASE ON
5 May 2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Öcalan v. Turkey,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BÎRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 26 February 2002, and on 22 January and 10 February 2003,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 46221/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Abdullah Öcalan ("the applicant"), on 16 February 1999.

2. The applicant was represented by Mr Ahmet Avşar, Mr Doğan Erbaş, Mr İrfan Dündar, Mr Hasip Kaplan, Ms Aysel Tuğluk, Mr İmmihan Yaşar, Mr Mükrime Tepe and Mr Filiz Köstak, of the Istanbul Bar, Mr Hatice Korkut and Mr Kemal Bilgiç, of the İzmir Bar, Mr Mahmut Şakar and Mr Reyhan Yalçındağ, of the Diyarbakır Bar, Mr Niyazi Bulgan, of the Gaziantep Bar, Mr Aydın Oruç, of the Denizli Bar and Mr Mark Muller, a London barrister. The Turkish Government ("the Government") were represented by their co-Agents, Mr Francis Szpiner, of the Paris Bar, and Mr Şükrü Alpaslan.

3. The applicant alleged, in particular, violations of various provisions of the Convention, namely Articles 2 (right to life), 3 (prohibition of ill-treatment), 5 (right to liberty and security), 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 13 (right to an effective remedy), 14 (prohibition of discrimination), 18 (limitation on use of restrictions on rights) and 34 (individual applications).

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 4 March 1999 the Court requested the Government to take interim measures within the meaning of Rule 39 of the Rules of Court, notably to ensure that the requirements of Article 6 in the proceedings against the applicant in the State Security Court were complied with and that the applicant was able to exercise his right to individual application to the Court through lawyers of his own choosing effectively.

On 8 March 1999 the respondent Government lodged their observations. The applicant's representatives did likewise on 12 March 1999.

On 23 March 1999 the Court invited the Government to clarify specific points concerning the measures taken pursuant to Rule 39 to ensure that the applicant had a fair trial.

On 9 April 1999 the legal adviser at the Turkish Permanent Representative's Office stated that the Government were not prepared to reply to the Court's questions, as they went far beyond the scope of interim measures within the meaning of Rule 39.

On 29 April 1999 the Court decided to communicate the application to the Government for their observations on its admissibility and merits.

The Government lodged their observations on 31 August 1999. The applicant lodged his observations in reply on 27 September and 29 October 1999.

On 2 July 1999 one of the applicant's representatives requested the Court to invite the Government to "stay the decision to execute the death penalty imposed on the applicant on 29 June 1999 until the Court has decided the merits of his complaints".

On 6 July 1999 the Court decided that the request for Rule 39 to be applied could be considered if the applicant's sentence was upheld by the Court of Cassation. On 30 November 1999 the Court decided to indicate to the Government the following interim measure for adoption:

> "The Court requests the respondent State to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention."

On 12 January 2000 the Turkish Prime Minister announced that the applicant's file was to be transmitted to the Turkish Grand National Assembly (which is empowered to approve or disapprove enforcement of the death penalty) when the proceedings before the Court were over.

6. A hearing concerning both the admissibility and the merits of the complaints (Rule 54 § 4) took place in public in the Human Rights Building, Strasbourg, on 21 November 2000.

There appeared before the Court:

(a) *for the Government*
Mr Francis SZPINER and Mr Şükrü ALPASLAN, *co-Agents*;
Mr Yunus BELET, Mr Orhan NALCIOĞLU, Mr Ergin ERGÜL,
Mr Gülhan AKYÜZ, Mr Bilal ÇALIŞKAN, Mr Özer ZEYREK,
Mr Recep KAPLAN, Mr Cengiz AYDIN, Mr Tuncay ÇINAR,
Mr Kaya TAMBASAR, Mr Münci ÖZMEN, Ms Deniz AKÇAY,
Ms Didem BULUTLAR and Ms Banur ÖZAYDIN, *Advisers*;

(a) *for the applicant*
Mr Hasip KAPLAN, Sir Sydney KENTRIDGE,
Mr Mark MULLER and Mr Timothy OTTY, *Counsel*,
Mr Kerim YILDIZ, Mr İrfan DÜNDAR, Mr Doğan ERBAŞ,
Ms Gareth PIERCE, Mr Louis CHARALAMBOUS
and Mr Philip LEACH, *Advisers*.

The Court heard addresses by Mr Szpiner and Mr Alpaslan on behalf of the Government and Mr Kaplan, Sir Sydney Kentridge, Mr Muller and Mr Otty on behalf of the applicant.

By a decision of 14 December 2000 the Chamber declared the application partly admissible.

On 15 December 2000 the Government and the applicant were advised that, pursuant to Rule 72 § 2, the Chamber had decided to give notice to the parties of its intention to relinquish jurisdiction in favour of the Grand Chamber in accordance with Article 30 of the Convention. On 15 January 2001 the Government objected to relinquishment. As a consequence, the case remained before the Chamber.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1) and written comments on each other's observations.

On 19 September 2002 the Government filed additional observations on the abolition of the death penalty in Turkey. On 22 October 2002 the applicant lodged his comments on that point.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Turkish national who was born in 1949 and is currently being held in İmralı Prison (Mudanya, Bursa, Turkey). Prior to his arrest he was the leader of the Workers' Party of Kurdistan (“the PKK”).

The facts of the case, as submitted by the parties, may be summarised as follows.

A. The applicant's arrest and transfer to Turkey

9. On 9 October 1998 the applicant was expelled from Syria, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities requested him to leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998 the applicant travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in Russia was accepted by the Duma, but the Russian Prime Minister did not implement that decision.

10. On 12 November 1998 the applicant went to Rome where he made an application for political asylum. The Italian authorities initially detained him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status and the applicant had to bow to pressure for him to leave Italy. After spending either one or two days in Russia he returned to Greece, probably on 1 February 1999. The following day (2 February 1999) the applicant was taken to Kenya. He was met at Nairobi Airport by officials from the Greek Embassy and put up at the Greek Ambassador's residence. He lodged an application with the Greek Ambassador for political asylum in Greece, but never received a reply.

11. On 15 February 1999 the Kenyan Ministry of Foreign Affairs announced that Mr Öcalan had been on board an aircraft that had landed at Nairobi on 2 February 1999 and had entered Kenyan territory accompanied by Greek officials without declaring his identity or going through passport control. The announcement added that the Minister of Foreign Affairs had convened the Greek Ambassador in Nairobi in order to elicit information about the applicant's identity. After initially stating that the new arrival was not Mr Öcalan, on being pressed by the Kenyan authorities the Ambassador had gone on to acknowledge that he was. The Minister of Foreign Affairs had been informed by the Greek Ambassador that the authorities in Athens agreed to arrange for Mr Öcalan's departure from Kenya.

The Kenyan Minister of Foreign Affairs also said that overseas Kenyan diplomatic missions had been the target of terrorist attacks and that the applicant's presence in Kenya constituted a major security risk. In those circumstances, the Kenyan Government were surprised that Greece, a State with which it enjoyed friendly relations, could knowingly have put Kenya in such a difficult position, exposing it to suspicion and the risk of attacks. Referring to the Greek Ambassador's role in the events, the Kenyan Government said that they had serious reservations about his credibility and had requested his immediate recall.

The Kenyan Minister of Foreign Affairs added that the Kenyan authorities had played no part in the applicant's arrest and had had no say in his final destination. The Minister had not been informed of any operations

by Turkish security forces at the time of the applicant's departure and there had been no consultations between the Kenyan and Turkish Governments on the subject.

12. On the final day of his stay in Nairobi, the applicant was informed by the Greek Ambassador after the latter had returned from a meeting with the Kenyan Minister of Foreign Affairs that he was free to leave for the destination of his choice and that the Netherlands was prepared to accept him.

On 15 February 1999 Kenyan officials went to the Greek Embassy to take the applicant to the airport. The Greek Ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the Ambassador and the Kenyan officials ensued. In the end, the applicant got into a car driven by a Kenyan official. On the way to the airport the car in which the applicant was travelling left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m.

13. The Turkish courts had issued seven warrants for Mr Öcalan's arrest and a wanted notice (“red notice”) had been circulated by Interpol. In each of those documents the applicant was accused of founding an armed gang in order to destroy the territorial integrity of the State and of instigating various terrorist acts that had resulted in loss of life.

From the moment of his arrest the applicant was accompanied by an army doctor throughout the flight from Kenya to Turkey. A video recording and photographs taken of Mr Öcalan in the aircraft for use by the police were leaked to the press and published. In the meantime, the inmates of İmralı Prison were transferred to other prisons.

14. The applicant was kept blindfolded throughout the flight except when the Turkish officials wore masks. The blindfold was removed directly the officials put their masks on. According to the Government, the blindfold was removed as soon as the aircraft entered Turkish airspace.

The applicant was taken into custody at İmralı Prison on 16 February 1999. While being transferred from the airport in Turkey to İmralı Prison he wore a hood. On photographs that were taken on the island of İmralı in Turkey, the applicant appears without a hood or blindfold. He later said that he had been given tranquillisers, probably at the Greek Embassy in Nairobi.

B. Police custody on the island of İmralı

15. From 16 February 1999 onwards the applicant was interrogated by members of the security forces. On 20 February 1999 a judge ruled on the basis of information in the case file that he should remain in police custody for a further three days as the interrogation had not been completed.

16. The judges and prosecutors, who were from the Ankara State Security Court, arrived on the island of İmralı on 21 February 1999.

17. According to the applicant, sixteen lawyers instructed by his family sought leave from the State Security Court on 22 February 1999 to see him. They were told orally that only one lawyer would be allowed access. Lawyers who went to Mudanya (the embarkation point for the island of İmralı) on 23 February 1999 were told by the administrative authorities that they could not visit the applicant. The applicant also alleges that his lawyers were harassed by a crowd at the instigation of plain-clothes police officers or at least with their tacit approval.

18. As soon as the applicant was detained, the island of İmralı was decreed a prohibited military zone. According to the applicant, the security arrangements in his case were managed by a "crisis desk" set up at Mudanya. It was the crisis desk that was responsible for granting lawyers and other visitors access to the applicant. According to the Government, special measures were taken to ensure the applicant's safety. He had many enemies who might have been tempted to make an attempt on his life. Likewise according to the Government, it was precisely for security reasons that lawyers were searched.

19. On 22 February 1999 the Public Prosecutor at the Ankara State Security Court questioned the applicant and took a statement from him as an accused. The applicant told the prosecutor that he was the founder of the PKK and its current leader. Initially, his and the PKK's aim had been to found an independent Kurdish State, but with the passage of time they had changed their objective and sought to secure a share of power for the Kurds as a free people who had played an important role in the founding of the Republic. The applicant confessed that village guards were a prime target for the PKK. He also confirmed that the PKK used violent methods against the civil population, in particular from 1987 onwards; he was personally opposed to such methods and had tried in vain to prevent their being used. He told the prosecutor that the warlords who wanted to seize power within the PKK had exerted some of their pressure on the Kurdish population; some of them had been tried and found guilty by the PKK and had been executed with his personal approval. He acknowledged that the Turkish Government's estimate of the number of those killed or wounded as a result of the PKK's activities was fairly accurate; that the actual number might even be higher; and that he had ordered the attacks as part of the armed struggle being waged by the PKK. He added that he had decided in 1993 to declare a ceasefire, acting on a request by the Turkish President, Mr Özal, which had been conveyed to him by the Kurdish leader Celal Talabani. The applicant also told the prosecutor that after leaving Syria on 9 October 1998 he had gone first to Greece and then to Russia and Italy. When the latter two countries refused to grant him the status of political refugee, he had been taken to Kenya by the Greek secret services.

C. Appearance before a judge and pre-trial detention

20. On 23 February 1999 the applicant appeared before a judge of the Ankara State Security Court, who ordered that he should be detained pending trial. The applicant did not apply to the State Security Court to have that decision set aside. Before the judge he repeated the statement he had made to the prosecutor. He said that decisions taken within the PKK were submitted to him for final approval as founder and leader of the organisation. In 1973-78 the PKK's activities had been political. In 1977 and 1978 the PKK had organised armed attacks on the *agalar* (major landowners). In 1979, after the applicant had gone to Lebanon, the PKK had begun its paramilitary preparations. Since 1984 the PKK had carried on an armed struggle within Turkey. The persons in charge in each province decided on armed actions and the applicant had confirmed the general plan for such actions. He had taken the strategic and tactical decisions for the organisation as a whole. The units had carried out the decisions.

D. Contacts with the outside world during the judicial investigation and conditions at İmralı Prison

21. On the day after he arrived in Turkey the applicant's Turkish lawyer, Mr Feridun Çelik, asked to visit his client. He was prevented by members of the security forces from leaving the premises of the Diyarbakır Human Rights Association and was subsequently arrested together with seven other lawyers.

22. On 17 February 1999 the Turkish authorities at Istanbul Airport refused Ms Böhler, Ms Prakken and their partner Mr Koppen leave to enter Turkey to visit the applicant, on the ground that they could not represent him in Turkey and that Ms Böhler's past history (she was suspected of having campaigned against Turkey's interests and of having taken part in meetings organised by the PKK) gave rise to the risk of prejudice to public order in Turkey.

23. On 25 February 1999 the applicant was able to talk to two of the sixteen lawyers who had asked to see him, Mr Z. Okçuoğlu and Mr H. Korkut. The first conversation took place in the presence of a judge and of members of the security forces wearing masks. The latter decided that it should not last longer than twenty minutes. The record of that conversation was handed over to the State Security Court. The applicant's other representatives were given leave to have their authority to act before the Court signed and to see their client later.

24. During the preliminary investigation from 15 February 1999, when the applicant was arrested, and 24 April 1999, when the trial began, the applicant had twelve interviews with his lawyers. The dates and duration of those interviews were as follows: 11 March (45 minutes), 16 March

(1 hour), 19 March (1 hour), 23 March (57 minutes), 26 March (1 hour, 27 minutes), 2 April (1 hour), 6 April (1 hour), 8 April (61 minutes), 12 April (59 minutes), 15 April (1 hour), 19 April (1 hour) and 22 April (1 hour).

25. According to the applicant, his conversations with his lawyers were monitored from behind glass panels and filmed with a video camera. After the first two short visits the applicant's contact with his lawyers was restricted to two visits a week, lasting an hour each. On each visit the lawyers were searched five times and required to fill in a very detailed questionnaire. Likewise according to the applicant, he and his advisers were not allowed to exchange documents or take notes during these interviews. The applicants' representatives were unable to give him either a copy of his case file (other than the indictment, which was notified by the prosecution) or any other material which would allow the applicant to prepare his defence.

26. According to the Government, no restrictions were placed on the applicant as regards either the number of visits by his lawyers or their length. Apart from the first visit, which took place under the supervision of a judge and members of the security forces who were present in the same room as the applicant and his lawyers, the interviews were held in accordance with the provisions of the Code of Criminal Procedure. In order to ensure their safety, the lawyers were taken to the island of İmralı by boat after embarking at a private quay. Hotel rooms were booked for them near the embarkation point. Likewise according to the Government, no restrictions were placed on the applicant's correspondence.

27. In the meantime, on 2 March 1999 delegates of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the "CPT") visited İmralı Prison. In a letter of 22 March 1999 to the representatives of the Turkish Government they indicated that the applicant was physically in good health and that he had said that he had not suffered any ill-treatment since his arrest. His cell was of a high standard. The CPT drew the Government's attention to the fact that the applicant's solitary confinement and his limited access to the open air could affect him psychologically.

28. The last visit by the CPT delegates to İmralı Prison, of which the applicant is the sole inmate, took place during their visit to Turkey from 2 to 14 September 2001. The delegates found that the cell occupied by the applicant was large enough to accommodate a prisoner and equipped with a bed, table, armchair and bookshelves. It also had an air-conditioning system, washing and toilet facilities and a window overlooking an inner courtyard. The applicant had access to books, newspapers and a radio, but not to television programmes or a telephone. On the other hand, he received twice daily medical checks by doctors and was visited by his lawyers once a week.

E. The media

29. According to the applicant, even before his trial began he was portrayed by a section of the media as a "baby-killer". His statements made as an accused during the preliminary investigation were disclosed to the press even before they had been made available to his lawyers.

30. According to the Government, the media and journalists had shown avid interest in the Öcalan case and all sorts of comments were made as to whether or not the applicant should be found guilty. The applicant's lawyers brought an action against a journalist whom they considered to have libelled the applicant.

F. Trial at the State Security Court

31. In an indictment submitted on 24 April 1999 (and joined to several others drawn up in the applicant's absence by various public prosecutors' offices between 1989 and 1998) the Public Prosecutor at the Ankara State Security Court accused the applicant of activities carried out for the purpose of bringing about the secession of part of the national territory. He sought the death penalty under Article 125 of the Criminal Code.

32. The case file ran to 17,000 pages and had been prepared by joining the files of seven sets of proceedings already instituted against the applicant by the various state security courts. The applicant's lawyers were given access to the case file and the indictment on 7 May 1999. Since the judicial authorities had not been able to supply a copy of the file, the applicant's lawyers had brought their own photocopier and finished copying the file on 15 May 1999. The prosecution had failed to place certain documents in it, such as those concerning the applicant's arrest in Kenya and transfer to Turkey.

33. The first two hearings held in Ankara on 24 and 30 March 1999 in the applicant's absence were taken up with procedural matters, such as third-party applications to intervene in the proceedings and the measures to be taken for the hearings to be held on the island of İmralı and for the attendance of the parties and the public at those hearings. According to the Government, allegations that the lawyers were harassed by the police when they emerged from the first hearing in Ankara on 24 March 1999 are currently the subject of a criminal investigation.

34. The State Security Court, composed of two civilian and one military judge, held nine hearings on the island of İmralı from 31 May to 29 June 1999 and these were attended by the applicant. The applicant told the court, among other things, that he reiterated the statements he had made to the prosecutor and the judge. He confirmed that he was the most senior PKK agent, that he led the organisation and that he had instructed the members of the organisation to carry out a number of acts. He stated that he had not

been ill-treated or insulted since his arrest. Furthermore, the applicant's representatives argued that the State Security Court could not be regarded as an independent and impartial tribunal within the meaning of Article 6 of the Convention. The applicant stated that, for his part, he accepted the court's jurisdiction.

35. The applicant said that he was willing to cooperate with the Turkish State in order to bring to an end the acts of violence associated with the Kurdish question and he promised to halt the PKK's armed struggle. He indicated that he wished to "work for peace and fraternity and achieve that aim within the Republic of Turkey". He observed that, while he had initially envisaged an armed struggle for the independence of the population of Kurdish origin, that had been as a reaction to the Government's political pressure on that population. When circumstances had changed, he had altered his aim and limited his claims to autonomy or a recognition of the Kurds' cultural rights within a democratic society. He accepted political responsibility for the PKK's general strategy but disclaimed criminal liability for the acts of violence which went beyond the PKK's declared policy. In order to highlight the rapprochement between the PKK and the Government, he applied to have the Government officials who had conducted negotiations with the PKK examined as witnesses for the defence. That application was refused by the State Security Court.

36. The applicant's lawyers' applications for the communication of additional documents or for further investigations in order to collect more evidence were refused by the State Security Court on the ground that they were delaying tactics.

37. The applicant's lawyers complained to the State Security Court about the restrictions and the difficulties they were having in conferring with their client. Their request to be permitted to confer with him during lunch breaks was accepted by the State Security Court at the hearing on 1 June 1999.

On 2 June 1999 the State Security Court ruled that the applicant was to be given access to the case file under the supervision of two staff members and that the applicant's lawyers were to be allowed to provide him with copies of documents from the case file.

The lawyers did not appear at the hearing on 3 June 1999. At their request, the transcripts of that hearing and copies of the documents placed in the file were given to them and the applicant on 4 June 1999. One of the applicant's counsel thanked the State Security Court for having instilled an atmosphere of calm.

38. On 8 June 1999 the prosecution made their final submissions. They sought the death penalty for the applicant, pursuant to Article 125 of the Criminal Code.

The applicant's advisers requested a one-month's adjournment to enable them to prepare their final submissions. The State Security Court granted them fifteen days, the statutory maximum allowed.

39. On 18 June 1999 Turkey's Grand National Assembly amended Article 143 of the Constitution and excluded military members (whether of the bench or of the prosecutor's office) from state security courts. Similar amendments were made on 22 June 1999 to the Law on the State Security Courts.

40. At the hearing on 23 June 1999 the judge appointed to replace the military judge sat for the first time on the bench of the State Security Court. The State Security Court noted that the new judge had already read the file and the transcripts, in accordance with Article 381 § 2 of the Code of Criminal Procedure, and that he had followed the proceedings from the outset and had attended the hearings.

The applicant's counsel opposed the appointment of the non-military judge owing to his previous involvement in the case. Their application for an order requiring him to stand down was dismissed by the State Security Court.

41. Also on 23 June 1999 the applicant's counsel set out the applicant's substantive defence to the charges.

42. On 29 June 1999, after hearing the applicant's final representations, the Ankara State Security Court found the applicant guilty of carrying out acts designed to bring about the secession of part of Turkey's territory and of training and leading a gang of armed terrorists for that purpose. It sentenced him to death, pursuant to Article 125 of the Criminal Code. The State Security Court held that the applicant was the founder and principal leader of the unlawful organisation the PKK. The aim of the latter was to detach a part of the territory of the Republic of Turkey so as to form a Kurdish State with a political regime based on Marxist-Leninist ideology. The court held that it had been established that, following decisions taken by the applicant and on his orders and instructions, the PKK had carried out several armed attacks, bomb attacks, acts of sabotage and armed robberies, and that in the course of those acts of violence thousands of civilians, soldiers, police officers, village guards and public servants had been killed. The court did not accept that there were mitigating circumstances allowing the death penalty to be commuted to life imprisonment, having regard to, among other things, the very large number and the seriousness of the acts of violence, the thousands of deaths caused by them, including those of children, women and old people, and the major, pressing threat to the country that those acts posed.

G. Appeal on points of law

43. The applicant appealed on points of law against that judgment, which, on account of the gravity of the sentence, was in any event subject to review by the Court of Cassation automatically.

44. In a judgment adopted on 22 November 1999 and delivered on 25 November the Court of Cassation affirmed the judgment of 29 June 1999 in every respect. It held that the replacement of the military judge by a civilian judge during the trial did not require the earlier procedural steps to be taken again seeing that the new judge had followed the proceedings from the beginning and that the law itself required that the proceedings should continue from the stage they had reached at the time of the replacement. The Court of Cassation also pointed out that the Ankara State Security Court was empowered by law to hold its hearings outside the area of its territorial jurisdiction, among other reasons on security grounds.

45. As to the merits, the Court of Cassation had regard to the fact that the applicant was the founder and chairman of the PKK. It referred to the latter's aim and activities, namely that it sought the foundation of a Kurdish State on a territory which Turkey should be made to cede after an armed struggle and to that end carried out armed attacks and sabotage against the armed forces and industrial premises and tourist facilities in the hope of weakening the authority of the State. The PKK also had a political front (the *ERNK*) and a military wing (the *ARNK*), which operated under its control. Its income was derived mainly from "taxes", "fines", gifts, subscriptions and the proceeds of armed robberies, gun-running and drug trafficking. According to the Court of Cassation, the applicant led all three of these groupings. In his speeches at party conferences, in his radio and television appearances and in the orders he had given to his activists, the applicant had instructed his men to resort to violence, indicated combat tactics, imposed penalties on those who did not obey his instructions and incited the civilian population to translate words into deeds. As a result of the acts of violence carried out by the PKK from 1978 up until the applicant's arrest (in all, 6,036 armed attacks, 3,071 bomb attacks, 388 armed robberies and 1,046 kidnappings) 4,472 civilians, 3,874 soldiers, 247 policemen and 1,225 village guards had died.

46. The Court of Cassation held that the PKK, founded and led by the applicant, had represented a substantial, serious and pressing threat to the country's integrity. It ruled that the acts of which the applicant was accused matched those which constituted the offence laid down in Article 125 of the Criminal Code and that it was not necessary, in order that that provision should apply, for the applicant – the founder and chairman of the PKK and the instigator of the acts of violence committed by that organisation – to have used a weapon himself.

H. Commutation of the death penalty to life imprisonment

47. In October 2001 Article 38 of the Constitution was amended so that the death penalty could no longer be ordered or implemented other than in time of war or of imminent threat of war or for acts of terrorism.

By Law no. 4771, which was published on 9 August 2002, the Turkish Assembly resolved, *inter alia*, to abolish the death penalty in peacetime (that is to say except in time of war or of an imminent threat of war) by amending the relevant legislation, including the Criminal Code. As a result of the amendments, a prisoner whose death sentence for an act of terrorism has been commuted to life imprisonment must spend the rest of his life in prison.

In a letter to the Court of 19 September 2002, the Government declared: "Abdullah Öcalan no longer faces the execution of the death penalty as finalised on 22 November 1999 by the judgment of the Turkish Court of Cassation".

By a judgment of 3 October 2002 the Ankara State Security Court commuted the applicant's death sentence to life imprisonment. It ruled that the offences under Article 125 of the Criminal Code of which the applicant was accused had been committed in peacetime and constituted terrorist acts.

The Nationalist Action Party (*MHP*, *Milliyetçi Hareket Partisi*), a political party with representatives in Parliament, applied to the Constitutional Court for an order setting aside certain provisions of Law no. 4771, including the provision abolishing the death penalty in peacetime for persons found guilty of terrorist offences. The Constitutional Court dismissed that application in a judgment of 27 December 2002.

On 9 October 2002 two trade unions – the Public-Sector Workers Union and the National Education Union (representing teachers) – which had intervened in the criminal proceedings on behalf of their deceased members, appealed on points of law against the judgment of 3 October 2002 by which the applicant's death sentence had been commuted to life imprisonment. They argued that the PKK's activities in south-east Turkey should be regarded as constituting "an imminent threat of war". Those proceedings are still pending.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Provisions on State Security Courts

48. Before the Constitution was amended on 18 June 1999, Article 143 provided that State Security Courts were composed of a president, two other regular members and two substitute members. The President of the State

Security Court, one of the regular members and one of the substitute members were appointed from among civilian judges, and the other regular member and substitute member were appointed from among military judges.

49. As amended by Law no. 4388 of 18 June 1999, Article 143 of the Constitution provides:

> "... State Security Courts shall be composed of a president, two other regular members, a substitute member, a Principal Public Prosecutor and a sufficient number of Public Prosecutors.
>
> The president, two regular members, a substitute member and the Principal Public Prosecutor shall be appointed from among judges and public prosecutors of the first rank and public prosecutors from among public prosecutors of other ranks. Appointments shall be made for four years by the National Legal Service Council, in accordance with procedures laid down in special legislation. Their terms of office shall be renewable..."

50. The necessary amendments concerning the appointment of the judges and prosecutors were made to Law no. 2845 on the State Security Courts by Law no. 4390 of 22 June 1999. By the terms of provisional section 1 of Law no. 4390, the terms of office of the military judges and military prosecutors in service in the State Security Courts were to end on the date of publication of that Law (22 June 1999). By provisional section 3 of the same Law, proceedings pending in the State Security Courts on the date of publication of the Law were to continue from the stage they had reached by that date.

B. Article 125 of the Turkish Criminal Code

51. Article 125 of the Turkish Criminal Code provides:

> "Anyone committing an act designed to subject the State or a part of the State to the domination of a foreign State, to diminish its independence or to impair its unity or which is designed to remove from the administration of the State a part of the territory under its control shall be liable to the death penalty."

C. Review of the lawfulness of detention

52. The fourth paragraph of Article 128 of the Code of Criminal Procedure (as amended by Law no. 3842/9 of 18 November 1992) provides that any person who has been arrested or in respect of whom a prosecutor has made an order for him or her to remain in police custody may challenge the measure in question before the appropriate district judge and, if successful, be released. In proceedings in State Security Courts (governed by Law no. 2845 of 16 June 1983) Article 128 of the Code of Criminal Procedure applies only as it was worded before the amendments of

18 November 1992, when it did not provide any right of appeal to persons arrested or held in police custody on the orders of a prosecutor.

53. Section 1 of Law no. 466 on the Award of Compensation to Persons Arrested Unlawfully or Held in Detention without Due Cause provides:

> "Compensation shall be paid by the State in respect of all damage sustained by persons:
>
> (1) who have been arrested, or detained under conditions or in circumstances incompatible with the Constitution or statute law;
>
> (2) who have not been immediately informed of the reasons for their arrest or detention;
>
> (3) who have not been brought before a judicial officer after being arrested or detained within the time-limit laid down by statute for that purpose;
>
> (4) who have been deprived of their liberty without a court order after the statutory time-limit for being brought before a judicial officer has expired;
>
> (5) whose close family have not been immediately informed of their arrest or detention;
>
> (6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial ..., or are acquitted or discharged after standing trial; or
>
> (7) who have been sentenced to a period of imprisonment shorter than the period spent in detention or ordered to pay a pecuniary penalty only..."

54. Article 144 of the Code of Criminal Procedure provides that, in principle, anyone arrested or detained pending trial may speak with his legal representative in private, without any need for the latter to have an authority to act. As regards the procedure in proceedings before the State Security Courts, Article 144 of the Code of Criminal Procedure is applicable only as worded prior to the amendments made on 18 November 1992. That version provides that a member of the state legal service may be present at meetings between the accused and his or her lawyer before the criminal proceedings have commenced.

D. Council of Europe and the death penalty

55. Protocol No. 6 to the Convention provides (Article 1): "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Article 2 of Protocol No. 6 provides:

> "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The

State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."

Protocol No. 6 has been ratified by forty-one of the forty-four member States of the Council of Europe and signed by all States, most recently on 15 January 2003 by Turkey. Only Turkey, Armenia and Russia have not yet ratified the Protocol.

56. Protocol No. 13 to the Convention, which provides for the abolition of the death penalty in all circumstances, was opened for signature on 3 May 2002. The Preamble to Protocol No. 13 reads:

"The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention');

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows..."

Article 1 of Protocol No. 13 states:

"The death penalty shall be abolished. No-one shall be condemned to such penalty or executed."

In accordance with Article 7 of the Protocol it shall "enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol."

57. In Opinion No. 233 (2002) of the Parliamentary Assembly of the Council of Europe on the *Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances* the Assembly recalled:

"... its most recent resolutions on the subject (Resolution 1187 (1999) on *Europe: a death penalty free continent*, and Resolution 1253 (2001) on the *Abolition of the death penalty in Council of Europe Observer states),* in which it reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment and a violation of the most fundamental right, that to life itself, and that capital punishment has no place in civilised, democratic societies governed by the rule of law" (paragraph 2).

The Assembly further noted:

> "The second sentence of Article 2 of the European Convention on Human Rights still provides for the death penalty. It has long been in the interest of the Assembly to delete this sentence, thus matching theory with reality. This interest is strengthened by the fact that more modern national constitutional documents and international treaties no longer include such provisions" (paragraph 5).

58. Article X § 2 of the "Guidelines on Human Rights and the Fight Against Terrorism" issued by the Committee of Ministers of the Council of Europe on 15 July 2002 reads:

> "Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out."

E. Other international developments concerning the death penalty

59. By its Resolution 1984/50 of 25 May 1984 on *Safeguards guaranteeing protection of the rights of those facing the death penalty,* the Economic and Social Council of the United Nations set out a series of standards to be observed by States which retained capital punishment.

Article 5 of the Resolution provides as follows:

> "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

60. In a number of cases involving application of the death penalty, the United Nations Human Rights Committee observed that if the due process guarantees in Article 14 of the International Covenant on Civil and Political Rights were violated, a sentence of death which was carried out would not be in conformity with Article 6 § 2 of the Covenant which delineates the circumstances when it is permissible to give effect to the death penalty.

61. In the case of *Reid v. Jamaica* (no. 250/1987), the Committee stated as follows:

> "[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(7), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal'."

62. Similar observations were made by the Committee in the case of *Daniel Mbenge v. Zaire* (Communication no. 16/1977, 8 September 1977,

U.N. Doc. Supp. no. 40, [A/38/40], at 134 [1983])) and *Wright v. Jamaica* (Communication no. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 [1992]).

63. In an Advisory Opinion on "The right to information on consular assistance in the framework of the guarantees of due process of law" (Advisory Opinion OC-16/99 of 1 October 1999) the Inter-American Court of Human Rights examined the implication of the guarantees of a fair procedure with Article 4 of the American Convention on Human Rights, which permitted the death penalty in certain circumstances. It stated:

> "134. It might be useful to recall that in a previous examination of Article 4 of the American Convention (Restrictions to the Death Penalty, Advisory Opinion OC-3/83 of 8 September, 1983, Series A No. 3) the Court observed that the application and imposition of capital punishment are governed by the principle that '[n]o one shall be arbitrarily deprived of his life'. Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to 'the most serious crimes'. In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it.
>
> 135. This tendency, evident in other inter-American and universal instruments, translates into the internationally recognised principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognises and protects is at stake: human life.
>
> 136. Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."

64. In its *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* judgment of 21 June 2002, the Inter-American Court stated:

> "Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake" (at § 148).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

65. The applicant complained of violations of Article 5 §§ 1, 3 and 4 of the Convention, the relevant provisions of which read as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government, by way of preliminary objection, have argued that the applicant's complaints under Article 5 §§ 1, 3 and 4 should be rejected for failure to exhaust domestic remedies. In its admissibility decision of 14 December 2000, the Court had noted that this question was so closely related to the merits of the complaint under Article 5 § 4 that it could not be detached from it. Accordingly, the Court will examine the Government's preliminary objection in the context of the applicant's claim under Article 5 § 4 and will address that complaint first.

A. Article 5 § 4 of the Convention

66. The applicant complained that, contrary to Article 5 § 4 of the Convention, he had not had an opportunity to take proceedings by which the lawfulness of his detention in police custody could be decided.

He said that during the first ten days of his detention he had been held incommunicado and had been unable to contact his lawyers. He had no legal training that would have enabled him to lodge an appeal without assistance from his lawyers. Nor had he been given access to the documents concerning his arrest that would have enabled him to prepare such an appeal. The applicant noted in that connection that the procedural guarantees provided by Article 6 of the Convention applied by analogy to proceedings for a review of the lawfulness of the detention within the meaning of Article 5 § 4. He added that persons who were detained had to be given access to documents in the possession of the authorities concerning their arrest in order to prepare an application for release and that they

required assistance from a lawyer if they were to prepare their application efficiently. The applicant maintained that in his case an application to a district judge or a judge of the State Security Court would have been inadequate, illusory and bound to fail.

67. The Government, however, raised a preliminary objection of failure to exhaust domestic remedies. The objection had two limbs and also included the Government's observations on the merits of the complaints under Article 5 § 4. Firstly, it was submitted that neither the applicant's lawyers nor his close relatives had lodged an application with the Mudanya Court of First Instance or a judge of the Ankara State Security Court to challenge the arrest, the fact that the applicant had been taken into police custody, the length of that custody or the order for his pre-trial detention. The Government referred to Article 128 § 4 of the Code of Criminal Procedure, which entitled suspects to apply to the district judge to have the lawfulness of their detention decided or to challenge an order by the public prosecutor's office that they should remain in custody. If the district judge considered the application well-founded, he could order the police not to question the suspect further and to bring him or her before the public prosecutor forthwith. The Government added that by virtue of Article 144 of the Code of Criminal Procedure, the applicant's representatives did not require a written authority to make such an application. Secondly, the Government referred to Law no. 466 of 15 May 1964 on the Award of Compensation to Persons Arrested Unlawfully or Held in Detention without Due Cause. They said that the applicant could have made the allegations that he had been detained unlawfully to the appropriate assize court.

68. The Court notes that in its decision of 14 December 2000 regarding the admissibility of the application, the Government's preliminary objection concerning, *inter alia*, this complaint was joined to the merits of the complaint under Article 5 § 4.

69. In that connection, the Court reiterates that the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of Article 5 § 4. There is no requirement that remedies that are neither adequate nor effective should be used (*Sakık and others v. Turkey*, 26 November 1997, *Reports* 1997-VII, p. 2625, § 53; *Vernillo v. France*, 20 February 1991, Series A no. 198, pp. 11-12, § 27; and *Johnston and Others v. Ireland*, 18 December 1986, Series A no. 112, p. 22, § 45). Furthermore, the remedy required by Article 5 § 4 must be of a judicial nature, which implies that "the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty" (*Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33, p. 24, § 60). In addition, in accordance with generally

recognised rules of international law, there may be special grounds for releasing the applicant from the obligation to exhaust the available domestic remedies (*Van Oosterwijck v. Belgium*, 6 November 1980, Series A no. 40, pp. 18-19, §§ 36-40).

70. The Court refers also to its finding in the *Sakık and Others v. Turkey* judgment (cited above, § 53) that there was "no example of any person detained in police custody having successfully ... appl[ied] to a judge for a ruling on the lawfulness of his detention or for his release" in proceedings before the State Security Courts . However, it also observes that, as the Government have argued, a 1997 amendment to Article 128 of the Turkish Code of Criminal Procedure clearly establishes a right under Turkish law to challenge in the courts decisions to hold a suspect in police custody. It follows that such a remedy exists in theory. As to how the remedy operates in practice, the Court notes that the Government have not furnished any example of a judicial decision in which an order by the public prosecutor's office at a State Security Court for a suspect to be held in police custody has been quashed before the end of the fourth day (the statutory maximum period for which the public prosecutor's office may order suspects to be held).

71. The Court considers that it is not required to rule on that issue for present purposes as, in any event, the special circumstances of the case made it impossible for the applicant to have effective recourse to the remedy.

72. Firstly, the conditions in which the applicant was held and notably the fact that he was kept in total isolation prevented his using the remedy personally. He possessed no legal training and had no possibility of consulting a lawyer while in police custody. Yet, as the Court has noted above (see paragraph 69 above), the proceedings referred to in Article 5 § 4 must be judicial in nature. The applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer.

73. Secondly, as regards the suggestion that the lawyers instructed by the applicant or by his close relatives could have challenged his detention without consulting him, the Court observes that the movements of the sole member of the applicant's legal team to possess an authority to represent him were obstructed by the police (see paragraph 21 above). The other lawyers, who had been retained by the applicant's family, found it impossible to contact him while he was in police custody. Moreover, in view of the unusual circumstances of his arrest, the applicant was the principal source of direct information on events in Nairobi that would have been relevant, at that point in the proceedings, for the purposes of challenging the lawfulness of his arrest.

74. Lastly, solely with regard to the length of time the applicant was held in police custody, the Court takes into account the seriousness of the

charges against him and the fact that the period spent in police custody did not exceed that permitted by the domestic legislation. It considers that in those circumstances, an application on that issue to a district judge would have had little prospect of success.

75. As to the Government's assertion that a claim for compensation could have been made under Law no. 466, the Court considers that that remedy cannot satisfy the requirements of Article 5 § 4 for two reasons: firstly, Law no. 466 merely provides prisoners who have been detained unlawfully or without due cause with an action in damages against the State. It will be noted that the right not to be deprived of one's liberty "save in accordance with a procedure prescribed by law" and the right to "be brought promptly before a judge" after arrest is not the same as the right to receive compensation for detention. Paragraphs 1 and 3 of Article 5 of the Convention cover the former and paragraph 5 of Article 5 the latter (see, *mutatis mutandis*, *Yağcı and Sargın v. Turkey* 8 June 1995, Series A no. 319-A, p. 17, § 44). The court invited to rule on the lawfulness of the detention under Law no. 466 examines the case after the event and therefore does not have jurisdiction to order release if the detention is unlawful, as Article 5 § 4 requires it should (*Weeks v. the United Kingdom*, 2 February 1987, Series A no. 114, p. 30, § 61).

Secondly, the Court notes that, with the exception of the situation – which did not obtain in the instant case – where a person is not committed for trial, or is acquitted or discharged after standing trial, all the cases in which compensation is payable under the provision concerned require the deprivation of liberty to have been unlawful. However, the detention in issue in the present case was lawful under Turkish law, as indeed the Government have conceded (to the same effect, *Sakık and Others v. Turkey* cited above, § 60).

76. In conclusion, the Court dismisses the Government's preliminary objection in respect of Article 5 § 4 and holds that there has been a violation of that provision.

For the same reasons, it rejects the preliminary objection in respect of the complaints under Article 5 §§ 1 and 3 (see paragraph 65 *in fine* above).

B. Article 5 § 1 of the Convention

77. The applicant complained that he had been deprived of his liberty unlawfully, without the procedure applicable on extradition being followed. He alleged a violation of Article 5 § 1 of the Convention.

1. The applicant's submissions

78. In that connection, the applicant maintained that there was prima facie evidence that he had been abducted by the Turkish authorities operating overseas, beyond their jurisdiction, and that it was for the

Government to prove that the arrest was not unlawful. The fact that arrest warrants had been issued by the Turkish authorities and a red notice circulated by Interpol did not give officials of the Turkish State jurisdiction to operate overseas. On that point the applicant refused to be considered a terrorist and affirmed that his activities were part of the Kurds' struggle to assert their rights. In support of that affirmation, he observed that an Italian court had quashed an administrative decision for his expulsion to Turkey on the ground that the death penalty was still in force there.

79. The applicant pointed out that no proceedings had been brought for his extradition from Kenya, whose authorities had denied all responsibility for his transfer to Turkey. Mere collusion between Kenyan officials operating without authority and the Turkish Government could not constitute inter-State cooperation. The Kenyan Minister of Foreign Affairs had stated on 16 February 1999 that the Kenyan authorities had played no role in the applicant's departure and that there had been no Turkish troops in Kenyan territory. The applicant further alleged that the Kenyan officials implicated in his arrest had been bribed.

80. The applicant referred to the case-law of the Convention institutions in the cases of *Cyprus v. Turkey* (application no. 8007/77, Commission decision of 17 July 1978, Decisions and Reports (DR) 13, p. 85) and *Drozd and Janousek v. France and Spain* (judgment of 26 June 1992, Series A no. 240, p. 29, § 91) and submitted that Turkey was responsible for acts performed by its officials beyond its borders. He maintained that he had been arrested as a result of an operation that had been planned in Turkey, Italy, Greece and other States.

81. Referring to the case of *Bozano v. France* (judgment of 18 December 1986, Series A no. 111, p. 23, § 54), the applicant stressed the need to protect the individual's liberty and security from arbitrariness. He said that in the instant case, his forced expulsion had amounted to extradition in disguise and had deprived him of all procedural and substantive protection. He pointed out in that connection that the requirement of lawfulness under Article 5 § 1 referred to international as well as domestic law. Contracting States were not just under an obligation to apply their laws in a non-arbitrary manner, but also to ensure that their laws complied with public international law. The applicant added that the guarantees against wrongful deprivation of liberty to which everyone was entitled could not be extinguished by certainty of guilt.

82. In his submission, the Commission's decision in the case of *Illich Sanchez Ramirez v. France* (application no 28780/95, Commission decision of 24 June 1996, DR 86, p. 155) was not relevant to the present case. Whereas in the aforementioned case there had been cooperation between France and Sudan, the Kenyan authorities had not cooperated with the Turkish authorities in the instant case. In the former case, the Commission considered that Mr Sanchez Ramirez was indisputably a terrorist, whereas

the applicant and the PKK had had recourse to force in order to assert the right of the population of Kurdish origin to self-determination.

83. Relying on the case-law of various domestic courts (the House of Lord's decision in the case of *R. v. Horseferry Road Magistrates' Court, ex parte Bennett*, Appeals Court 1994, vol. 1, p. 42; the decision of the Court of Appeal of New Zealand in the case of *Reg. v. Hartley*, New Zealand Law Reports 1978, vol. 2, p. 199; the decision of the United States Court of Appeals for the Second Circuit in the case of *United States v. Toscanino* (1974) 555 F. 2d. 267, 268; the decision of 28 May 2001 of the Constitutional Court of South Africa in the case of *Mohammed and Dalvie v. The President of the Republic of South Africa and others,* (CCT 17/01, 2001 (3) SA 893 CC) the applicant maintained that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest amounted to an abduction and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.

2. The Government's submissions

84. In their observations of 7 January 2002 the Government affirmed, without further explanation, that, in the light of the Court's case-law in the case of *Banković and Others v. Belgium and 16 Other Contracting States* ((dec.) [GC], no. 52207/99, ECHR 2001-XII), their responsibility was not engaged by the applicant's arrest abroad.

The Government further maintained that the applicant had been arrested and detained in accordance with a procedure prescribed by law, following cooperation between two States, Turkey and Kenya. They said that the applicant had entered Kenya not as an asylum-seeker, but by using false identity papers, and added that since Kenya was a sovereign State, Turkey had no means of exercising its authority there. The Government also pointed to the fact that there was no extradition treaty between Kenya and Turkey. The applicant had been apprehended by the Kenyan authorities and handed over to the Turkish authorities under arrangements for cooperation between the two States. On arriving in Turkey, he had been taken into custody under arrest warrants issued by the proper and lawful judicial authorities in Turkey, in order to be brought before a judge (the Turkish courts had issued seven warrants for the applicant's arrest before his capture and Interpol had circulated a wanted notice (“red notice”)). The Government was adamant that there had been no extradition in disguise, as Turkey had accepted the Kenyan authorities' offer to hand over the applicant, who was in any event an illegal immigrant in Kenya.

85. The Government referred in that connection to the aforementioned case of *Illich Ramirez Sanchez v. France*, which the Commission had declared inadmissible. They maintained that there were major similarities between the Franco-Sudanese cooperation that had achieved an arrest in that

case and the cooperation between Turkey and Kenya that had led to Mr Öcalan's arrest. They submitted that the Commission's approach should accordingly be followed, namely that cooperation between States confronted with terrorism was normal in such cases and did not infringe the Convention. The Government maintained, therefore, that the applicant had been brought before a Turkish judicial authority at the end of a lawful procedure, in conformity with customary international law and as part of the strategy of cooperation between sovereign States in the prevention of terrorism.

3. The Court's assessment

(a) General principles

86. The Court reiterates that on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. What is at stake here is not only the "right to liberty" but also the "right to security of person" (see, among other authorities, *Bozano v. France* cited above, p. 23, § 54; *Wassink v. the Netherlands*, 27 September 1990, Series A no. 185-A, p. 11, § 24). The Court has previously stressed the importance of effective safeguards, such as the remedy of habeas corpus, to provide protection against arbitrary behaviour and incommunicado detention (see, among other authorities, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B, pp. 55-56, §§ 62-63).

87. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (*Benham v. the United Kingdom*, 10 June 1996 – *Reports of Judgments and Decisions* 1996-III, p. 753, § 41; and *Bouamar v. Belgium*, 29 February 1988, Series A no. 129, p. 21, § 49).

88. The Court accepts that an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person's individual rights to security under Article 5 § 1 (see, to the same effect, *Stocké v. Germany*, 12 October 1989, Series A no. 199, opinion of the Commission, p. 24, § 167).

89. The Court points out that "the Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to

justice, provided that it does not interfere with any specific rights recognised in the Convention" (ibid., pp. 24-25, § 169).

90. As regards extradition arrangements between States when one is a party to the Convention and the other not, the Court considers that the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see, to the same effect, *Freda v. Italy*, application no. 8916/80, Commission decision of 7 October 1980, (DR) 21 p. 250; *Klaus Altmann (Barbie) v. France*, application no. 10689/83, Commission decision of 4 July 1984, (DR) 37, p. 225; *Luc Reinette v. France*, application no. 14009/88, Commission decision of 2 October 1989, (DR) 63 p. 189). The Court reiterates that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition" (*Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, p. 35, § 89).

91. The Court further notes that the Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It considers that, subject to its being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an extradition in disguise cannot as such be regarded as being contrary to the Convention (see the Commission's case-law to this effect, *Illich Sánchez Ramirez v. France*, cited above).

92. Independently of the question whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question which only falls to be examined by the Court if the host State is a party to the Convention – it must be established to the Court "beyond all reasonable doubt" that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law (see, *mutatis mutandis*, *Stocké v. Germany* cited above, p. 19, § 54).

(b) Application of the principles to the present case

93. As regards the responsibility of Turkey in the applicant's arrest, the Court reiterates its reasoning in the case of *Banković and Others* (cited above, §§ 59-60 and 67):

> "As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States...
>
> Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence... In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence...
>
> ...
>
> In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."

In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković and Others* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey (see in this respect the aforementioned decisions in the cases of *Illich Sánchez Ramirez v France* and *Freda v. Italy*).

94. As to whether the arrest complied with Turkish domestic law, the Court notes that the Turkish criminal courts had issued seven warrants for the applicant's arrest and Interpol had circulated a wanted notice ("red notice"). In each of those documents, the applicant was alleged to have founded an armed gang with a view to undermining the territorial integrity of the State and to have instigated a number of terrorist acts that had resulted in the loss of life. Those acts constituted criminal offences under the Turkish Criminal Code. Following his arrest and on the expiry of the statutory period for which he could be held in police custody the applicant

was brought before a court. Subsequently, he was charged, tried and convicted of offences under Article 125 of the Criminal Code. It follows that his arrest and detention complied with orders that had been issued by the Turkish courts "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence".

95. The Court must decide in the light of the parties' arguments whether the applicant's detention in Kenya resulted from acts of the Turkish officials that violated Kenyan sovereignty and international law (as the applicant has submitted) or from cooperation between the Turkish and Kenyan authorities (as the Government have submitted).

96. The Court observes, firstly, that the Kenyan authorities did in fact play an effective role in events in the present case. While it is true that the applicant entered Kenya without declaring his identity to the immigration officers, once they had been informed of the applicant's presence at the Greek Embassy in Nairobi, the Kenyan authorities invited the Greek Ambassador, with whom the applicant was staying in Nairobi, to arrange for the applicant to leave Kenyan territory. Shortly before the applicant was due to leave Kenya, more precisely as he was being transferred from the Greek Embassy to the airport, Kenyan officials intervened and separated the applicant from the Greek Ambassador. The car in which the applicant was travelling was driven by a Kenyan official, who took him to the aircraft in which Turkish officials were waiting to arrest him.

97. The Court further notes that the Kenyan authorities did not perceive the applicant's arrest by the Turkish officials in an aircraft at Nairobi Airport as being in any way a violation of Kenyan sovereignty. It did not lead to any international dispute between Kenya and Turkey or to any deterioration in their diplomatic relations. The Kenyan authorities did not make any protest against the Turkish Government on this point or claim any redress from Turkey, such as the applicant's return or compensation.

98. The Court observes that the Kenyan authorities did, however, issue a formal protest to the Greek Government, accompanied by a demand for the Greek Ambassador's immediate recall, on the ground that the applicant had entered Kenya illegally with the help of Greek officials and was unlawfully staying there. It notes that the applicant was not welcome in Kenya and that the Kenyan authorities were anxious for him to leave.

99. These aspects of the case lead the Court to accept the Government's version of events: it considers that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover.

100. The Court is not persuaded by the statement by the Kenyan Minister of Foreign Affairs on 16 February 1999 that, contrary to what the applicant maintained, the Kenyan authorities had had no involvement in the applicant's arrest or transfer (see paragraph 11 above). While it is true that the applicant was not arrested by the Kenyan authorities, the evidence

before the Court indicates that Kenyan officials had played a role in separating the applicant from the Greek Ambassador and in transporting him to the airport immediately preceding his arrest on board the aircraft.

101. In the light of these considerations and in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure to be followed, the Court holds that it has not been established beyond all reasonable doubt that the operation carried out in the instant case partly by Turkish officials and partly by Kenyan officials amounted to a violation by Turkey of Kenyan sovereignty and, consequently, of international law.

102. The Court holds, lastly, that the fact that the arrest warrants were not shown to the applicant until he was detained by members of the Turkish security forces in an aircraft at Nairobi Airport does not deprive his subsequent arrest of a legal basis under Turkish law (see, to the same effect, *Illich Sánchez Ramirez v. France* cited above).

103. It follows that the applicant's arrest on 15 February 1999 and his detention must be regarded as having been in accordance with "a procedure prescribed by law" for the purposes of Article 5 § 1 (c) of the Convention. Consequently, there has been no violation of Article 5 § 1 of the Convention.

C. Article 5 § 3 of the Convention

104. The applicant alleged that, contrary to, Article 5 § 3 of the Convention, he had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

He said that he had been arrested before 11 p.m. on 15 February 1999 and brought before the judge on 23 February 1999. The Government had not provided any plausible explanation for that gap between his arrest and his first appearance before a judge. The weather report which the Government had produced on the bad weather conditions that had prevented access to the island of İmralı concerned only the afternoon of 23 February 1999, whereas the public prosecutor and the judge had been on the island since 22 February 1999. The applicant said that he had been held incommunicado in the meantime and that his lawyers' request to visit him on 22 February 1999 had been turned down not by the judicial authorities but by the "crisis desk", an entity which possessed no judicial powers. The applicant went on to say that he had not been assisted by counsel when he appeared before the judge on 23 February 1999. He added that the judge could not be regarded as "a judge or other officer" within the meaning of Article 5 § 3, since he was a member of the State Security Court, whose independence and impartiality were contested.

105. The Government observed that under Turkish rules of criminal procedure, the length of police custody could be extended to seven days

where the person detained was suspected of crimes connected with terrorism. In the instant case the applicant had been arrested on 16 February 1999 and taken into police custody for an initial period of four days ending on 20 February 1999. On the latter date a judicial order had been made extending the period to be spent in police custody by three days, that is to say until 23 February 1999. Owing to adverse weather conditions (there was a storm in the region), the representatives of members of the public prosecutor's office and the judge of the State Security Court had been unable to reach the island of İmralı until 22 February 1999. The public prosecutor had questioned the applicant that same day. The applicant had appeared before the judge the following day (23 February 1999). After hearing the applicant, the judge had ordered his detention pending trial on the basis of three warrants that had already been issued for his arrest.

106. The Court has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (*Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B, p. 33, § 61; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, p. 27, § 58; and *Aksoy v. Turkey* cited above, p. 2282, § 78). This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (*Sakık and Others v. Turkey*, cited above, pp. 2623-2624, § 44)

107. The Court notes that the police custody in issue commenced with the applicant's arrest either very late on 15 February 1999 or very early on 16 February 1999. The applicant was held in police custody for four days until 20 February 1999. On that date a judicial order was made extending the period by three days, that is to say until 23 February 1999. The public prosecutor questioned the applicant on 22 February 1999. The applicant appeared before a judge for the first time on 23 February 1999 and the judge, who was without any doubt an “officer” within the meaning of Article 5 § 3 (see, among other authorities, *Sakık and Others v. Turkey* cited above, §§ 12 and 45), ordered his detention pending trial. The total period thus spent by the applicant in police custody before being brought before a judge came to a minimum of seven days.

108. The Court notes that in the case of *Brogan* it held that a period of four days and six hours in police custody without judicial supervision fell outside the strict constraints as to time permitted by Article 5 § 3, even when the aim was to protect the community as a whole from terrorism (*Brogan and Others v. the United Kingdom* cited above, p. 33, § 62).

109. The Court cannot accept the Government's argument that adverse weather conditions were largely responsible for the period of seven days it took for the applicant to be brought before a judge. No evidence has been

adduced to the Court that establishes that the judge attempted to reach the island on which the applicant was being held so that the latter could be brought before him within the total statutory period of seven days allowed for police custody. The Court observes in that connection that the police custody ran its ordinary course under the domestic rules. In addition to the four days ordered by the public prosecutor's office itself, the judge granted an additional period of three days after examining the case on the basis of the file. It seems unlikely that the judge would have granted the additional time had he intended to have the applicant brought before him before it expired.

110. The Court cannot, therefore, accept that it was necessary for the applicant to be detained for seven days without being brought before a judge.

Consequently, there has been a violation of Article 5 § 3.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Whether the Ankara State Security Court, which convicted the applicant, was independent and impartial

111. The applicant alleged that since a military judge had sat on the bench of the State Security Court that had convicted him, he had not been tried by an independent and impartial tribunal. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal."

112. He pointed out that the independence and impartiality of a court was measured by reference to both subjective and objective tests. A military judge with the rank of colonel had sat on the bench of the State Security Court for part of the proceedings. The military judge had been replaced by a civilian judge just a week before the applicant's conviction and two months after the hearings before the State Security Court had started. In the meantime, in a case that concerned a conflict between the organisation led by the applicant and the army in which the military judge was an officer, the military judge had heard the evidence and the oral submissions, contributed to important interlocutory rulings and discussed the case with the other judges, thereby potentially influencing the conduct and outcome of the proceedings. The military judge had sat in all the hearings in which interlocutory rulings had been made, including the hearing at which the applicant's application to have additional witnesses examined had been refused. The applicant added that the substitute judge who had replaced the

military judge had earlier acted in the case and had ordered the applicant's pre-trial detention.

113. The Government, on the other hand, said that the military judge had left the State Security Court following legislative amendments. The substitute judge (a civilian) had been following the proceedings from the start and had attended the hearings, although he had not been entitled to vote. The substitute judge had replaced the military judge before the stage in the proceedings in which evidence was gathered had ended. Had he considered that the State Security Court needed to pursue its investigations, he could have voted against making an order to close that stage of the proceedings before additional investigative measures were ordered. The Government said that the attendance of substitute judges at hearings was not a special measure confined to the Öcalan case. Provision for their attendance was made in the rules of criminal procedure

114. The Court points out that in its judgments in the cases of *İncal v. Turkey* of 9 June 1998 (*Reports* 1998-IV, p. 1547) and *Çiraklar v. Turkey* of 28 October 1998 (*Reports* 1998-VII, pp. 3073-3074, § 40), it noted that certain aspects of the status of military judges sitting in the State Security Courts that had convicted the applicants in those cases raised doubts as to the independence and impartiality of the courts concerned. The applicants in those cases had had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.

What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see *İncal v. Turkey* cited above, pp. 1572-1573, § 71).

115. The applicant appears to have indicated that he accepted the jurisdiction of the State Security Court (see paragraph 34 above). He must, therefore, according to the respondent Government, be taken to have waived his right to an independent and impartial tribunal.

116. It is recalled that a waiver – in so far as such a waiver is permissible – must be established in an unequivocal manner (*Pfeifer and Plankl v Austria*, 22 April 1998, Series A no. 227, p. 16, § 37). However, the applicant's statement cannot be interpreted as an unequivocal waiver of his right to an independent and impartial tribunal since his lawyers actually challenged the independence and impartiality of the court on account of the presence of a military judge. In addition, accepting that a court has "jurisdiction" to conduct a trial refers to its legal competence to try a person and does not necessarily – if at all – involve an acceptance of the

independence and impartiality of that court. The Court does not consider, therefore, that the applicant can be said to have waived his right.

117. The Court notes that when the applicant was convicted the State Security Court was composed of three civilian judges. Following a constitutional amendment (see paragraphs 39 and 40 above), the military judge had been replaced by a civilian judge before the defendant's lawyers made their submissions on the merits of the case. Moreover, the civilian judge had sat as a substitute judge and had followed the trial proceedings from the beginning.

118. However, in the Court's view the last-minute replacement of the military judge was not capable of curing the defect in the composition of the court which had led it to find a violation on this point in the above-mentioned *İncal* and *Çiraklar* judgments. In the first place, the replacement had occurred only one week before the applicant's conviction and two months after the trial had begun. Moreover, two preliminary hearings and six main hearings had already taken place prior to the replacement on 23 June 1999 and the entire prosecution case against the applicant had already been presented by that stage. In short, most of the trial had already taken place before the military judge ceased to be a member of the court. The Court need not speculate on the question whether the military judge had actually influenced the other judges in the court during the course of the trial since, as in the *İncal* and *Çıraklar* cases, it was his very presence prior to replacement which was the source of the problem.

119. It is true that a change in the composition of a trial court in the course of the proceedings need not necessarily give rise to an issue under Article 6 § 1 (see, in this connection, *P.K. v. Finland* (dec) no. 37442/97, 9 July 2002). However, in the present case it is the presence of the military judge for most of the trial proceedings that gives rise to the problem and not the change in the composition that had taken place.

120. Moreover, the exceptional nature of the trial itself concerning a high-profile accused who had been engaged in a lengthy armed conflict with the Turkish military authorities and who faced the death penalty are factors which cannot be overlooked in this assessment. The presence of a military judge – undoubtedly considered necessary because of his competence and experience in military matters – can only have served to raise doubts in the accused's mind as to the independence and impartiality of the court.

121. Against the above background, the Court concludes that the Ankara State Security Court, which convicted the applicant, was not an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. Consequently, there has been a violation of this provision on this point.

B. Whether the proceedings before the State Security Court were fair

122. The applicant complained that the provisions of Article 6 §§ 1, 2 and 3 of the Convention had been infringed owing to the restrictions and difficulties he had encountered in: securing assistance from his lawyers; gaining access for him and his lawyers to the case file; calling defence witnesses; and securing access for his lawyers to the full prosecution file. He also alleged that the judges had been influenced against him by a hostile media.

123. The relevant part of Article 6 of the Convention reads as follows:

> "1. ... everyone is entitled to a fair ... hearing within a reasonable time...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;..."

1. The applicant's submissions

124. The applicant began by setting out certain legal principles. Firstly, in a case in which the accused faced the death penalty, rules of procedural fairness had to be applied more strictly than in non-capital cases. Secondly, fair process entailed a defence right to full participation without restriction at all stages of the proceedings from the beginning (in the present case, the applicant's arrest) right through to the execution of sentence. Thirdly, the national judicial authorities had a positive obligation to ensure equality of arms between the prosecution and the defence at the trial. Lastly, a trial's fairness depended as much on substantive issues as on procedural ones.

125. The applicant went on to set out the main reasons why he considered that his trial had not met the standards required by Article 6.

126. The applicant pointed out that unfettered, confidential and prompt access to legal assistance of one's choosing at all stages of the proceedings

from the moment of detention was one of the fundamental requirements of a fair hearing in a democratic society. He considered, however, that in the instant case contact with his lawyers had been rendered difficult, a factor that had had repercussions on his defence rights. The applicant observed in that connection that his lawyers had not been allowed to visit him until ten days after his arrest and that he had made statements to the judicial authorities in the meantime. The applicant had also encountered difficulties and delays in appointing lawyers of his choice. He noted further that his first meeting with his lawyers had taken place in the presence of members of the security forces. The other visits by his lawyers had been supervised and listened to by the authorities and filmed with a video camera. Ultimately, the applicant had not been able to confer in private with his lawyers, in breach of the mandatory provisions of the Code of Criminal Procedure. After two short initial visits, his contact with his lawyers had been limited to two weekly visits of an hour each. In proceedings that had been extremely rapid and had generated an enormous case file, the total duration of those visits had been manifestly insufficient for him to prepare his defence. The applicant said that lawyers wishing to enter or leave the island of İmralı, which had been decreed a prohibited military zone, required the permission of a "crisis desk", which was not a judicial authority.

Furthermore, when travelling in connection with the proceedings his lawyers had been subjected to harassment by crowds at the instigation or at least with the tacit approval of plain-clothes police officers. His lawyers had not been given the same facilities as those enjoyed by the members of the prosecution when travelling to the places of detention and trial.

127. The applicant stressed the importance to him and his lawyers, for the purposes of preparing the defence, of full and effective access to all the documents in the case file, including ones that were only potentially relevant to the establishment of guilt and the issue of sentencing. In that connection, he said that he had not been permitted to receive a copy of the case file for the trial from his lawyers, or anything else that would assist him in the preparation of his defence. He had been obliged to write out his defence by hand without being able to see any of the documents in the case file other than the indictment, which had already been furnished to him.

128. Furthermore, because of the speed with which the proceedings had been conducted, his lawyers had had difficulty in obtaining access to all the documents in the file. They were given access to the case file, comprising 17,000 pages, just sixteen days before the hearings started. The defence's ability to analyse the documents had been made even more difficult by, *inter alia*, the restrictions imposed throughout the investigation on communications between the applicant and his lawyers. The State Security Court had nonetheless dismissed the application by the applicant's lawyers to take additional evidence. The applicant added that, while before the State

Security Court he had accepted political responsibility for the PKK's general policy, he had denied criminal liability for acts of violence going beyond the PKK's declared policy. It had been with a view to highlighting the fact that there had been a rapprochement between the PKK and the Government that the applicant had requested that the members of the Government team that had led the negotiations with the PKK be heard as witnesses.

129. The applicant submitted that the prosecution had failed to disclose documents which could have assisted the applicant with his defence, in breach of its positive obligation to do so. For example, although requested by the applicant, the documents concerning his transfer from Kenya to Turkey had not been produced.

130. The applicant contended that the authorities had taken no action to prevent the defamatory campaign against him by politicians and the media. Yet his statements as a suspect in police custody had been divulged to the press, even before they had been made available to his lawyers.

131. In conclusion, the applicant said that he had not enjoyed equality of arms with the prosecution in preparing his defence, notably owing to the difficulties which had prevented him and his lawyers from having sufficient time to confer in private, from obtaining effective access to the case file and from putting forward his defence in a secure environment.

2. The Government's submissions

132. The Government maintained that the applicant had had a fair trial. In that connection, they observed firstly that the applicant had been convicted under Article 125 of the Criminal Code, whose aim was to protect the democratic values of the Republic. The Criminal Divisions of the Turkish Court of Cassation, sitting in plenary session, had held that the PKK was an organisation whose aim was to detach part of Turkish territory, by force and acts of violence, in order to form a Kurdish State with a political regime based on Marxist-Leninist ideology. The Government said that the acts of violence perpetrated by the PKK and acknowledged by the applicant at his trial had involved some 6,036 armed attacks on civilians, 8,257 armed confrontations with the security forces, 3,071 bomb attacks, 388 cases of armed robbery and 1,046 kidnappings. Those acts exactly matched the offences included in the list of terrorist acts set out in Articles 1 and 2 of the European Convention on the Suppression of Terrorism. The Government noted that the applicant had admitted before the courts that he had played a role in the creation and organisation of the PKK and in the planning and perpetration of acts of violence committed by members of that organisation.

133. As regards the rights of the defence, the Government noted that the applicant had had a public hearing, had been able to participate fully in the hearings, as special measures had been taken to ensure his safety, had addressed the court without being interrupted, and had said everything he

wished to say in his defence. They maintained that the applicant had been provided with every facility for the preparation of his defence, since he had been able to consult the lawyers of his choice during both the preliminary investigation and the trial and, with the exception of the first visit, the only restrictions to which his lawyers' visits had been subject were those set out in the Code of Criminal Procedure. Nor had there been any restrictions on the applicant's correspondence and he had been able to lodge with the State Security Court an eighty-page set of defence submissions which he had drafted himself.

134. The Government emphasised that even before the hearings on the island of İmralı the applicant's lawyers had been given an opportunity to take full photocopies of all the documents in the case file. In fact, the 17,000-page case file had been compiled from the case files in seven sets of criminal proceedings that had already been started in various State Security Courts. Those proceedings had been pending for several years before the applicant's arrest and the applicant was already familiar with the papers. In any event, very few new documents had been added to the case file. The Government asserted that the State Security Court had communicated all the relevant documents to the applicant and allowed him to study the case file and any annexes which he wished to see under the supervision of two officials. The State Security Court had also informed the applicant that it would provide him with a copy of any document which he believed would assist him with his defence.

135. Among the other facilities that had been made available to assist the applicant with his defence, the Government said that, on the instructions of the President of the State Security Court, a photocopier had been installed in the hearing room for the use of the lawyers. Furthermore, the lawyers had been taken to the island of İmralı by boat, embarking at a private quay for security reasons. Hotel rooms had been reserved for them near the embarkation point. When the lawyers had not been present at a hearing, the records of that hearing and copies of the documents produced for the case file had been delivered to them the following day. Counsel for the applicant had thanked the President of the State Security Court for instilling a calm atmosphere.

136. The Government observed, furthermore, that the statements which the applicant had made in the absence of his lawyers when he was in police custody had not been relied on in the judgment delivered by the State Security Court. In any event, the applicant had repeated all those statements before the State Security Court and had indicated that his earlier statements had been made of his own free will.

137. The Government stated that the applicant's application to call defence witnesses had been dismissed by the State Security Court in a properly reasoned decision. The witnesses concerned, who were mediators between the Government and the PKK, were not in a position to shed any

further light on the main allegation against the applicant, namely that he was the PKK's principal leader. The Government noted in that connection that the applicant had already admitted that main accusation.

138. With respect to the impact of the media on Mr Öcalan's trial, the Government said that the newspapers and various television channels concerned were private companies which enjoyed press freedom when covering judicial proceedings. In the instant case the applicant's arrest and trial were of major news value to the media and journalists had shown great interest in the case. A wide range of comments, some critical of the applicant, others favourable to him, had appeared in the Turkish media. The possibility that the media had exploited statements about the case by politicians could not be ruled out, but such comments were purely political and had had no impact on the professional judges who had sat in the applicant's case.

3. The Court's assessment

139. The Court considers that in order to determine whether the rights of the defence were respected in the criminal proceedings against the applicant, it is necessary firstly to examine the issues of the legal assistance available to the applicant and the access he and his lawyers were given to the case file.

(a) Legal assistance

(i) Lack of legal assistance for the applicant while he was in police custody

140. Under the Court's case-law, Article 6 may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it (*Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275, p. 13, § 36). The manner in which Article 6 §§ 1 and 3 (c) is applied during the investigation depends on the special features of the proceedings and the facts of the case. Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (*John Murray v. the United Kingdom*, 8 February 1996, *Reports* 1996-I, pp. 54-55, § 63).

141. In the present case, the applicant was questioned by the security forces, a public prosecutor and a judge of the State Security Court while being held in police custody in Turkey for almost seven days, from 16 February 1999 to 23 February 1999. He received no legal assistance during that period and made several self-incriminating statements that were

subsequently to become crucial elements of the indictment and the public prosecutor's submissions and a major contributing factor in his conviction.

142. As to whether the applicant had waived his right to consult a lawyer, the Court notes that on the day after his arrest, his lawyer in Turkey, Mr Feridun Çelik (who already possessed a valid authority), sought permission to visit him. However, Mr Çelik was prevented from travelling by members of the security forces. In addition, on 22 February 1999 sixteen lawyers who had been retained by the applicant's family sought permission from the State Security Court to visit the applicant, but their request was turned down by the authorities on 23 February 1999.

143. In these circumstances, the Court is of the view that to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence to which the accused is entitled by virtue of Article 6 (*mutatis mutandis*, *Magee* cited above, §§ 44-45).

(ii) Consultation with his lawyers out of hearing of third parties

144. The Court notes that the parties do not dispute that the applicant's first visit from his lawyers took place under the supervision and within sight and hearing of members of the security forces and a judge, all of whom were present in the same room as the applicant and his lawyers. The security forces restricted the visit to twenty minutes. The record of the visit was sent to the State Security Court.

145. As regards subsequent visits, the Court notes that no members of the security forces or the state legal service were present in the same room as the applicant and his lawyers. The applicant said that prison officers were present in a room adjoining the room in which he met his lawyers, and that the door between the two rooms was always left open such that his meetings with his lawyers took place within sight and hearing of the prison officers. While the Government did not dispute that, they explained that the restrictions were lawful under the domestic legislation and were intended to ensure the applicant's security. The Court observes that under the domestic legislation applicable at the material time to proceedings in the State Security Courts, a member of the state legal service was entitled to be present at meetings between the accused and his lawyer during the period preceding the commencement of the criminal proceedings (see paragraph 54 above).

Having examined the parties' versions of events, the Court accepts that meetings between the applicant and his lawyers after the initial visit took place within hearing of members of the security forces, even though the security officers concerned were not in the room where the meetings took place.

146. The Court refers to its settled case-law and reiterates that an accused's right to communicate with his legal representative out of hearing

of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (*S. v. Switzerland*, 28 November 1991, Series A no. 220, p. 16 § 48). The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments (see *Brennan v. the United Kingdom*, no. 39846/98, §§ 38-40, ECHR 2001-X). However, as stated above (see paragraph 140 above) restrictions may be imposed on an accused's access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing.

147. In the present case, the Court accepts, in the absence of any convincing explanation from the Government, that the applicant and his lawyers were unable to consult out of hearing of the authorities at any stage. It considers that the inevitable consequence of that restriction, which was imposed during both the preliminary investigation and the trial, was to prevent the applicant from conversing openly with his lawyers and asking them questions that were important to the preparation of his defence. The rights of the defence were thus significantly affected.

148. The Court observes in that connection that the applicant had already made statements by the time he conferred with his lawyers and made further statements at hearings before the State Security Court after consulting them. If his defence to the serious charges he was required to answer was to be effective, it was essential that those statements be consistent. Accordingly, the Court considers that it was necessary for the applicant to be able to speak with his lawyers out of hearing of third parties.

149. As to the Government's contention that the supervision of the meetings between the applicant and his lawyers was necessary to ensure the applicant's security, the Court observes that the lawyers had been retained by the applicant himself and that there was no reason to suspect that they had threatened their client's life. They were not permitted to see the applicant until they had undergone a series of searches. Mere visual surveillance by the prison officials, accompanied by other measures, would have sufficed to ensure the applicant's security.

150. The Government's argument that the applicant had not complained personally to the State Security Court that he had been unable to consult with his lawyers in private must also be rejected. The Court reiterates that waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (*mutatis mutandis*, *Pfeifer and Plankl v Austria,* cited above, Series A no. 227, p. 16, § 37). It notes that the applicant's lawyers did in fact complain to the State Security Court about

the difficulties they had encountered at meetings with their client (see paragraph 37 above).

151. Accordingly, the Court holds that the fact that it was impossible for the applicant to confer with his lawyers out of hearing of members of the security officers violated the rights of the defence, as guaranteed by Article 6 § 3 (c).

(iii) Number and length of the visits by the applicant's lawyers

152. The Court notes that after the first two visits by his lawyers, which were approximately two weeks apart, contact between the applicant and his lawyers was restricted to two visits a week, of an hour each.

153. The Court reiterates that while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to "defend himself in person or through legal assistance ...", it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (*Quaranta v. Switzerland*, 24 May 1991, Series A no. 205, p. 16, § 30). In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (*Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 16, § 33). The Court also points out that the manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (*Imbrioscia v. Switzerland* cited above, p. 14, § 38).

154. The Court observes that in the instant case, the charges against the applicant included numerous acts of violence perpetrated by an illegal armed organisation and that he was alleged to be the leader of that organisation and the principal instigator of its acts. The Court further notes that the presentation of those highly complex charges generated an exceptionally voluminous case file (see paragraph 32 above). It considers that in order to prepare his defence to those charges the applicant required skilled legal assistance equal to the complex nature of the case. It finds that the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hourly meetings per week with his lawyers in order to prepare for a trial of that magnitude.

155. With respect to the Government's argument that visits took place in accordance with the frequency and departure times of the ferries between the island of İmralı and the coast, the Court considers that while the

Government's decision to hold the applicant in an island prison far from the coast is understandable, in view of the exceptional security considerations in the case, restricting visits to two hourly visits a week is less easily justified. It notes that the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the "diligence" which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (*Colozza v. Italy* cited above, p. 15, § 28).

156. As to the Government's argument that the applicant's lawyers organised press conferences after each visit and acted as spokespersons for the PKK, the Court holds that any such conduct on their part could not justify the restrictions in issue, since restrictions cannot be placed on the rights of the defence for reasons that are not directly related to the trial. In addition, there is no evidence before the Court that any complaint was lodged in Turkey against the applicant's lawyers for acting as spokespersons for the PKK.

157. Consequently, the Court considers that the restriction on the number and length of the applicant's meetings with his lawyers was one of the factors which made the preparation of his defence difficult and was contrary to the provisions of Article 6 of the Convention.

(b) The applicant's access to the case file

158. The Court notes at the outset that it is common ground that the prison authorities did not authorise the applicant's lawyers to provide him with a copy of the documents in the case file, other than the indictment, which had been officially served on him. It was not until the hearing of 2 June 1999 that the State Security Court gave the applicant permission to consult the case file under the supervision of two registrars and his lawyers permission to provide him with a copy of certain documents.

159. The Court must examine whether the fact that the applicant was prevented from obtaining communication of the documents in the case file, other than the indictment, until 2 June 1999 violated the rights of the defence, as guaranteed by Article 6 § 1, taken together with Article 6 § 3 (see, among other authorities, *Pullar v. the United Kingdom*, 10 June 1996, *Reports* 1996-III, p. 796, § 45).

It is reiterated in that connection that under the principle of equality of arms, one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his or her opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (see, among other authorities, *Bulut v. Austria*, 22 February 1996, *Reports* 1996-II, pp. 380-381, § 47).

160. Three matters appear to the Court to be essential in the instant case.

Firstly, the reasoning followed by the Court in the cases of *Kamasinski* and *Kremzow*, which is relied on by the Government, in which it held that restricting the right to inspect the court file to an accused's lawyer is not incompatible with the rights of the defence (*Kremzow v. Austria*, 21 September 1993, Series A no. 268-B, p. 42, § 52; and *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, p. 39, § 88) cannot apply in the instant case. For that principle to apply, the evidence must be made available to the accused before the hearing and the accused's lawyer must be given an opportunity to comment on it in his or her oral submissions (*mutatis mutandis*, *Kremzow v. Austria* cited above, § 63). However, quite the opposite occurred in the instant case: the applicant was not permitted to inspect the evidence produced by the prosecution personally before the hearings. When the applicant's lawyers made their comments on that evidence, they had yet to obtain the applicant's observations following a direct inspection of the documentation. The fact that the applicant was given permission on 2 June 1999 to consult the case file under the supervision of two registrars did little to remedy that situation, in view of the considerable volume of documents concerned and the short time available to the applicant.

161. Furthermore, as a result of the position he occupied in the armed organisation concerned (the PKK), the applicant was one of the people best able to assess the relevance to the defence of the substantial body of evidence that had been adduced by the prosecution. He was much better placed and better informed than his lawyers to determine who within the PKK bore responsibility for which acts and to what degree. It should be noted that the prosecution attributed to the applicant moral responsibility for several hundred acts of violence that were not physically carried out by him. It is reasonable to suppose that had he been permitted to study the prosecution evidence directly and for sufficient time, he would have been able to identify arguments relevant to his defence other than those his lawyers had raised themselves without the benefit of his instructions.

162. Lastly, the applicant's lawyers may have been prevented from giving the applicant an assessment of the importance of all these items of evidence by the sheer number and volume of documents and the restriction imposed on the number and length of their visits.

163. The Court therefore holds that the fact that the applicant was not given appropriate access to any documents in the case file other than the indictment also served to compound the difficulties encountered in the preparation of his defence, in breach of the provisions of Article 6 § 1, taken together with Article 6 § 3 (b).

(c) Access by the applicant's lawyers to the court file

164. A further issue before the Court is whether the applicant's lawyers were given sufficient access to the court file to enable them to prepare their client's defence properly. The applicant pointed to the following factors: the failure to furnish his lawyers with a copy of the file when the indictment was served, the extreme rapidity with which the proceedings were conducted, the exceptionally voluminous case file, the difficulties encountered in making photocopies and the practical difficulties caused by the special security measures. The Government, on the other hand, maintained that the applicant's lawyers had obtained copies of all the documents in the file which they considered relevant to the preparation of the defence case.

The Court is therefore invited to determine whether, in the instant case, the applicant's lawyers' access to the documents in the case file was restricted, either formally or in practice, and, if so, whether the restrictions affected the fairness of the proceedings.

165. The Court observes that the indictment was served on the applicant and his lawyers on 24 April 1999. The court file was put at the disposal of the applicant's lawyers on 7 May 1999, but no copy was provided. The applicant's lawyers finished photocopying the documents on 15 May 1999. They were in possession of the full file in the case from that date onwards. Two weeks later, on 31 May 1999, the hearings before the State Security Court began. The applicant's lawyers were invited to make their final submissions – in reply to the prosecution's submissions – at the eighth substantive hearing, which was held on 23 June 1999.

166. The Court reiterates that the principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon (*Brandstetter v. Austria*, 28 August 1991, Series A no. 211, p. 27 §§ 66 and 67).

The Court further notes that it has previously held that for the purposes of Article 6 of the Convention a period of three weeks was sufficient to enable the applicant and his lawyer in the case concerned to draft their reply to a forty-nine page document (*Kremzow v. Austria* cited above, p. 42, § 48).

167. In the present case, the Court observes that the applicant's lawyers received a 17,000 page file approximately two weeks before the beginning of the trial in the State Security Court. Since the restrictions imposed on the number and length of their visits made it impossible for the applicant's

lawyers to communicate the documents in the file to their client before 2 June 1999 or to involve him in its examination and analysis, they found themselves in a situation that made the preparation of the defence case particularly difficult. Subsequent developments in the proceedings did not permit them to overcome those difficulties: the trial proceeded apace; the hearings continued without interruption until 8 June 1999; and on 23 June 1999 the applicant's lawyers were invited to present their submissions on all the evidence in the file, including that taken at the hearings.

168. The Court finds that the fact that the applicant's lawyers were not given access to the case file until late in the day, coupled with the other difficulties encountered by the defence referred to above (see paragraphs 143, 151, 157 and 163 above) made it difficult for the applicant to exercise the defence rights to which Article 6 entitled him as an accused (see, *mutatis mutandis*, *Magee* cited above, §§ 44-45)

C. The Court's conclusion regarding Article 6

169. The Court consequently notes that the applicant was not tried by an independent and impartial tribunal, was not assisted by his lawyers when questioned in police custody, was unable to communicate with them out of hearing of third parties and was unable to gain direct access to the case file until a very late stage in the proceedings. Furthermore, restrictions were imposed on the number and length of his lawyers' visits and his lawyers were not given proper access to the case file until late in the day. The Court finds that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened. There has therefore been a violation of Article 6 § 1, taken together with Article 6 § 3 (b) and (c).

170. As regards the other complaints under Article 6 of the Convention, the Court considers that it has already dealt with the applicant's main grievances arising out of the proceedings against him in the domestic courts. It therefore holds that it is unnecessary to examine the other complaints under Article 6 relating to the fairness of the proceedings.

III. DEATH PENALTY: ALLEGED VIOLATION OF ARTICLES 2, 3 AND 14 OF THE CONVENTION

171. The applicant maintained that the imposition and/or execution of the death penalty constituted a violation of Article 2 – which should be interpreted as no longer permitting capital punishment – as well as an inhuman and degrading punishment in violation of Article 3 of the Convention. He also claimed that his execution would be discriminatory in breach of Article 14. The relevant part of these provisions provide:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Preliminary issue

172. In further submissions of 19 September 2002, the Government informed the Court that the Constitution had been amended so that the death penalty could no longer be ordered or implemented other than in time of war or of imminent threat of war or for acts of terrorism and that the Turkish Grand National Assembly had abolished the death penalty by enacting Law no. 4771 which entered into effect on 9 August 2002. This law provided for the abolition of the death penalty in peacetime by amending, *inter alia*, the Criminal Code (see paragraphs 7 and 47 above). Moreover, Mr Öcalan's sentence was subsequently commuted to life imprisonment by the Ankara State Security Court, which ruled that the offences under Article 125 of the Criminal Code for which the applicant had been convicted had been committed in peacetime and constituted terrorist acts. In the Government's submission, the allegations raised by the applicant under Article 2 of the Convention should now be rejected as inadmissible on the grounds that the death penalty has now been abolished in Turkey.

173. The applicant submitted in reply that the Court should nevertheless continue its examination of the issues raised under Article 2 as the risk that the applicant might be subjected to the death penalty had not been completely removed since, *inter alia*, an appeal had been lodged against the commutation of his sentence (see paragraph 47 above).

174. It is true that the Court could declare an application inadmissible at any stage of the proceedings in accordance with Article 35 § 4 of the Convention. However, in the present case the applicant had been sentenced to death and had spent more than three years detained in isolation awaiting a determination of his fate. Up until recently (see paragraphs 5 and 47 above)

there was reason to fear that the death sentence would be implemented. In addition, his complaint relates not only to the question of the implementation of the sentence but also to that of its imposition. Accordingly, the Court considers it more appropriate to examine the issues raised by the death penalty on the merits.

The Court therefore rejects the Government's plea.

B. Merits

(1) Original submissions of those appearing before the Court

(a) The applicant

175. For the applicant any recourse to the death penalty violated both Articles 2 and 3 of the Convention. By their practices over the last fifty-two years the Contracting States should be taken to have abrogated the exception provided in the second sentence of Article 2 § 1 of the Convention. When the Convention was signed in 1950, the death penalty was not perceived as a degrading and inhuman penalty in Europe and was provided for in the legislation of a number of States. Since that time European States have reached a consensus that the death penalty is an inhuman and degrading penalty within the meaning of Article 3 of the Convention. There has been a *de facto* abolition throughout Europe. Such developments should be seen as an agreement by Contracting States to amend Article 2 § 1.

176. No construction of Article 2 should permit a State to inflict inhuman and degrading treatment since the death penalty *per se* constitutes such treatment in breach of Article 3 of the Convention. In this latter respect the following submissions were made.

177. Developments in international and comparative law showed that the death penalty could also be seen to be contrary to international law. In this respect reference was made, *inter alia*, to a judgment of the South African Constitutional Court in which it was held that the death penalty was contrary to the South African Constitution's prohibition on cruel, inhuman or degrading treatment (*S v Makwanyane*, (1995) (6) Butterworths Constitutional Law Reports 665) and to the judgment of the Canadian Supreme Court in *US v Burns* (2001) SCC 7, where that Court, in a case concerning the extradition of a fugitive to the United States of America, considered capital punishment to amount to cruel and unusual punishment. The United Nations Human Rights Committee had also held that execution of a death sentence constituted cruel and inhuman treatment contrary to Article 6 of the International Covenant on Civil and Political Rights (see paragraph 60 above). Reference was also made to similar statements by the

Hungarian Constitutional Court and the Constitutional Courts of Ukraine, Albania, Lithuania and the Republic of Srpska.

178. The applicant further maintained (1) that it would infringe Article 2 to implement a death sentence which had been imposed following a procedure which did not conform with Articles 5 and 6 of the Convention and (2) that the enforcement of the death penalty imposed on him would be discriminatory given that since 1984 the Government had been following a clearly stated policy of no longer carrying out such executions.

179. Finally the applicant maintained that the imposition of the death penalty by a Court which failed to satisfy the requisite standards of the Convention and which permitted violations of the applicant's rights under Article 6 also violated Articles 2 and 3.

(b) The Government

180. The Government pointed out that Turkey had not been under any Convention obligation to abolish the death penalty. The text of the Convention could not be changed or corrected by an agreement among States that the death penalty was incompatible with human-rights standards. It was not open to the Court to substitute such developments in values and standards which had taken place in other societies for the text of the Convention.

181. It was stressed that the death penalty was clearly provided for in Article 2 of the Convention. Irrespective of whether capital punishment ought to be abolished, Article 3 of the Convention could not be interpreted to include a prohibition of that penalty. That provision did not admit of any derogation, whereas Article 2 of Protocol No. 6 made provision for the death penalty to be retained in time of war or of imminent threat of war. It was obvious that the signatories to this Protocol did not consider the death penalty to be a degrading or inhuman punishment, since if they did such an exception would not have been made. The existence of a war could not make a punishment less inhuman or degrading.

182. The Government further maintained that the applicant's trial had been conducted fairly by an independent and impartial tribunal within the meaning of Article 6 and that his arrest in Kenya had been lawful.

183. They also rejected any allegation of discrimination against the applicant, arguing that he had not been convicted either because of his ethnic origin or on account of his political opinions but because he had been the instigator of a large number of murders and bomb attacks carried out by the armed organisation that he led.

(2) The Court's assessment

(a) As regards the implementation of the death penalty

184. The Court refers to the Government's argument that the applicant no longer risks execution. In a letter to the Court of 19 September 2002, the Government declared that Abdullah Öcalan no longer faced the execution of the death penalty as finalised on 22 November 1999 by the judgment of the Turkish Court of Cassation (see paragraph 47 above). The Court notes that the death penalty has been abolished in Turkey (ibid.). Furthermore the applicant's sentence has been commuted to a period of life imprisonment (ibid.). In addition the constitutional action challenging the compatibility with the Constitution of the legislation abolishing the death penalty has failed (ibid.). Against this background the Court considers that the threat of implementation of the death sentence has been effectively removed.

185. It is true that a further legal action against the commutation of his sentence is still pending before the Turkish courts. The judgment of the Ankara State Security Court of 3 October 2002 has been appealed against by two trade unions who argue that the PKK's activities in south-east Turkey are akin to war (see paragraph 47 above). However, having regard to the developments described above as well as to the Government's declaration to the Court in their letter of 19 September 2002, it can no longer be said that there are substantial grounds for fearing that the applicant will be executed, notwithstanding the above-mentioned appeal. It must also be borne in mind in this context that Turkey has now signed Protocol No. 6 (see paragraph 55 above) and that the non-implementation of the capital sentence is in keeping with Turkey's obligations as a signatory State to this Protocol, in accordance with Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, to "refrain from acts which would defeat the object and purpose" of the Protocol.

186. In these circumstances, the applicant's complaints under Articles 2, 3 and 14 based on the implementation of the death penalty must be rejected. Accordingly there has been no violation of these provisions on this basis.

(b) As regards the imposition of the death penalty

187. It remains to be determined whether the imposition of the death penalty, in itself, gave rise to a breach of the Convention.

(i) Article 2

188. At the outset the Court considers that no separate issue arises under the present head as regards Article 2 and prefers to examine this question under Article 3.

(ii) Article 3 read against the background of Article 2

(α) Legal significance of the practice of the Contracting States as regards the death penalty

189. The Court reiterates that the Convention is to be read as a whole and that Article 3 must be construed in harmony with the provisions of Article 2. If Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1 (see *Soering v. the United Kingdom*, of 7 July 1989, Series A no. 161, p. 40, § 103). Accordingly, the Court must first address the applicant's submission that the practice of the Contracting States in this area can be taken as establishing an agreement to abrogate the exception provided for in the second sentence of Article 2 § 1, which explicitly permits capital punishment under certain conditions.

190. The Court reiterates that it must be mindful of the Convention's special character as a human-rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and *Loizidou v. Turkey*, 18 December 1996, Reports 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention which arise in the present case.

191. It is recalled that the Court accepted in its *Soering v. the United Kingdom* judgment that an established practice within the Member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (see the above-cited judgment, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (ibid. §§ 103-104).

192. The applicant takes issue with the Court's approach in the *Soering* judgment. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the

States may be measured and that the evidence shows that all members of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.

193. The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see the *Selmouni v France* judgment of 28 July 1999, *Reports* 1999-V, § 101).

194. It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see the above-cited *Soering* judgment, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1950 and indeed since the Court's *Soering v. the United Kingdom* judgment in 1989.

195. Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States – most recently in the respondent State – and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

196. Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No 6 by the three remaining

States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2.

197. In expressing this view, the Court is aware of the opening for signature of Protocol No. 13 which provides an indication that the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. However this Protocol seeks to extend the prohibition by providing for the abolition of the death penalty in all circumstances – that is to say both in time of peace and in times of war. This final step toward complete abolition of the death penalty can be seen as a confirmation of the abolitionist trend established by the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

198. In the Court's view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

(β) Unfair proceedings and the death penalty

199. In the Court's view, present-day attitudes in the Contracting States towards the abolition of the death penalty, as reflected in the above analysis, must be taken into account when examining the compatibility with Articles 2 and 3 of any death sentence. As noted above, the Court will postulate that the death penalty is permissible in certain circumstances.

200. As already highlighted by the Court in the context of Article 3, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention while awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (see *Soering* cited above, p. 41, § 104).

201. Since the right to life in Article 2 of the Convention ranks as one of the most fundamental provisions of the Convention – one from which there can be no derogation in peacetime under Article 15 – and enshrines one of the basic values of the democratic societies making up the Council of

Europe, its provisions must be strictly construed (see, *mutatis mutandis*, *McCann v. the United Kingdom*, 27 September 1995, Series A no. 324, pp. 45-46, § 147), *a fortiori* the second sentence of Article 2.

202. Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that "Everyone's right to life shall be protected by law". An arbitrary act cannot be lawful under the Convention (*Bozano v. France*, cited above, §§ 54 and 59).

203. It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the "execution of a sentence of a court", that the "court" which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law (*İncal v. Turkey*, cited above; *Çıraklar v. Turkey*, cited above; *Findlay v. the United Kingdom*, 25 February 1997, *Reports* 1997-I; *Hauschildt v. Denmark*, 24 May 1989, Series A no. 154) and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided (see, in this connection, Article 5 of ECOSOC Resolution 1984/50 and the decisions of the UN Human Rights Committee – cited above at paragraphs 59-62; also the Advisory Opinion OC-16/99 of 1 October 1999 of the Inter-American Court of Human Rights on 'The right to information on consular assistance in the framework of the guarantee of due process of law', §§ 135-136, and *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, § 148 – referred to at paragraphs 63 and 64 above). Lastly, the requirement in Article 2 § 1 that the penalty be "provided by law" means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be "accessible" and "foreseeable" as those terms are understood in the case-law of the Court (see *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

204. It follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible.

205. It remains for the Court to examine the implications of the above interpretation for the issue under Article 3 concerning the imposition of the death penalty.

206. The above conclusion concerning the interpretation of Article 2 where there has been an unfair trial must inform the opinion of the Court when it considers the question of the imposition of the death penalty in such circumstances.

207. In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be

executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention. Having regard to the rejection by the Contracting Parties of capital punishment, which is no longer seen as having any legitimate place in a democratic society, the imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.

(iii) Conclusion

208. The Court notes that there has been a moratorium on the implementation of the death penalty in Turkey since 1984 and that the Turkish Government in the present case complied with the Court's interim measure pursuant to Rule 39 to stay the execution (see paragraph 5 above). It is further noted that the applicant's file was not sent to Parliament for approval of the death sentence as was then required by the Turkish Constitution.

209. The Court has also had regard, in this context, to the case of *Çinar v. Turkey* (No. 17864/91, dec. 5.9.94, D.R. 79, p. 5) in which the Commission rejected a claim that Article 3 had been violated in the case of an applicant who had also been sentenced to death in Turkey. In its reasoning, the Commission took into account the long-standing moratorium on the death penalty and concluded in the circumstances of that case that the risk of the penalty being implemented was illusory.

210. The Court is not persuaded that the same can be said in the case of Mr Öcalan whose political background as leader and founder of the PKK, which had been engaged in a sustained campaign of violence causing many thousands of casualties, had made him Turkey's most wanted person. His singularity as a person convicted of a capital offence is evident from the conditions of strict isolation in which he has been detained. Given the applicant's high-profile, the fact that he had been convicted of the most serious crimes under the Turkish Criminal Code and the general political controversy in Turkey – prior to the decision to abolish the death penalty – surrounding the question of whether he should be executed, it cannot be open to doubt that the risk that the sentence would be implemented was a real one. Indeed, the present proceedings have been predicated upon that risk up until the present judgment, as reflected in the Court's interim measure under Rule 39 (see paragraph 5 above). The risk remained in existence for more than three years during the applicant's detention in İmralı from the date of the Court of Cassation's judgment of 25 November 1999 affirming the applicant's conviction until the recent judgment of the Constitutional Court of 27 December 2002 upholding the validity of the law

abolishing the death penalty. Thereafter, as the Court has found (see paragraph 184 above) the risk had essentially disappeared.

211. The Court refers to its conclusions concerning the applicant's complaints under Article 6 of the Convention. It has found that he was not tried by an independent and impartial tribunal and that there was a breach of the rights of the defence under Article 6 § 1, taken together with Article 6 § 3 (b) and (c), having regard to the fact that the applicant had no access to a lawyer during police detention, that he was unable to communicate with his lawyers out of the hearing of officials, that restrictions had been imposed on the number and length of his lawyers' visits to him, that he was unable to consult the case-file until a late stage in the procedure and that his lawyers did not have sufficient time to consult the file properly (see paragraph 169 above).

212. The death penalty has thus been imposed on the applicant following an unfair procedure which could not be considered compatible with the strict standards of fairness required in cases involving a capital sentence. Moreover he has had to suffer the consequences of such imposition for more than three years.

213. Having regard to the above, the Court concludes that the imposition of the death sentence on the applicant following an unfair trial amounted to inhuman treatment in violation of Article 3.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION: CONDITIONS OF DETENTION

214. The applicant further complained that the conditions in which he had been transferred from Kenya to Turkey and detained on the island of İmralı amounted to treatment that infringed Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Conditions in which the applicant was transferred from Kenya to Turkey

215. The applicant said that he had been "abducted" in Kenya by Turkish officials and that his abduction necessarily constituted a violation of his right to respect for his physical integrity. He added that the circumstances in which the arrest had been effected (he had been blindfolded, handcuffed, and drugged, filmed with a video camera in the aircraft, and displayed to the press and the television cameras blindfolded against a backdrop of Turkish flags) also amounted to degrading and

inhuman treatment. In his submission, the fact that he had been abducted for political reasons was in itself capable of constituting a breach of Article 3.

216. The Government contested those allegations and said that the applicant had not been ill-treated at any point, either during his transfer to Turkey or in İmralı Prison. They pointed out that the applicant had informed both the CPT delegates, who met him just after his period in police custody had ended, and the State Security Court that he had not been ill-treated since his arrest.

217. The Government explained that the applicant had been blindfolded briefly during his transfer from Kenya to Turkey in order to prevent him from identifying the members of the security forces escorting him, from being able to see secret military zones or from causing self-inflicted injuries. The blindfold had been removed as soon as the aircraft had entered Turkish airspace. The press had managed to obtain the photographs and video recording – which had been intended for police use – without permission from the official authorities. The applicant's state of health had been monitored constantly by a doctor on board the aircraft.

218. The Court reiterates at that outset that Article 3 enshrines one of the fundamental values of the democratic societies (*Soering* cited above, p. 34, § 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Article 3 makes no provision for exceptions and no derogation from it is permissible even under Article 15 of the Convention in time of war or other national emergency (*Chahal v. the United Kingdom*, 15 November 1996, *Reports* 1996-V, p. 1855, § 79).

219. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, for instance, *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25, p. 65, § 162). In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account (ibid., p. 65, § 161).

220. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see, among other authorities, *Kudła v. Poland*, [GC], no. 30210/96, § 92, ECHR 2000-XI). Furthermore, in considering whether a punishment or

treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (*Albert and Le Compte v. Belgium*, 10 February 1983, Series A no. 58, p. 13, § 22). In order for an arrest or detention in connection with court proceedings to be degrading within the meaning of Article 3, the humiliation or debasement to which it gives rise must be of a special level and in any event different from the usual degree of humiliation inherent in arrest or detention (see, *mutatis mutandis*, *Raninen v. Finland*, 16 December 1997, *Reports* 1997-VIII, pp. 2821-2822, § 55).

221. Handcuffing, one of the forms of treatment complained of in the present case, does not normally give rise to an issue under Article 3 of the Convention where it has been imposed in connection with lawful arrest or detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or abscond, or cause injury or damage. In this connection, the public nature of the treatment may be a relevant factor. In addition, the publicity given to the treatment or the mere fact that the victim is humiliated in his or her own eyes may be a relevant consideration (*Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, p. 16, § 32; and *Raninen* cited above, p. 2822, § 56).

222. The Court further considers that artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure. It must examine the effect of that treatment in the special circumstances of each case (see, *mutatis mutandis*, *Salman v. Turkey*, [GC], no. 21986/93, § 132, ECHR 2000-VII).

223. In the present case, the Court observes that the applicant was forced to wear handcuffs from the moment of his arrest by the Turkish security forces on the aircraft until his arrival at the prison on the island of İmralı. It also notes that he was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish security forces and that he was considered dangerous. The Court accepts the Government's submission that the sole purpose of requiring the applicant to wear handcuffs as one of the security measures taken during the arrest phase was to prevent him from attempting to abscond or causing injury or damage to himself or others.

224. As regards the blindfolding of the applicant during his journey from Kenya to Turkey, the Court observes that that was a measure taken by the members of the security forces in order to avoid being recognised by the applicant. They also considered that it was a means of preventing the applicant from attempting to escape or injuring himself or others. The

applicant was not questioned by the security forces when he was blindfolded. The Court accepts the Government's explanation that the purpose of that precaution was not to humiliate or debase the applicant but to ensure that the transfer proceeded smoothly and it acknowledges that, in view of the applicant's character and the reactions to his arrest, considerable care and proper precautions were necessary if the operation was to be a success.

The Court's view on this point is not altered by the fact that the applicant was photographed wearing a blindfold in the aircraft that took him back to Turkey. It points out that there had been fears for the applicant's life following his arrest and the photographs, which the Government say were intended for use by the police, served to reassure those concerned about his welfare. The Court notes, lastly, that the applicant was not wearing a blindfold when he was photographed in Turkey shortly before his transfer to the prison.

225. The applicant said that he was under sedation when he was transferred from Kenya to Turkey, the drugs having been administered to him either at the Greek Embassy in Nairobi before he boarded the plane or in the aircraft that had taken him to Turkey. The Government rejected the latter suggestion. The Court notes that there is no evidence in the case file to substantiate the allegation that the Turkish security forces administered drugs to the applicant. Since the applicant also seems to think that the most probable explanation is that he was drugged before he was put on board the flight from Nairobi to Turkey, the Court considers that this allegation against the Turkish officials has not been established.

226. The Court also notes that the applicant informed the CPT delegates, who saw him after his period in police custody had ended, that he had not been subjected to ill-treatment during his transfer to Turkey or while in police custody (see paragraph 27 above). Furthermore, at the hearing on 31 May 1999 the applicant stated in the State Security Court: “Since my arrest I have not up to now been subjected to torture, ill-treatment or insults”. While the applicant's vulnerability at the time as a result of his being on trial for a capital offence means that that statement does not by itself conclusively establish the facts, it does support the Government's submissions.

227. Lastly, since the applicant's arrest was lawful under Turkish law, the Court cannot accept the applicant's submission that his “abduction” overseas on account of his political opinions constituted inhuman or degrading treatment within the meaning of Article 3.

228. That being so, the Court considers that it has not been established “beyond all reasonable doubt” that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that is inherent in every arrest and detention or attained the minimum level of severity required for Article 3 of the

Convention to apply. Consequently, there has been no violation of that provision on this point.

B. Conditions of detention on the island of İmralı

229. The applicant further complained under Article 3 that the conditions of his detention on the island of İmralı were inhuman. In that connection, he contended that his treatment was contrary to that provision of the Convention, in particular in that he was the sole prisoner on the island, there were severe restrictions on contact with his lawyers and members of his family, his health had deteriorated since his arrival in the prison, there was very little opportunity for physical exercise and his access to the media was restricted.

230. With regard to the conditions of detention on the island of İmralı, the Government observed at the outset that the applicant had at no stage been held in solitary confinement. He had received visits from doctors, his lawyers and members of his family. The Government produced photographs which in their submission showed that the applicant's cell was of a high standard. They reiterated that the applicant had been tried and convicted of being the head of a major armed separatist organisation that continued to regard him as its leader. All the restrictions imposed on visits by lawyers and telephone communications were intended to prevent the applicant from continuing to run the organisation from his prison cell.

231. In that connection, the Court refers again to its case-law cited above (see paragraphs 218 to 220 above) and reiterates that under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (*Kudła* cited above, § 94; *Kalachnikov v. Russia*, (dec.) no. 47095/99, § 95, ECHR 2001-XI).

232. The Court notes also that complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contacts with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or punishment (see, among other authorities, *Messina v. Italy* (dec.) no. 25498/94, ECHR 1999-V).

233. As to the present case, the Court accepts at the outset that the applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, the leader of a large, armed separatist movement, is considered by the Turkish authorities to be the most dangerous terrorist in

Turkey. Reactions to his arrest and trial have shown that a very large number of people hated him and wanted him dead. Other reactions to the same events have also demonstrated that many people regarded the applicant as one of the main leaders of the pro-Kurdish movement. It is reasonably foreseeable that such people will seek to help the applicant escape from prison. In those circumstances, it is understandable that the Turkish authorities should have found it necessary to take extraordinary security measures to detain the applicant, who is the only prisoner in the sole institution on an island far off the coast.

The Court further observes that the standard of the applicant's prison cell was indisputably beyond criticism. From the photographs that have been provided and the findings of the Delegates of the European Committee for the Convention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), who visited the applicant's prison during their mission to Turkey from 2 to 14 September 2001, the Court notes that the cell which the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also equipped with an air-conditioning system, washing and toilet facilities and a window overlooking an inner courtyard. The Court considers that these conditions do not give rise to any issue under Article 3 of the Convention.

234. As regards the fact that the applicant was isolated, the Court observes that he cannot be regarded as being detained in sensory isolation or solitary confinement. It is true that his only contact is with prison staff, as he is the sole inmate. The applicant has books, newspapers and, more recently, a radio at his disposal. He does not have access to television programmes or a telephone. On the other hand, he receives twice daily visits from doctors and once weekly visits from his lawyers (who were permitted to see him twice a week during his trial). Apart from the fact that access to İmralı Prison is difficult, it does not appear that there are any restrictions on him receiving visits from his relatives.

235. The Court notes the CPT's recommendations that the applicant's relative social isolation should not be allowed to continue for too long and that its effects should be attenuated by giving him access to television and to telephone communications with his lawyers and close relatives. However, it is also mindful of the Government's concerns that the applicant may seek to take advantage of communications with the outside world to renew contact with members of the armed separatist movement of which he was the leader. It cannot be said that these concerns are unfounded. An added consideration is the Government's fear that it would be difficult to protect the applicant's life in an ordinary prison.

236. While it shares the CPT's concerns about the long-term effects of the applicant's social isolation, the Court finds that the general conditions in which he is being detained at İmralı Prison have not reached the minimum level of severity necessary to constitute inhuman or degrading treatment

within the meaning of Article 3 of the Convention. Consequently, there has been no violation of that provision on that account.

V. ARTICLE 34 OF THE CONVENTION

237. The applicant complained of being hindered in the exercise of his right of individual application in that his legal representatives in Amsterdam had not been permitted to contact him after his arrest and/or the Government had failed to reply to the Court's request for them to supply information. He alleged a violation of Article 34 of the Convention, which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

238. The Government's submissions were confined to the second limb of that complaint. They maintained that the refusal to grant Ms Prakken and Ms Böhler access to Turkish territory had been based on an administrative decision that was partly attributable to the fact that Ms Böhler had campaigned against Turkey's interests and attended meetings organised by the PKK. The Government added that at the time permission was refused neither Ms Prakken nor Ms Böhler had a special authority to represent the applicant before the Court. The authenticity of the sole authority they did possess was contested by the Government.

239. The Court is invited to decide whether the applicant was in practice hindered in the effective exercise of his right of application by the two matters to which he refers (see, among other authorities, *Cruz Varas v. Sweden*, 20 March 1991, Series A no 201, p. 37, § 104).

240. As regards the applicant's inability to communicate with his lawyers in Amsterdam following his arrest, the Court notes that he was not thereby prevented from lodging his complaints with the Court. A group of representatives composed of lawyers chosen by the applicant, including the lawyers in Amsterdam, subsequently applied to the Court and put forward all the applicant's allegations concerning the period in which he had had no contact with his lawyers (see paragraphs 5 and 7 above). There is therefore nothing to indicate that the exercise of the applicant's right to individual application was impeded to any significant extent.

241. As to the Government's failure to reply to the Court's second request for information, which was for details of the proceedings instituted against the applicant on an indictment calling for the death penalty, the Court notes, firstly, that its examination of that aspect of the case was to some extent delayed by the Government's refusal to furnish the requested information prior to the request for observations on the admissibility and merits of the application.

However, the Court finds, without prejudice to its views on the binding nature of interim measures under Rule 39, that in the special circumstances of the case that refusal did not amount to a violation of the applicant's right to individual petition for the following reasons: subsequently, as part of their observations on the admissibility of the application, the Government furnished the information the Court had requested (see paragraph 5 above). Furthermore, the Government's refusal to supply that information earlier did not prevent the applicant from making out his case on the complaints concerning the criminal proceedings that had been brought against him. Indeed, those complaints, which mainly concern Article 6 of the Convention, have been examined by the Court, which has found a violation as regards those points (see paragraph 169 above).

242. The Court also reiterates in that connection that the information requested from the Government concerned the fairness of the proceedings that could have led to the death penalty imposed on the applicant being carried out. As seen above in connection with the Court's analysis under Articles 2 and 3 (see paragraphs 184 and 185 above) the risk that the applicant would be executed has now effectively disappeared following the abolition of the death penalty in peacetime in Turkey and the decision of 27 December 2002 of the Constitutional Court.

243. In conclusion, the Court holds that there has been no violation of Article 34 *in fine*.

VI. OTHER COMPLAINTS

244. Relying on the same facts, the applicant also alleged a violation of Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken alone or together with the aforementioned provisions of the Convention.

245. Repeating the arguments set out above with regard to the other complaints, the Government submitted that those complaints too were ill-founded and had to be dismissed.

The applicant wished to pursue his complaints.

246. Having examined the complaints, which the parties did not expand upon in any detail in their oral submissions, the Court notes that they are based on virtually the same facts as those relied on in the complaints examined in the preceding parts of this decision.

Consequently, it considers that no separate examination of the complaints under Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken alone or together with the aforementioned provisions of the Convention, is necessary.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

247. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

248. The applicant made no claim for pecuniary or non-pecuniary damage. He asked the Court to afford him, if appropriate, an opportunity to lodge additional observations on this point in the event of any findings of a violation.

249. The Government made no observations on this point.

250. In view of the nature of its findings regarding the applicant's various allegations, the Court considers that the question of just satisfaction is ready for determination and that it is unnecessary to reserve it.

Having regard to the special circumstances of the case, the Court finds that any damage the applicant may have sustained has been sufficiently compensated for by its findings of a violation of Articles 3, 5 and 6 of the Convention.

B. Costs and expenses

251. The applicant claimed the sum of 485,802.69 pounds sterling (GBP) – 739,719.44 euros (EUR) – for the costs and expenses he had incurred for the seven lawyers and three trainee lawyers who had acted for him outside Turkey. That sum was made up as follows: GBP 413,099.38 (EUR 629,031.77) for the fees of the lawyers and their assistants, GBP 6,648.06 for costs of expert witnesses, GBP 42,267.30 for translation costs, GBP 14,607.82 for travel and subsistence and GBP 9,179.91 for sundry expenses.

In addition, for the costs and expenses of six of his lawyers in Turkey the applicant claimed the sum of GBP 264,531.70, broken down as follows: GBP 199,896.74 for lawyers' fees, GBP 51,248.24 for translation costs and sundry expenses, GBP 9,183.48 for travel in Turkey and GBP 4,203.24 for travel to and subsistence in Strasbourg. In addition, for one of his lawyers in Turkey, Mr Kaplan, the applicant sought GBP 28,000 for fees and GBP 15,000 for translation, travel and subsistence costs and sundry expenses.

252. The Government submitted that those claims were manifestly unreasonable, in particular as regards the amount of the lawyers' fees. Most of the observations made on behalf of the applicant by his lawyers did not concern the legal issues which the Court was invited to decide, but contained general political information and arguments about the situation of Kurds in Turkey that were widely available in general publications. The

Government also contended that the applicant had been represented by too many lawyers.

253. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (*Sunday Times v. the United Kingdom*, 6 November 1980 (*Article 50*), Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (*Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, 28 May 2002, § 27).

254. In the present case, the Court notes, firstly, that it has found a violation in respect of only some of the applicant's complaints under the Convention (see paragraphs 76, 110, 169 and 213 above). The Court therefore notes that not all the time for which the applicant's main lawyers claim remuneration was spent solely on the complaints in respect of which a violation was found.

Furthermore, the claims in respect of the applicant's representatives' fees relate to fourteen lawyers and three assistants. The Court considers that to have such a large number of representatives to plead the complaints that resulted in the finding of a violation was both excessive and unnecessary.

The Court also finds that the total costs claimed under this head are not costs which were necessarily incurred: it finds in this respect that part of the amounts claimed by the legal representatives for travel and consultations between themselves and with third parties were unnecessary for the presentation of the complaints that led to a finding of a violation.

255. Accordingly the Court considers that the applicant should only be reimbursed part of his costs incurred before the Court. Having regard to the circumstances of the case, the fee scales applicable in the United Kingdom and in Turkey, the complexity of certain issues raised by the application and ruling on an equitable basis, it considers it reasonable to award the applicant EUR 100,000 in respect of the claims made by all his legal representatives. That sum shall be paid into a bank account nominated by both Mr Hasip Kaplan and Mr Mark Muller, his Turkish and United Kingdom representatives respectively.

C. Default interest

256. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points (*Christine Goodwin v the United Kingdom* [GC], no. 28657/95, § 124, ECHR 2002-VI).

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection concerning Article 5 §§ 1, 3 and 4 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a remedy by which the applicant could have the lawfulness of his detention in police custody decided;

3. *Holds* unanimously that there has been no violation of Article 5 § 1 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention on account of the failure to bring the applicant before a judge promptly after his arrest;

5. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention in that the applicant was not tried by an independent and impartial tribunal;

6. *Holds* unanimously that there has been a violation of Article 6 § 1, taken together with Article 6 § 3 (b) and (c), of the Convention, in that the applicant did not have a fair trial;

7. *Dismisses* unanimously the Government's preliminary objections concerning the applicant's complaints relative to the death penalty;

8. *Holds* unanimously that there has been no violation of Article 2 of the Convention;

9. *Holds* unanimously that there has been no violation of Article 14 of the Convention, taken together with Article 2 as regards the implementation of the death penalty;

10. *Holds* unanimously that there has been no violation of Article 3 of the Convention as regards the complaint relative to the implementation of the death penalty;

11. *Holds* by six votes to one that there has been a violation of Article 3 as regards the imposition of the death penalty following an unfair trial;

12. *Holds* unanimously that there has been no violation of Article 3 of the Convention, both as regards the conditions in which the applicant was transferred from Kenya to Turkey and the conditions of his detention on the island of İmralı;

13. *Holds* unanimously that no separate examination is necessary of the applicant's remaining complaints under Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken individually or together with the aforementioned provisions of the Convention;

14. *Holds* unanimously that there has been no violation of Article 34 *in fine* of the Convention;

15. *Holds* unanimously that its findings of a violation of Articles 3, 5 and 6 of the Convention constitute in themselves sufficient just satisfaction for any damage sustained by the applicant;

16. *Holds* unanimously
    (a) that the respondent State is to pay the applicant's lawyers in the manner set out in paragraph 255 of the present judgment, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 100,000 (one hundred thousand euros) in respect of costs and expenses, plus any value-added tax that may be chargeable;
    (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

17. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and French, the English text being authentic, and notified in writing on 12 March 2003, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Türmen is annexed to this judgment.

E.P.
M.O.B.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEN

I regret that I am unable to share the opinion of the majority that there has been a violation of Article 6 in that the Ankara State Security Court which convicted the applicant was not an independent and impartial tribunal and of Article 3 due to the imposition of the death penalty following an unfair trial.

Article 6. Independence and impartiality of the Ankara State Security Court.

During the proceedings before the State Security Court, the applicant stated clearly and unequivocally that he accepted the court's jurisdiction. In the judgment (see paragraph 116), the majority finds that this statement cannot be construed as a waiver by the applicant of his right to an independent and impartial tribunal for two reasons:

(a) His lawyers challenged the independence and impartiality of the Court.

(b) Accepting jurisdiction does not entail accepting that the court is independent and impartial.

In my opinion neither reason is well-founded. In the first place, it is the applicant who has been tried by the State Security Court, not his lawyers. What is at issue is whether the applicant has legitimate cause to fear that the tribunal is not independent and impartial (see, for example, *İncal v. Turkey*, *Reports* 1998-IV, § 71). The lawyers are his representatives hired by him. The Court's judgment cannot be based on the opinion of his lawyers when there is a clear statement from the applicant.

Secondly, the applicant could have said the opposite or just remained silent on this issue. However, he chose to make a deliberate statement expressing his trust in the Court and thereby his trust that he would be receiving a fair trial. How is it possible to expressly trust a Court and at the same time refuse to accept that it is an independent and impartial court, as suggested in the judgment?

On the other hand, the present case is different from the cases referred to in the judgement. It is distinguishable on the facts: even though a military judge was on the bench of the State Security Court at the beginning of the proceedings, it was composed of three civilian judges when it delivered its judgement convicting the applicant. Following constitutional amendments, the military judge was replaced by a civilian judge before the defence made their submissions on the merits of the case, that is to say before the “trial” stage of the proceedings ended. The substitute judge (a civilian judge) had followed the proceedings from the beginning. On becoming a full member

of the court, he could have requested an extension of the investigation stage of the proceedings to enable further evidence to be gathered. Furthermore, once a full member of the court, he was entitled to take part in the examination of any defence application for additional investigations. Subsequently, the decision to end the investigation stage was taken by three civilian judges. They deliberated on the issue of the applicant's guilt and delivered their verdict. Moreover, the civilian judge was not bound by procedural decisions taken earlier with the participation of the military judge.

In these circumstances, the facts of the present case are distinguishable from those examined in the *İncal* and *Çıraklar* cases. Since the applicant was convicted by three civilian judges, the military judge who sat at the beginning of the trial was replaced by a civilian judge before the procedural "trial" stage had ended and that judge was entitled to require further investigations if he considered it necessary, the applicant cannot reasonably contend that he had legitimate cause to fear that the independence and impartiality of the State Security Court which convicted him had been affected by the military judge's presence during the initial stage of the proceedings.

In a similar case, *İmrek v. Turkey* (dec.), no. 57175/00, 28 January 2003) in which the military judge was replaced by a civilian judge after the constitutional amendment, the Second Section found the complaint in connection with the independence and impartiality of the State Security Court inadmissible. Both in *Öcalan* and *İmrek*, the military judges were replaced before the trial stage of the proceedings had ended and before the defence had made their submissions on the merits of the case.

As to the argument that until he was replaced the military judge had influenced the other members of the State Security Court by his comments, it should be mentioned that under Turkish criminal procedure opinions expressed by judges in votes on decisions and verdicts are matters of public record and their holders readily identifiable. When decisions are taken on a majority vote, the judges in the minority express a dissenting opinion in the decisions concerned. Such a system substantially reduces the influence which judges may exercise on each other during deliberations.

On the other hand, the State Security Court which convicted the applicant was composed of professional judges who had reached the highest judicial rank. Judges of that level and experience are better equipped than anyone to resist the influence of their colleagues or of the outside world. In these circumstances, since the military judge could not exercise any influence either before or after his departure, the personal independence and impartiality of his civilian colleagues could not have been affected.

Article 3. Death sentence following an unfair trial.

I agree with the majority that following the abolition of the death penalty in Turkey, the applicant's complaints under Articles 2, 3 and 14 regarding the implementation of the death penalty must be rejected.

I also agree with the analysis made in the judgment on the relationship between Article 2 and Article 3 to the effect that, if Article 2 permits capital punishment, Article 3 cannot be interpreted as prohibiting the death penalty as this would then nullify Article 2 (see paragraph 189 of the judgment).

It is true that all Contracting States have now signed Protocol No. 6 and 41 of them have ratified it. However, such a development cannot be taken as signalling the agreement of the Contracting States to abrogate the exception in Article 2 § 1. The existence of such an agreement would require clear evidence over and above the uniform amendment of penal policy in favour of abolition.

Such evidence is, however, lacking. It still remains the practice of the States to amend the Convention in pursuit of their policy of abolition by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The most recent example is the opening for signature of Protocol No. 13 to the Convention, which amends the Convention by providing for the abolition of the death penalty in all circumstances – that is to say, both in times of peace and times of war.

In the Preamble to Protocol No. 13, the Member States of the Council of Europe signatory to the Protocol indicate their wish to strengthen the protection of the right to life in the Convention, expressly take note that Protocol No. 6 does not exclude the death penalty in respect of acts committed in time of war and resolve to take the final step in order to abolish it in all circumstances.

Such language runs directly counter to the suggestion that the States have, through their practice, already taken “the final step” towards abolition. In reality there is no basis for the view that this new Protocol represents the treaty confirmation of any previous agreement between the States to complete the abrogation – only partially achieved in Protocol No. 6 – of the exception contained in Article 2 § 1. Against such a clear background, the conclusion reached in the judgment that the exception in Article 2 § 1 is abrogated is not tenable.

Accordingly, Article 2 § 1 must still be read as permitting the imposition of the death penalty. It follows that the death penalty is not prohibited by Article 3 and cannot be considered *per se* and without more to constitute an inhuman and degrading punishment.

The judgment holds the view that “the States have agreed through their practice to modify the second sentence in Article 2 § 1 in so far as it permits capital punishment in peacetime. Against this background ... the

implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3".

According to this view, Article 2 still permits death penalty in wartime.

The logical conclusion would then be that the death penalty constitutes a breach of Article 3 in peace time but not in wartime (because it is permitted in Article 2). However, Article 3 contains an absolute guarantee against torture and ill-treatment. Even in wartime, torture and ill-treatment are prohibited under Article 3. Therefore, the analysis in the judgment regarding the relationship between Articles 2 and 3 is not compatible with Article 3.

Imposition of the death penalty *per se* does not give rise to a breach of Article 3 (see *Soering*, Series A no. 161, § 103). This seems to be accepted also by the majority as the judgement is confined to death penalty following an unfair trial, that is to say a combination of Articles 6 and 3 of the Convention. The majority in fact came to the conclusion that "the imposition of the death sentence on the applicant following an unfair trial amounted to inhuman treatment in violation of Article 3 (see paragraph 213 of the judgment).

It must be underscored at the outset that the applicant has not made a complaint to the Strasbourg Court to this effect. The applicant's submissions were that a death sentence (and/or its execution) amounted to an infringement of the first sentence of Article 2 and inhuman punishment under Article 3. The applicant also complained under Article 2 that he had been sentenced to death at the end of criminal proceedings which had breached Articles 5 and 6 in several respects. However, the applicant in his written or oral submissions never claimed under Article 3 that he felt fear and anguish due to the unfairness of the criminal proceedings which resulted in a violation of Article 3, that is to say a complaint that combines Articles 3 and 6.

The admissibility decision of 14 December 2000 is based upon the complaints contained in the application.

Even if we accept that the Court has decided *ex officio* to examine Article 3 combined with Article 6, it would be difficult if not impossible to do so due to the nature of Article 3. Inhuman treatment within the meaning of Article 3 is based on a subjective concept, that is to say fear and anguish felt by the applicant that reaches the threshold level required by Article 3. In the absence of such a complaint, it is not possible for the Court to stand in the applicant's shoes and decide *ex officio* that there has been a violation of Article 3 in reliance on the assumption that the applicant must have felt such fear and anguish.

Moreover, it is established in the case-law of the Court that the burden of proof lies with the applicant. The applicant must show beyond reasonable doubt that he has suffered fear and anguish that reaches the threshold level required by Article 3. "... [T]he Court considers that it should accept, ...on the basis of the evidence which it has examined that the Commission could

properly reach the conclusion that the applicant's allegations were proved beyond reasonable doubt, it being recalled that such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences...” (*Selmouni* v. *France* [GC], no. 25803/94, ECHR 1999-V, § 88). The exception to this principle is where the applicant has sustained unexplained injuries while in under police custody.

For a threat to constitute an inhuman treatment there must be a “real risk”. A mere possibility is not in itself sufficient (*Vilvarajah v. the United Kingdom*, 30 October 1991, Series A no. 215, § 111). The threat should be “sufficiently real and immediate” (*Campbell and Cosans v. the United Kingdom*, 25 February 1982, Series A no. 48, § 26). “It must be shown that the risk is real” (*H.L.R. v. France*, 29 April 1997, *Reports* 1997-III, § 40).

In the present case, there is no ground to believe that there was a real and immediate risk that the applicant would be executed, for the following reasons:

(a) In Turkey, the death penalty has not been executed since 1984.

(b) The Turkish Government with an official communication sent to the Court, accepted the Rule 39 decision of former Section I and stayed Mr Öcalan's execution (see paragraph 5 of the judgment).

(c) In compliance with the Rule 39 decision, the Government did not send his file to the Parliament for the death sentence to be approved (under the Turkish Constitution, the death penalty may be executed only after the Parliament adopts a law approving the sentence). In other words, the process of execution never started. Under such circumstances, it is not possible to conclude that a real threat of execution existed for Mr Öcalan in the period between the Turkish Court's decision and the abolition of the death penalty in Turkey.

In *Soering*, the Court ruled, *mutatis mutandis*, that there was no inhuman treatment as long as the Government complied with the interim measure indicated by the Strasbourg organs (*Soering*, § 111). The same considerations must apply in the present case. As the Government agreed to comply with the Rule 39 decision, there has never been a “sufficiently real and immediate” threat of execution for the applicant.

In *Çınar v. Turkey* (application no. 17864/91, Commission decision of 5 September 1994, (DR) 79-B, p. 5), the applicant claimed that there had been a violation of Article 3, because his death sentence, which became definitive on 20 October 1987 was submitted to the Grand National Assembly for approval and the Grand National Assembly did not take any decision until 1991. He was therefore exposed to the death-row phenomenon.

The Commission rejected this claim on the ground that the death penalty has not been executed in Turkey since 1984 and the risk of the penalty has been illusory.

I cannot accept the majority's opinion that in the present case the risk of execution for the applicant was more real than in Çınar.

In *Çınar*, the applicant's file was submitted to the Turkish Parliament. The Parliament, as in all other death-penalty cases, has not taken any action on it. It has always been possible, however theoretical it may be, for the Parliament to take a decision approving the national court's judgement.

In the present case, the Government have not forwarded the applicant's file to the Parliament in compliance with the Strasbourg Court's interim-measure indication. The Government indicated that it considered the Strasbourg proceedings as part of the proceedings against the applicant.

The applicant's political background did not increase the risk of execution, as is suggested in the judgment. On the contrary, it made him less vulnerable because of the political ramifications of his execution. The fact that there has been a quasi-consensus among all political parties in the Parliament not to execute, confirms this view. For the same reason, the "political controversy" mentioned in the judgment (see paragraph 210) does not reflect the reality. The political consensus in the Parliament is evident from the fact that the same Parliament abolished the death penalty on 9 August 2002 with a large majority.

Furthermore, in the circumstances of the case, the unfairness of the proceedings did not have any effect on the outcome of the trial. As stated in paragraph 35 of the judgment, during the trial the applicant accepted the main charge against him under Article 125 of the Turkish Penal Code, that is to say pursuing an act aimed at separating a part of state's territory. Mr Öcalan accepted political responsibility for the PKK's general strategy as its leader. He accepted that he envisaged establishing a separate State on the territory of the Turkish State. He knew what the charge against him was and the penalty for it. (There is only one penalty in Article 125 of the Turkish Penal Code). He also stated expressly that he accepted the State Security Court's jurisdiction. Therefore, even if all Article 6 requirements were fulfilled, the sentence would not have been different.

Therefore, there is no causal link between the unfairness of the criminal proceedings and the threat of execution.

Finally, in the case-law the Strasbourg organs have rejected the claims that non compliance with Article 6 requirements by the respondent State leads to a violation of Article 3.

In the case of *Altun v. Federal Republic of Germany*, (application no. 10308/83, Commission decision of 3 May 1983, (DR) 36, p. 209), the Commission examined the applicant's allegation that he might be tried under a procedure that did not comply with the guarantees laid down in Article 6 of the Convention and came to the conclusion that even supposing that the allegation was not entirely unfounded, "it would not in itself make extradition appear as an inhuman treatment".

In *Soering* too, the applicant claimed that on his return to the United States, under Virginia law, he would not be able to secure his legal representation, as required by Article 6 § 3 (c). This claim was examined by the Court under Article 6, taken alone, not together with Article 3.

In conclusion:

(1) Imposition of the death penalty *per se* does no lead to a breach of Article 3.

(2) Imposition of the death penalty following an unfair trial does not constitute a violation of Article 3 for the following reasons:

(a) In the present case there is no causal link between the unfairness of the proceedings and Article 3.

(b) The applicant did not claim that due to the unfairness of the proceedings he felt a fear and anguish that reached the threshold level required by Article 3.

(c) Fear and anguish are subjective feelings. In the absence of such a complaint, it is wrong for the Court to stand in the applicant's shoes.

(d) There has never been a real and immediate risk of execution, as the Government complied with the Rule 39 decision of the Chamber and did not send the applicant's file to the Parliament.