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UDLÆNDINGESERVICE

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Notat om muligheden for en retfærdig rettergang i Tyrkiet

Reformer

Siden 2002 har Tyrkiet gjort betydelige fremskridt i forsøget på at tilnærme sig EU standarderne på retsområdet. AK-parti regeringen har gennemført de mest omfattende reformer i Tyrkiet siden Atatürk:

- Dødsstraffen er blevet ophævet
- Kurdisk må anvendes af radio- og tv stationer. Der må undervises i kurdisk udenfor det offentlige skolesystem
- Menings- og forsamlingsfrihed er blevet lovfæstet
- Lovgrundlaget for foreninger og religiøse sammenslutninger er blevet styrket.
- Det er blevet sværere for myndighederne at forbyde politiske partier og politiske aktiviteter
- Højere erstatning til ofre for konfrontationer mellem sikkerhedsstyrkerne og illegale organisationer
- Statssikkerhedsdomstolene er blevet ophævet
- Internationale, herunder europæiske konventioner, har fortrinsret frem for tyrkisk lov
- En nul-tolerance politik overfor myndighedernes brud på menneskerettighederne
- En ny straffelov, en ny retsplejelov og en ny lov vedrørende eksekveringen af domstolsbeslutninger trådte i kraft den 1. juni 2005.

Strafferetsreformerne styrker hovedsageligt kvinders og børns rettigheder og fokuserer mere på betydningen af menneskerettigheder. Der er sket en væsentlig forhøjelse af straffene for f.eks. voldtægt, seksuel misbrug af mindreårige, menneskesmugling, mishandling af indsatte i fængslerne og æresdrab. Arrestanter har fået deres rettigheder udvidet, og politiets magtudøvelse er blevet begrænset.

Hovedelementerne i den nye straffelov er følgende:

- bestemmelser, der foreskriver alvorlige straffe for myndighedspersoner, der begår tortur. En person, der torturerer en anden person til døde, vil få livsvarigt fængsel
- æresdrab straffes som et almindeligt drab.

Siden oktober 2004 er mere end 12.000 fængslede blevet løsladt før tiden. Det svarer til 1/7 af alle indsatte.

Hovedelementerne i den nye strafferetsplejelov er følgende:

- Oprettelse af en ny appelinstans
- Retten kan nu afvise en sigtelse, der ikke er velbegrundet
- Dommere, der har været indblandet i tidligere processer mod en anklaget, kan ikke deltage i en ny sag mod vedkommende
- Et domstolspoliti er blevet oprettet. Skal hjælpe anklagemyndigheden i særlige sager
- En arrestants rettigheder udvides: Enhver arrestant skal oplyses om muligheden for ikke at tale og at få tilkaldt en advokat
- Årsagerne til arrestationen skal tydeligt fremgå.

De tyske udlændingemyndigheders vurdering af nul-tolerance politikken overfor tortur (rapport af december 2005)

"AK-parti regeringen har anvendt alle lovmæssige muligheder for at forhindre tortur. Hårdere straf til dem, der torturerer. De bliver anklaget/sigtet direkte uden indblanding fra de pågældendes overordnede. Der er udstedt cirkulære til statsadvokaterne om at prioritere tortursager højest. Lægeundersøgelse af indsatte i politiets varetægt og bedre muligheder for forsvarsadvokaterne. Det er dog ikke lykkedes for regeringen at udrydde tortur. Det er heller ikke lykkedes at gennemføre så mange straffesager mod dem, der torturerer, som planlagt. Det er dog opmuntrende at se, at færre og færre personer, der er anklaget for tortur, får held med at undgå sigtelse/anklage, og at appelretten i mange sager har forhøjet straffen for tortur".

Tyrkiske kriminaldomstole (1. instans)

Sulh Ceza Mahkemesi: Lokale kriminaldomstole for sager med strafmaksimum på 2 års fængsel.

Asliye Ceza Mahkemesi: Kriminaldomstole for sager med strafmaksimun på mellem 2 og 10 års fængsel.

Agir Ceza Mahkemesi: Kriminaldomstole for alvorlige forbrydelser, der straffes med mere end 10 års fængsel.

Specielle *Agir Ceza Mahkemesi (heavy penal courts)*: Efterfølgerne af statssikkerhedsdomstolene: Pådømmer sager vedrørende forbrydelser mod staten (landsfor-

ræderi, bevæbnet oprør, medlemskab og støtte til bevæbnede bander og narkotikahandel). Derudover sager vedrørende kriminalitet begået under undtagelsestilstand, terrorisme og organiseret kriminalitet. De specielle Agir Ceza Mahkemesi domstole findes i byerne: Adana, Ankara, Diyarbakir, Erzurum, Istanbul, Izmir og Malatya.

Tyrkiske fængsler

Fængslerne er administreret af Generaldirektoratet for Fængsler og Arresthuse under justitsministeriet. Fængselsloven af 1. juni 2005 regulerer forholdene i fængslerne.

En undersøgelseskommission fra Europa Parlamentet har gennemgået de tyrkiske fængsler. Man vurderede, at de såkaldte F-type fængsler, hvor blandt andet terrorister indsættes, havde samme standard som fængslerne i Centraleuropa for så vidt angår cellestørrelsen, hygiejnen, fritidsaktiviteter og sygdomsbehandling. Der var ikke beviser for behandling, der medførte brud på menneskerettighederne i fængslerne, som frygtet af tyrkiske menneskerettighedsorganisationer. De omtalte sultestrejkeaktioner vendt mod tilstanden i F-type fængslerne medførte ofte, at deltagere blev løsladt midlertidigt på grund af sygdomme (Wernicke-Korsakoff syndromet). Europarådet er involveret i bygningen af 2 mønsterfængsler i byerne Usak og Elazig.

Omkring 57.000 personer sidder for øjeblikket fængslet i Tyrkiet. Heraf er 3.700 idømt straf for terrorisme, 1.500 for organiseret kriminalitet. 2.400 er kvinder og 2.000 er unge mennesker.

Der findes følgende fængselstyper:

- Lukkede fængsler
- Sikkerhedsfængsler (F-type)
- Lukkede kvindefængsler
- Lukkede ungdomsfængsler
- Åbne fængsler
- Åbne reformfængsler for unge
- overvågningscentre.

Muligheden for at få en retfærdig rettergang i Tyrkiet

Det amerikanske udenrigsministeriums seneste menneskerettighedsrapport (bilag 1)

Det amerikanske udenrigsministeriums seneste menneskerettighedsrapport fra marts 2006 oplyser, at domstolene ikke kan anses for at være fuldstændigt uafhængige af den udøvende magt, idet visse beslutninger fra regeringen og Det Nationale Sikkerhedsråd kan opfattes som direktiver til domstolene. Ophobning af sager og langsomt arbejdende bureaukrati forhindrer, at antallet af sager mod

myndighedspersoner, der anklaget for tortur, gennemføres i et rimeligt tempo. Den anklagedes mulighed for at få en forsvarsadvokat udpeget af advokatrådet gennemføres i praksis. Anklagede har ret til sammen med sin advokat at være tilstede under retssagen. Anklagede og hans advokat kan frit udspørge anklagemyndighedens vidner. Anklagede og hans advokat har adgang til anklagemyndighedens oplysninger og bevismateriale. Den anklagede anses for at være uskyldig, indtil det modsatte er bevist. Den dømte har adgang til at appellere kendelsen. Retssager trækker ofte ud i meget lang tid. Tilståelse afgivet under angivet tortur anvendes undertiden, inden en undersøgelse af torturbeskyldninger er færdigbehandlet. I juni 2005 frikendte Den Høje Appelret en morddømt, idet pågældende ikke havde fået adgang til advokat under tilbageholdelsen, ligesom der var torturbeskyldninger. Den mest prominente rettergang mod en terrorist er fortsat sagen mod PKK's leder Abdullah Öcelan. Her har den europæiske menneskerettighedsdomstol vurderet, at Öcelan ikke fik en retfærdig rettergang, idet 1 af dommerne var en militærdommer, at Öcelan ikke fik adgang til advokat under tilbageholdelsesperioden, at der gik 7 dage inden han blev bragt for en dommer, og at han senere alene havde begrænset adgang til advokat.

EU-Kommissionens fremskridtsrapport om Tyrkiet (bilag 2)

Ifølge kommissionens fremskridtsrapport fra november 2005 er store juridiske reformer blevet gennemført i Tyrkiet. Men implementeringen er fortsat ikke fuldstændig gennemført. Selvom der er sket et drastisk fald i antallet af brud på menneskerettighederne, sker der fortsat krænkelser. Der er derfor fortsat behov for forandringer i Tyrkiet vedrørende meningsfrihed, religionsfrihed, fagforeningsrettigheder, kvinders rettigheder, kulturelle rettigheder og stærkere indgreb overfor tortur. Tyrkiet bør administrativ arbejde mere intensivt på at få reformerne til at virke. For så vidt angår retfærdig rettergang anfører kommissionen, at domstolenes uafhængighed er garanteret af forfatningen og i andre love. Den arresterede har krav på at få oplyst årsagen til arrestationen. Den arresterede skal bringes for en dommer indenfor 24 timer. §§ 36 og 141 i forfatningen garanterer retten til en retfærdig og offentlig retssag. § 182 i strafferetsplejeloven stipulerer, at retssager skal være offentlige. § 36 i forfatningen og § 150 i strafferetsplejeloven anfører, at alle sigtede har ret til en advokat udpeget af advokatrådet. Anklagede, der risikerer mere end 5 års fængsel, skal være repræsenteret af en advokat. Taler den anklagede ikke tyrkisk, har vedkommende ret til tolkebistand. Ifølge § 223 i strafferetsplejeloven kan der ikke idømme dobbeltstraf for den samme forseelse (ne bis in idem). Enhver anses for uskyldig, indtil det modsatte er bevist.

Amnesty International rapport om uretfærdige retssager i Tyrkiet (bilag 3)

Amnesty International har i en rapport af 7. september 2006 kritiseret Tyrkiet og finder fortsat ikke, at personer anklaget for terrorisme kan se frem til en retfærdig rettergang. De tyrkiske myndigheder kan ikke garantere adgang til tilstrækkelig juridisk bistand og lægebehandling. Der mangler tilstrækkelige undersøgelser af torturbeskyldninger. Der anvendes fortsat tilståelser afgivet under tortur. Der er meget lange forundersøgelser og meget lange sagsforløb, og der manglende opfølgning af kendelser fra Den Europæiske Menneskerettighedsdomstol (idet det er

alene sager påbegyndt efter 4. februar 2003, der efter kritik af ECHR bliver genoptaget i Tyrkiet). Amnesty henviser til følgende konkrete sager:

- Mehmet Aytunc Altay sagen, der blev påbegyndt i 1993, og hvor sagen fortsat verserer nu i Kassationsdomstolen (appelinstansen): Der mangler en uafhængig undersøgelse af torturbeskyldninger. Domstolen afviste et af forsvarets vidner. Domstolen anvendte tilståelse afgivet under tortur. Den dømte nægtet ny sag efter kritik fra ECHR. Sagen har varet 13½ år.

- Turgay Ulu sagen, der blev påbegyndt i 1996 og fortsat verserer nu i Heavy Penal Court: Manglende uafhængig undersøgelse af torturbeskyldning og en uafhængig lægeundersøgelse. Sagen har varet mere end 10 år. Nøglevidner nægtet fremmøde i retten.

- Mehmet Desde og 9 andre personer sagen, der blev påbegyndt i 2002. Sagen verserer fortsat ved en Heavy Penal Court: Der er anvendt tilståelser og lignende oplysninger opnået under tortur. Afvisning af forsvarerens vidner. Manglende adgang til advokathjælp mens de tilbageholdte var i politiets varetægt. Lægeundersøgelser ikke offentliggjort i sin helhed.

- Metin Kaplan sagen begyndt i 2004 og endnu ikke afsluttet: Manglende undersøgelse af torturbeskyldninger. Anvendelse af tilståelse afgivet under tortur. Rettens afvisning af at indkalde forsvarets nøglevidner.

- Sagen vedrørende 16 personer fra Sirnak, der blev påbegyndt i 2004 og endnu ikke afsluttet: Overskridelse af den tilladte tilbageholdelsestid. De tilbageholdte blev tvunget til skriftligt at acceptere manglende advokatbistand. Manglende undersøgelse af torturbeskyldning. Tilståelse og lignende oplysninger afgivet under tortur anvendt af retten. Positiv særbehandling af anklagemyndigheden og manglende kvalificerede tolkebistand.

Bilag 1 US State department Human Rights report 2005

" Denial of Fair Public Trial

The law provides for an independent judiciary; however, the judiciary was sometimes subject to outside influence. There were allegations of judicial corruption.

The law prohibits the government from issuing orders or recommendations concerning the exercise of judicial power; however, the government and the National Security Council (NSC), an advisory body to the government composed of civilian government leaders and senior military officers, periodically issued announcements or directives about threats to the government, which could be interpreted as general directions to the judiciary.

The High Council of Judges and Prosecutors was widely criticized for undermining the independence of the judiciary. The minister of justice serves as chairman of the seven-member high council, and the justice ministry undersecretary also serves on the council. The High Council (HC) selects judges and prosecutors for the higher courts and is responsible for oversight of the lower courts. The HC is located in the Ministry of Justice and does not have its own budget. While the constitu-

tion provides for job security through tenure, the HC controls the careers of judges and prosecutors through appointments, transfers, promotions, reprimands, and other mechanisms.

In February prosecutors opened a case against Ercan Yalcinkaya, former deputy secretary general of the high court of appeals, on charges of accepting bribes and trying to influence the court on behalf of organized crime figure Alaaddin Cakici. An Ankara court acquitted Yalcinkaya in June.

The judicial system is composed of general law courts; specialized heavy penal courts; military courts; the Constitutional Court, the nation's highest court; and three other high courts. The High Court of Appeals hears appeals for criminal cases, the Council of State hears appeals of administrative cases or cases between government entities, and the Audit Court audits state institutions. Most cases were prosecuted in the general law courts, which include civil, administrative, and criminal courts. In 2004 parliament adopted legislation providing for the establishment of regional appeals courts to relieve the high court's caseload and allow the judiciary to operate more efficiently. The courts were scheduled to begin operations in 2007.

The Constitutional Court examines the constitutionality of laws, decrees, and parliamentary procedural rules and hears cases involving the prohibition of political parties. If impeached, ministers and prime ministers can be tried in the constitutional court. However, the court cannot consider "decrees with the force of law" issued under a state of emergency, martial law, in time of war, or in other situations as authorized by parliament. Military courts, with their own appeals system, hear cases involving military law for members of the armed forces. Military courts can also hear cases involving crimes committed by both civilians and military personnel.

Administrative and bureaucratic barriers impeded prosecutions and contributed to the low number of convictions of security force personnel for human rights abuses. Under the law courts could not convict unless a defendant attended at least one trial session. Police defendants sometimes failed to attend hearings in order to avoid conviction; prosecuting attorneys claimed courts failed to make serious attempts to locate such defendants, even in cases where the defendants received salary or pension checks at their home address.

Under legislation enacted in June, a judge can bar an attorney from representing a client if the attorney comes under investigation for violating certain articles of the penal code.

Trial Procedures

There is no jury system; a judge or a panel of judges decides all cases. Trials are public. The law requires bar associations to provide free counsel to indigents who request it from the court, and bar associations across the country did so in practice. Defendants have the right to be present at trial and to consult with an attorney in a timely manner. Defendants or their attorneys can question witnesses for the prosecution and present witnesses and evidence on their behalf. Defendants and their attorneys have access to government-held evidence relevant to their cases. Defendants enjoy a presumption of innocence and the right to appeal.

The law provides for the right to a speedy trial; however, at times trials lasted for years (see section 1.d.). Proceedings against security officials often were delayed because officers did not submit statements promptly or attend trials. In some cases, such delays extended beyond the statute of limitations, causing the trial to end without a verdict.

The law prohibits the use of evidence obtained by torture in court; however, prosecutors sometimes failed to pursue torture allegations, and exclusion of evidence occurred only after a separate case on the legality of the evidence was resolved. However, in practice a trial based on a confession allegedly coerced under torture could proceed, and even conclude, before the court had examined the merits of the torture allegations.

In June the High Court of Appeals overturned a murder conviction reached by a court in Sinop Province on the grounds that police interrogated the defendant without granting him access to an attorney and there was evidence that the suspect had been tortured.

In May the ECHR Grand Chamber ruled that imprisoned PKK leader Abdullah Ocalan did not receive a fair trial during the proceedings that led to his 1999 conviction. The ruling upheld a 2003 decision by a lower ECHR body. The ECHR ruling was based in part on the fact that a military judge initially sat on the three-judge panel that tried Ocalan, although he was later removed. The court also determined that authorities denied Ocalan access to an attorney during his detention

period, improperly held him for seven days before taking him before a judge, and restricted his subsequent access to attorneys. At year's end there were no new developments in the case".

Bilag 2 EU-Kommissionens fremskridtsrapport fra november 2005 vedrørende Tyrkiet

"EU policies in the area of the judiciary and fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and high standards of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption. Member States must ensure the respect of fundamental rights and EU citizens' rights as guaranteed by the *acquis* and by the Charter of Fundamental Rights.

As regards **independence and impartiality of the judiciary**, various provisions of the Turkish Constitution guarantee judicial independence. Article 9 provides that judicial power 104 is exercised by independent courts. Under Article 138 judges are protected from receiving instructions, recommendations or suggestions that may influence them in the exercise of their judicial power. Furthermore, no legislative debate may be held concerning the exercise of judicial power in a pending trial, and both the legislative and the executive are required to comply with court decisions without alteration or delay. Article 140 requires judges to discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges. However, Article 40(6) provides that judges and public prosecutors are attached to the Ministry of Justice in so far as their administrative functions are concerned. These constitutional guarantees of an independent judiciary are reflected in various provisions of domestic law, including the Law on Judges and Public Prosecutors, the Criminal Procedure Law, the Civil Procedure Code and the Penal Code.

The High Council of Judges and Prosecutors is the supreme governing body of the judiciary. The judicial members of the High Council are appointed by the President of the Republic. The High Council is composed of five judges, the Minister of Justice and the Undersecretary of the Ministry of Justice. The High Council does not have its own secretariat or budget and its premises are inside the Ministry of Justice building.

The High Council of Judges and Prosecutors and the Ministry of Justice are responsible for the *appointment* of graduates of the Judicial Academy as judges and prosecutors. Graduates seeking entry to the judicial profession, as either judges or prosecutors, first take a written examination administered by the School Selection and Placement Centre which administers all examinations for entry to higher education institutes in Turkey. Candidates who pass the written examination are then interviewed by a panel composed of representatives of the Ministry of Justice, and the successful candidates are admitted to the Judicial Academy for two years' training. The oral examination enables the Ministry of Justice to exercise considerable influence over the recruitment of candidate judges and prosecutors. The High Council is also responsible for *transfers* between posts, *promotions*, the allocation of posts and the imposition of *disciplinary penalties* and *removal from office*. Appeals against decisions of the High Council are made to a twelve-person panel composed of the seven original Council members plus five alternate members.

Amendments to the Law on Judges and Prosecutors adopted by the National Assembly in June 2005 are intended to simplify the procedure for practising lawyers to become judges or prosecutors. Until the adoption of these amendments, practising lawyers had very rarely become judges. These amendments provide that lawyers under thirty-five with at least three years' professional experience can apply to take a written examination and an interview; successful candidates undergo six months training at the Justice Academy before admission as a judge or prosecutor.

Article 139 of the Constitution guarantees the *permanence of judicial office*, subject to certain limited exceptions, such as incapacity due to ill-health.

The draft law to establish an *association of judges* has not yet been adopted.

Although *salaries for judges and prosecutors* have been increased significantly in recent years, they nevertheless remain modest

In order to raise awareness of international *ethical standards*, the High Council of Judges and Prosecutors disseminated the United Nations Bangalore Principles of Judicial Conduct to all judges and prosecutors.

In relation to the **quality and efficiency of the judiciary**, The Ministry of Justice and the Judicial Academy, which was established in 2003, organised extensive *training* for judges and prosecutors on the Penal Code and the Code of Criminal Procedure, as well as in areas such as 105 human rights, asylum law, money laundering, trafficking in persons and intellectual property rights. The Judicial Academy has been responsible for training all candidate judges and prosecutors since 2004 and is gradually taking over in-service training of judges and prosecutors from the Ministry of Justice. The General Assembly of the Academy contains eight representatives of the Ministry of Justice and the Academy is largely funded by the Ministry. In the last academic year, the Academy trained 915 candidate judges and prosecutors.

All judges and prosecutors are *evaluated* regularly by judicial inspectors to assess their integrity, efficiency and quality. The inspectors are officials of the Ministry of Justice and submit their reports to the Ministry.

The *budget* of the Ministry of Justice was increased by 16.5% in 2005 compared to 2004. Nevertheless, expenditure on the judicial system remains low compared to the average in the EU Member States.

So far as *computerisation* is concerned, progress on the National Judicial Network Project which started in 1998 continued and it is now operational in a number of courts and prisons .

This Project enables many tasks currently performed on paper, such as filing court proceedings, to be performed electronically. A database including decisions of the Supreme Court of Appeal and the Council of State has been created and added to the network. Judicial records can now be accessed through the network by judges and prosecutors. In addition, most courts and prosecutors' offices in Turkey have been connected with each other online. The *number of judges and prosecutors* has remained largely stable; there are currently 5 952 judges and 3 179 prosecutors in service and a further 1 053 judges and prosecutors in training. A law adopted in December 2004 provided for the recruitment of 4 000 additional judges and prosecutors, 100 judicial inspectors and 6 619 court administrative staff. This recruitment would represent an increase of almost 50% in the number of judges and prosecutors in Turkey and would contribute significantly to reducing delays in court proceedings. However, concern has been expressed by the senior judiciary in Turkey that the influence of the Ministry of Justice in the recruitment of such a substantial number of additional judges and prosecutors may gravely undermine the independence of the judiciary.

So far as *duration of trials* before the Criminal courts is concerned, the average criminal trial period in 2004 was 210 days, while the average duration of civil proceedings was 177 days. The *backlog* of cases before the Criminal courts was slightly reduced in 2004; 1 070 133 criminal cases were carried over from 2003 to 2004, while 1 056 754 criminal cases were carried over from 2004 to 2005. The backlog of cases before the Civil courts also decreased slightly; 671 915 cases were carried over from 2004 to 2005, compared to 679 501 cases carried over from 2003 to 2004.

The new Code of Criminal Procedure grants prosecutors greater discretion to discontinue unmeritorious cases and enables judges to return indictments which are not based on sufficient evidence. These powers should increase the speed with which cases are tried by the courts, as they will enable clearly weak cases to be dropped at an early stage. Moreover, the system of plea bargaining has been introduced by the new Code of Criminal Procedure.

As regards **legal guarantees including access to justice**, so far as the prohibition of *arbitrary arrest* is concerned, Article 90 of the Criminal Procedure Code provides that persons who are arrested by the police must be informed of the reason for their arrest.

Article 141 of the Constitution limits the length of pre-trial *detention* by providing for the

right to be judged within a reasonable time. Under Article 91 of the Criminal Procedure Code, a person who has been arrested shall in general be brought before a court within twenty four hours; in exceptional cases, this period may be extended to a maximum of four days. A person who has been remanded in custody awaiting trial may be detained, under Article 102 of the Criminal Procedure Code, for up to six months if accused of a minor offence and two years if accused of a serious offence; in exceptional cases, this period may be extended to three years.
Article 38 of the Constitution provides for the *presumption of innocence* to be applied in criminal trials.
Article 36 and 141 of the Constitution guarantee the *right to a fair and public trial.* Article 182 of the Code of Criminal Procedure also provides for trials to be held publicly.

The *right of defence* is enshrined in Article 36 of the Constitution. The Code of Criminal Procedure regulates the use of legal counsel and the rights of defence in criminal investigations and during trials. The new Code substantially improves the rights of the defence. Article 150 of the new Code of Criminal Procedure provides that all accused persons may have access to a lawyer and that representation by legal counsel is mandatory, both during the investigation and the trial, for offences punishable by more than five years' imprisonment. Legal representation is also mandatory for minors, the deaf and persons of limited mental capacity. Article 147 of the Code of Criminal Procedure provides that detainees must be reminded of their right to have a defence lawyer present and that a lawyer may be appointed by the Bar Association. Bar associations have reported a 100% increase in the appointment of lawyers for accused persons since the entry into force of the new Code.

The provision of an interpreter free of charge for defendants and witnesses who cannot speak the Turkish language has been strengthened by the new Code of Criminal Procedure. Courts are now required to establish lists of expert witnesses, including interpreters, in their area of jurisdiction. However, as there are no interpreters trained in legal interpretation between Turkish and languages used by non-Turkish speaking ethnic groups in Turkey, there may still be difficulties in ensuring effective interpretation for the non-Turkish speaking population.
The new Criminal Code also introduces the principle of cross-examination, which strengthens the rights of the defence. Nevertheless, certain practices undermine *equality of arms.* The design of the court room, in which the prosecutor is seated on a raised platform next to the judges while defence counsel is seated at ground level, places the prosecution in a privileged position vis-à-vis the defence. Defence counsel experience difficulties in communicating with their clients both in the court house immediately before the trial (in part due to lack of suitable facilities) and in the court room during the course of the trial.

The principle of *legality of criminal offences* is set out in Article 38 of the Constitution and in Article 2 of the Penal Code.

The *non-retroactivity of penalties* is established in Article 38 of the Constitution and in Article 7 of the Penal Code.
Proportionality between the criminal offence and the penalty is guaranteed by Article 3 of the Penal Code.
The principle of *ne bis in idem* is established in Article 223 of the Code of Criminal Procedure.

In relation to **anti-corruption policy,** Turkey has ratified the Council of Europe Criminal Law and Civil Law Conventions on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials It. has joined the Group of States against Corruption (GRECO), which monitors compliance with Council of Europe anti-corruption standards. The UN Convention against Corruption has been signed but not yet ratified.
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The new Penal Code contains provisions concerning bribery, trading in influence, abuse of power and embezzlement. The Code also introduces the concept of liability of legal persons in cases of corruption. It contains detailed provisions concerning corruption in public procurement. As offences of corruption are now dealt with by the Code, the proposed law on corruption has been withdrawn. Despite the fact that the application of parliamentary immunity has been identified as a significant problem in the context of corruption in Turkish public life, no development can be reported in this area. No progress has been made concerning the transparency of the financing of political parties. Although public officials are

required to submit asset declarations, there is a need to extend the scope and frequency of declarations.

The Ethical Board for Public Servants started to operate in September 2004. A circular was adopted in 2004 instructing public bodies to cooperate fully with the Board. A regulation on the code of ethics for public employees was adopted in April 2005.
Responsibility for fighting corruption is currently split between several organisations, such as the Prime Ministry Inspection Board, Inspection Boards within each Ministry, the High Audit Board and the Public Procurement Authority. The functioning of inspection boards needs to be aligned with international best practices and their independence needs to be strengthened. The efficiency and effectiveness of various governmental, parliamentary and other bodies established to combat corruption remain a matter of concern. The consistency of the policies and the degree of coordination and cooperation are weak. Turkey is encouraged to strengthen the independence and effectiveness of anti-corruption bodies. Furthermore, dialogue between the government, public administration and civil society needs to be strengthened. In addition more action should be taken to raise public awareness of corruption as a serious criminal offence. Continuous support at the highest political level for the fight against corruption should be ensured.

As regards **fundamental rights,** Turkey became a member of the Council of Europe in 1949, shortly after the institution was founded, and ratified the European Convention on Human Rights (ECHR) in 1954. Individual petition has been possible since 1987. Turkey has ratified Protocols 1, 2, 3, 5, 6, 8 and 11 to this Convention.

A number of institutions have been established in Turkey to carry out work in the area of human rights. These include the Reform Monitoring Group, the Human Rights Presidency and the Parliamentary Human Rights Investigation Committee. In particular, the Human Rights Presidency has continued to intensify its work to provide training on human rights, process complaints and address specific cases. Nevertheless, the impact of the Presidency remains low as it has a limited budget, its role in relation to line ministries is poorly defined and it is not consulted on legislative proposals. From October 2004 to March 2005, the Human Rights Presidency and the provincial Human Rights Boards attached to the Presidency received complaints of human rights abuses from 565 individuals. This figure represents less than one complainant per board, suggesting limited awareness of the existence of the boards and/or low levels of trust. The local boards are also under-resourced and their effectiveness varies depending on the approach of the deputy governor chairing them. The Ministry of Interior's Investigation Office has received over 1000 complaints of human rights abuses since its establishment in 2004, although on only one occasion has an investigation led to disciplinary action being taken against a public official.

The *death penalty* in peacetime was abolished in August 2002 and in all circumstances in January 2004, when Turkey signed Protocol No 13 to the ECHR.

Most of the legislative and administrative framework prohibiting *torture and inhuman or degrading treatment or punishment* has been put in place and reports of torture and ill-treatment in Turkey are diminishing in most parts of the country".

Bilag 3 Amnesty International, Turkey: Justice Delayed and Denied. September 2006

"The persistence of protracted and unfair trials for those charged under anti-terrorism legislation

"It is said that the [State Security Courts] *were abolished but actually they were not. Only their names* [and] *the signs at the entrance changed and they became heavy penal courts equipped with special powers."*

Köksal Bayraktar, Professor of Law, Galatasaray University, Istanbul(1)

Introduction
Unfair trials continue to blight Turkey's human rights record. Despite recent reforms in law and practice, Amnesty International continues to have concerns about many aspects of the criminal justice system. One area of concern – the focus of this report – is criminal proceedings against

people charged under anti-terrorism legislation. Such individuals are tried in special Heavy Penal Courts, which replaced the State Security Courts after they were abolished in June 2004. Amnesty International is concerned about a pattern of unfair trial procedures, in particular in relation to people who were charged under previous legislation and whose trials began in the State Security Courts, but for whom the legislative changes and continuation of their cases in the special Heavy Penal Courts have not resulted in justice. Thus this report focuses on people charged between early 1993 and the end of 2004 whose cases are still ongoing. The report is based largely on research carried out in Turkey in 2005 and 2006, including the observation of trials before the special Heavy Penal Courts. A sample of cases were collected from lawyers in Istanbul, Ankara, Izmir and Diyarbakır, and the report includes five cases from amongst this sample which illustrate the concerns raised in full detail and makes mention in footnotes of other cases.

The report highlights the following violations of fair trial rights:

- Lack of safeguards during interrogation in the recent past: incommunicado detention (including denial of access to legal counsel) and inadequate medical examinations
- Failure to investigate allegations of torture or other ill-treatment in police or gendarmerie custody
- Continuing use of statements allegedly extracted under torture or other ill-treatment as evidence for prosecution and in on-going trial proceedings
- Denial of equality of arms and of the right to an effective defence
- Extremely prolonged pre-trial detention(2) in violation of the right to trial within a reasonable time or to release from detention
- Protracted criminal proceedings, in violation of the right to be tried without undue delay
- Failure of courts to conduct thorough, impartial and *de novo* examination of evidence and its application to law in retrials of cases following European Court of Human Rights rulings which have found Turkey in violation of fair trial provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Background

The abolition of the State Security Courts and their transformation into special Heavy Penal Courts must be viewed in the context of a period which has seen a series of amendments to the 1982 Constitution, followed up by reform packages – known as Harmonization Laws – which made adjustments to a large number of different laws. These were undertaken by the Justice and Development Party government and the government which preceded it over a four-year period in order to bring many aspects of Turkish law into conformity with international standards. The move was undertaken as a contribution towards fulfilling pre-established criteria in Turkey's bid for future accession to European Union membership.

Some of the reforms in the Harmonization Laws, together with the introduction of a new Turkish Penal Code and Criminal Procedure Code on 1 June 2005, directly affect the group dealt with in this report – those charged with offences punishable under anti-terrorism legislation. By way of an introduction to the recent reforms and Amnesty International's continuing concerns about fair trial, it is necessary briefly to summarize the background to the history of special courts for state-security-related offences.

Special courts for offences against state security

Since the 1980s, Amnesty International has repeatedly criticized unfair trial procedures in special courts in Turkey, whether military or state security.(3)

Under a new Constitution in 1982, the then military government established State Security Courts (Devlet Güvenlik Mahkemeleri) to try cases involving crimes against the security of the state, and organized crime.(4) The State Security Courts began to operate from May 1984 and replaced military courts which had been in operation during the martial law period.(5) They did not differ

substantially from military courts and most judges in the new courts had gained their experience from military courts. The main difference was that these courts were not within military compounds and existed only in eight (of then 67 and now 81) provinces.

In April 1991 the Law to Fight Terrorism (law no. 3713) entered into force and cases involving crimes against the security of the state were now punishable under this law. Individuals tried under the new anti-terrorism legislation now faced prison terms twice as long as those for comparable offences by ordinary criminal prisoners.(6)

Like the military court system, State Security Courts also failed to meet international standards of independence and impartiality. The panel of three judges in each State Security Court included a military judge. As armed forces officers, such military judges remained dependent on the military for salary and pension, subject to military discipline and therefore not independent of military control. In a number of cases the European Court of Human Rights has found the presence of military judges in the State Security Courts to be a violation of the fair trial principles set out in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The removal of military judges from the State Security Courts was prompted primarily by the trial of Abdullah Öcalan, captured leader of the Kurdistan Workers' Party (Partiya Karkeren Kurdistan, PKK). Concerned that the European Court of Human Rights might also find the trial of Abdullah Öcalan (whose first hearing was on 31 May 1999) unfair on these grounds, the then Turkish government took the step of removing the military judge from the bench.(7) Because the European Court of Human Rights has generally taken as its focus the presence of military judges in the State Security Courts to find a violation of fair trial principles spelled out under Article 6(1) of the ECHR, it has hardly ever dealt with other aspects of fair trial violations such as length of proceedings, also regulated in Article 6(1).(8)

In general, however, the removal of military judges failed to guarantee fair trials before State Security Courts. Civilian judges and prosecutors in these courts continued the same abusive practices and procedures. As with the military courts, evidence used in the State Security Courts was overwhelmingly confession-based with insufficient attention paid to other forms of evidence gathering, and convictions were often based on statements by defendants and witnesses allegedly obtained under torture or other ill-treatment.

In the context of a package of reforms to the Constitution passed in June 2004, the State Security Courts were formally abolished. The move was heralded by the government as a "turning point". After some uncertainty about their new name, the State Security Courts were transformed into Heavy Penal Courts. Heavy Penal Courts (*ağır ceza mahkemeleri*) already existed within the regular judicial system, but those that replaced the former State Security Courts were only competent to try cases involving organized crime, terrorism and state security. Though nominally integrated into the regular judicial system, these courts did not in fact deal with cases outside those areas.(9) Since the entering into law of a new Criminal Procedure Code on 1 June 2005, the official name for these courts has been "Heavy Penal Courts (competent to examine crimes under article 250 of the Criminal Procedure Code)".(10) Simply to distinguish them from the regular system of Heavy Penal Courts not competent to deal with terrorist offences or organized crime, this report will term the new courts "special Heavy Penal Courts". Since this report concerns trials of those suspected of politically motivated crimes, there is no discussion here of organized crime which also falls under the competence of the special Heavy Penal Courts.

The new special Heavy Penal Courts thus continued to try cases that had started before them when they were State Security Courts.

Amnesty International's concerns about special Heavy Penal Courts

Judges and prosecutors of the special Heavy Penal Courts are often the same individuals who presided over the same cases when they were before the State Security Courts, and lawyers have consistently complained to Amnesty International that there has been no change to the panel of judges they encounter during trial hearings. The new courts are still widely known by their old name.

A large backlog of cases from the State Security Courts was thus transferred to the special Heavy Penal Courts and the main argument of this report is that the new courts have failed to confront some of the most serious violations of the right to fair trial perpetuated in the earlier courts.

- ***Failure to investigate allegations of torture or other ill-treatment***

Since at least 1980 Amnesty International has raised the concern that many thousands of individuals in Turkey have been held incommunicado and interrogated without the presence of a lawyer and that many have been subjected to torture or other ill-treatment (as documented in numerous AI reports). The organization has consistently expressed grave concerns over the failure of Turkish governments to take measures to end the practice of torture and other ill-treatment and bring alleged perpetrators to justice.

Since coming to office in 2002, the Justice and Development Party government has continually avowed its commitment to a "zero tolerance for torture" policy, in the process acknowledging the legacy of torture in Turkey and passing legislation intended to tackle the systemic problems of torture or other ill-treatment in places of detention. Amnesty International considers that in spite of such a policy and the introduction of some important measures in this area, the government has failed to ensure that, where torture or other ill-treatment allegations are made, full and thorough medical examinations take place, allegations are fully, promptly, independently and impartially investigated, and appropriate steps taken to bring alleged perpetrators to justice.

In many reports Amnesty International has emphasized that the lack of medical reports consistent with the torture allegations cannot be taken as proof that torture was not applied. In its memorandum to the government of August 2005 (AI Index: EUR 44/027/2005) the organization urged that court decisions as to whether or not torture took place should also not be based on (possibly deficient) medical reports but should "*look beyond the medical reports drawn up during police/gendarmerie custody and ... take evidence from all persons concerned and arrange in good time for on-site inspections and/or specialist medical examinations*".

Amnesty International further stated: "*It is essential that, even in the absence of an express complaint, an investigation should be undertaken wherever there is reasonable ground to believe that torture or ill-treatment might have occurred according to Article 12 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which Turkey is a state party.*"

- ***Statements allegedly extracted under torture or other ill-treatment used as evidence in court***

Amnesty International remains extremely concerned that a "zero tolerance for torture" policy cannot be counted genuine unless concrete steps are taken to tackle the legacy of torture which persists in the present. There are two aspects to this: firstly, the overwhelming climate of impunity which continues to prevail in Turkey and which means that perpetrators of torture or other ill-treatment are rarely brought to justice, and, secondly – and of particular relevance in this report – the continuing reliance as evidence in court on statements (or rather "confessions") allegedly extracted under torture or other ill-treatment. Most of the cases included in this report entail strong allegations that statements extracted by these illegal means formed either the sole evidence or a major part of it.

The State Security Courts consistently failed to ensure the application of Turkey's obligations under international human rights law as well as relevant provisions in domestic laws relating to extracted testimonies. Amnesty International is concerned that the failure is being perpetuated in the special Heavy Penal Courts and that defendants continue to be sentenced on the basis of evidence extracted under torture or other ill-treatment ("torture evidence"). Most of the cases that were transferred from the State Security Courts to the special Heavy Penal Courts involve confession-based evidence allegedly extracted under torture or other ill-treatment of defendants or witnesses.

Amnesty International reminds the Turkish government of the absolute ban on the use of "torture evidence" in international and domestic law.

Turkey banned the use of "torture evidence" when in 1988 it ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Convention provides that states: "*shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction*" (Article 12), and also "*shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings...*" (Article 15).(11) Moreover, the UN Special Rapporteur on torture has said that "*where allegations of torture or other forms of ill-treatment are raised by a defendant during trial, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment."(12)*

Furthermore, in 1992, the Turkish government amended the then Criminal Procedure Code explicitly to include the requirement that statements by detainees or witnesses should not be made under duress: "*The statements of the defendant and the testifying person must reflect his own free will. Physical or emotional interventions such as ill-treatment, forceful administration of medicine, tiring or deception to hinder such a reflection, or the use of physical force or devices which distort the will are prohibited. No illegal advantage can be promised. Even if there is consent, testimonies extracted by use of the above-mentioned prohibited methods cannot be considered as evidence.*" (Article 135 (a) of the old Criminal Procedure Code; incorporated as Article 148 of the 2005 Criminal Procedure Code)

There have been instances of the Court of Cassation making exemplary rulings which demonstrate recognition of the ban on "torture evidence". These seem, however, to be rarely registered by lower courts. For example, a Court of Cassation ruling in 2003 quashed the conviction of two minors for supporting a terrorist organization on the basis that the sole evidence in the case consisted of statements made in detention which the defendants alleged in court had been extracted from them under torture. The Court of Cassation stated in this case: "*A decision to acquit must be given since beyond the statements in custody which the defendants later rejected sufficient, clear and believable evidence for conviction had not been presented*".(13)

There are also instances where the Court of Cassation has quashed convictions because the trial court did not wait for the outcome of separate trials of alleged torturers.(14) However, in the case of Mehmet Desde and others (see pp. 23-28 in this report) the Court of Cassation has so far ignored the fact that a separate trial is continuing against Mehmet Desde's alleged torturers.

In view of the prohibition on "torture evidence", Amnesty International remains dismayed by the widespread attitude of judges in the special Heavy Penal Courts: judges are consistently failing to take measures to initiate investigation into complaints of torture or to attempt to assess the admissibility of evidence allegedly obtained illegally. When defendants and/or their lawyers have alleged that statements have been extracted under torture and should not be used as evidence, the simplistic and straightforwardly erroneous response of some judges has even been to point out that there is no legal provision for the removal of documents constituting evidence from court files.(15)

Various reforms were introduced in a new Criminal Procedure Code, Law 5271 which came into force on 1 June 2005. One fundamental safeguard that was introduced provided that statements made to the security forces (police or gendarmerie) may not be used as evidence in court proceedings unless they are signed in the presence of a lawyer or confirmed in front of a judge: "*Statements to the security forces that have been signed in the absence of a lawyer cannot count as evidence unless they are repeated in front of a judge*" (Article 148). This reform was a major achievement and, if implemented, would mark significant progress in the campaign to end torture and other ill-treatment. However, it is not retroactive, so defendants in ongoing trials or even trials yet to commence may still be convicted on the basis of statements extracted under torture or other ill-treatment before 1 June 2005 when the presence of a lawyer was not required.

Amnesty International considers that as an urgent priority a systematic review of all pending criminal proceedings should be undertaken to determine all those cases where there are allegations that, during interrogation in the course of the initial investigation, statements by defendants or witnesses were illegally extracted through torture or other ill-treatment. The organization recommends that the Turkish authorities should then drop all cases where the main evidence against the defendant rests on "confessions" alleged to have been illegally extracted under torture or other ill-treatment.

- ***A return to incommunicado detention***

Among the rights of a person charged with a criminal offence Article 6(3)c of the ECHR defines the right *"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."* Turkey has taken a number of steps to bring its legislation in line with this provision and to ensure that detainees in police or gendarmerie custody have prompt access to legal counsel.

In March 1997, the Grand National Assembly of Turkey (GNAT) shortened the maximum incommunicado detention period for detainees in police or gendarmerie custody suspected of offences punishable under anti-terrorism legislation to four days. Detention in police or gendarmerie custody could be extended by order of a judge for a further six days in the eastern and southeast

provinces of the country under state of emergency, and for three days in the rest of Turkey. During these additional days the detainee was allowed access to legal counsel.(16)

The so-called Harmonization Laws, reform packages passed in order to bring Turkish law into conformity with international standards, resulted in a further limitation of the maximum period of detention and finally enabled all detainees (including those detained for terrorism-related offences) to have access to legal counsel from the first stage of investigation. The first reform package (Law No. 4744) passed on 6 February 2002 shortened the maximum detention period in the region under a state of emergency to seven days. The second package (Law No. 4748) was enacted on 9 April 2002 and removed the provision that a judge at a State Security Court could withhold certain information from the defendant and his lawyer until the first hearing of the case. The sixth reform package was enacted on 19 July 2003 and introduced the provision that all detainees have the right to legal counsel from the first moment of their detention. Finally, the new Criminal Procedure Code of 1 June 2005 introduced the provision (Article 148(4)) that statements to the security forces cannot count as evidence if they were signed in the absence of a lawyer, unless they are confirmed in front of a judge.

Unfortunately, many positive regulations including detailed rules set out in decrees and statutes have been ignored by security officials and complaints to prosecutors and judges have remained unaddressed. In some cases detainees have been officially registered as being in detention after several days of "unofficial" (unrecorded) detention (the case of the 16 people from Şırnak dating from November 2004 illustrates this point: see pp. 32-34), and in a great number of cases, detainees have not been granted access to legal counsel, even if they asked for it.

Amnesty International has also received complaints that blindfolded suspects were forced to sign papers stating that they did not wish to be represented by a lawyer without an opportunity to read the text.

In view of the continuing obstacles to detainees' access to legal counsel, therefore, Amnesty International is deeply concerned by the inclusion of a provision in newly passed anti-terrorism legislation which signals a return to incommunicado detention.(17) Although there has been no move to extend the detention period for those suspected of terrorist offences (which is currently 48 hours), Article 9 (b) of the new law (amending Article 10 of Law 3713) restricts the right to immediate access to legal counsel for those detained on suspicion of committing terrorism offences, specifying that, at a prosecutor's request and on the decision of a judge, a detainee's access to legal counsel may be delayed by 24 hours.

The right to immediate access to legal counsel has been one of the major gains of the reform process in Turkey and is set out in the Code of Criminal Procedures (Article 149(1)). The fact that incommunicado detention was effectively brought to an end through such a provision is of particular significance in a country in which allegations of torture and ill-treatment in police custody have been so widespread. Amnesty International is extremely concerned that in the Turkish context restriction of the right to immediate access to legal counsel for those suspected of terrorist offences may reverse the progress made in this area, and before the new law was passed strongly urged the Turkish government to withdraw a provision which compromises the avowed "zero tolerance for torture" policy.(18)

- ***Restrictions on the right to an effective defence***

Two further worrying provisions of the June 2006 revisions to the Law to Fight Terrorism are included in paragraphs (d) and (e) of Article 9 (amending Article 10 of the Law to Fight Terrorism).

Paragraph (d) allows for the defence lawyer to be restricted, on the request of the prosecutor and decision of a judge, from examining the contents of the file about a suspect and obtaining copies of documents. This applies in cases where it is deemed that full access to the file might "endanger the aims of the investigation" into the suspect. In other words the suspect's right to an effective defence, which includes the right to be granted access to appropriate information, is restricted. Amnesty International considers that this may seriously compromise the right of a suspect – if prosecuted – to receive a fair trial. In a fair trial, the defence and the prosecution must be treated in a manner that ensures that both parties have an equal opportunity to prepare and present their case ("equality of arms"). The right to adequate time and facilities to prepare the defence is an important aspect of this principle.

The right to an effective defence requires also that anyone accused of a criminal offence be able to

communicate in confidence with his or her lawyer. A further provision in paragraph (e) of Article 9 allows for, at the request of the prosecutor and on decision of a judge, the presence of an official during meetings between a person suspected of having committed a terrorist offence and their lawyer, and for a judge to be able to examine documents passed between them. This is stated as applying in cases where there is evidence of the defence lawyer acting as an intermediary between an organization and a suspect. Amnesty International considers that such a measure erodes the right to confidential communication between lawyer and client as outlined in the UN Basic Principles on the Role of Lawyers.(19) Moreover, the organization considers that the provision may conflict with Principle 18 of the Basic Principles on the Role of Lawyers which states: *"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."*

The principle of equal treatment by the court of prosecution and defence (equality of arms) is visibly and blatantly violated in all criminal courts in Turkey. Prosecutors enter and leave the court by the same door as the judges, and sit with them on the bench, raised above the floor of the courtroom where the defence and defendants sit. Such access to the judges and the difference in status gives the prosecution the opportunity to directly influence the judge. Some court decisions appear arbitrary and unfair. For instance, defence lawyers have stated that their requests to have prosecution witnesses brought to court to give testimony and to be cross-examined have been repeatedly rejected, in violation of the right of the defence to question witnesses against the accused (for a particularly striking example, see the case of Turgay Ulu on pp.21-23).(20)

In some cases, a defendant's right to participate fully in the proceedings and thereby to defend himself has been undermined by the failure of the authorities to provide qualified interpreters (see the case of the Şırnak 16, pp. 32-34). Among the short-term expectations expressed by the European Commission on 9 November 2005, the reforms of the judicial system in Turkey also included *"Enhance the opportunities for effective defence such as access to legal aid and qualified interpretation services."(21)*

Various reforms introduced in a new Criminal Procedure Code, Law 5271 which came into force on 1 June 2005, may contribute to strengthening the right to an effective defence. The principle of cross-examination has now been introduced into courts in Turkey and thus lawyers for the defence now can cross-question witnesses (Article 201 of the new CPC). The defence may now summon witnesses to testify, even if they have been refused by the court: *"If the presiding or single judge rejects the demand of a defendant or participant to hear a witness or an expert, the defendant or participant can bring the persons to court. They will be heard in the hearing."* (Article 178). (The cases of Metin Kaplan and Mehmet Desde and others in this report demonstrate how, despite this law, courts are still refusing to hear defence witnesses). The development itself must also be regarded as of limited significance since defence lawyers often want to hear witnesses for the prosecution as well as witnesses and experts testifying for the defence; the provisions of Article 178 do not address the failure or reluctance of the court to summon prosecution witnesses. (As mentioned above, the case of Turgay Ulu (pp. 21-23) illustrates the point most clearly.)

- ***Presumption of innocence undermined***

Everyone has the right to be presumed innocent and treated as innocent, until and unless they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness. Many defence lawyers have complained to Amnesty International that the principle of the presumption of innocence is often undermined when the court treats defendants who exercise their right to silence by refusing to give statements in police custody as indicative of links with a political organization.

The right to the presumption of innocence also applies to all public officials. Public authorities, particularly prosecutors and police, must not make statements about the guilt or innocence of an accused before the outcome of the trial. In some cases prejudicial public statements have been made about the accused before and during trials by senior police officers.

- ***Prolonged pre-trial detention and protracted proceedings***

The length of pre-trial detention and trial proceedings for those charged with offences punishable under anti-terrorism legislation in Turkey can in itself constitute a violation of the ECHR. Article 5(3) of the ECHR provides: *"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."*

Article 6(1) ECHR provides: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled* ***to a fair and public hearing within a reasonable time*** *by an independent and impartial tribunal established by law."* While Article 5(3) ECHR applies to the length of custody (at police or gendarmerie stations) and pre-trial detention, Article 6(1) mainly applies to the length of the proceedings.

While the ECHR does not provide a clear definition of what constitutes "a reasonable time", judgments by the European Court of Human Rights dealing with length of pre-trial detention provide guidance. In the case of *Batı and others v. Turkey*, for instance, the Court ruled that 20 months' pre-trial detention constituted a violation of Article 5(3).(22) Given that the trial in question was a complex one involving some 20 defendants, it becomes all the more astonishing to find that in equivalent or arguably much less complex cases in Turkey defendants continue to remain in pre-trial detention during prolonged trial proceedings for periods of over 10 years. (See the cases of Mehmet Aytunç Altay and Turgay Ulu, pp.18-23).

As mentioned above (pp. 3-4), in relation to Article 6 violations, the European Court of Human Rights has to date mainly ruled on the presence of a military judge on the bench in the State Security Courts (in cases up till June 1999) and has therefore rarely ruled on other violations of Article 6(1), such as protracted proceedings.

Amnesty International is concerned that in Turkey even trials involving a limited number of defendants can last for several years and sometimes for more than 10 years, and that during this entire process defendants remain in prison. The special Heavy Penal Courts, like the State Security Courts that preceded them, certainly have a heavy workload. The General Directorate of Criminal Registration and Statistics in the Justice Ministry listed over 11,000 cases each year between 2000 and 2004, peaking in 2001 with more than 13,000 cases. Divided among some 18 courts (in eight provincial capitals of Turkey) this means that on average each court has to deal with more than 600 cases each year.

However, it has become habitual to hold a maximum of one hearing per month (postponement of two or more months are not exceptional). The schedules do not take into account how and when defendants and/or witnesses will appear in court. Even defendants in pre-trial detention are often not taken to court, partly because of the distance of the prisons and partly out of general disorganization and negligence. There are many failures of communication between official institutions such as the security forces, the prison administration and also the forensic institute, and this undoubtedly also slows down the whole process.

Prosecutors and judges have often demonstrated an unwillingness to consider new evidence in favour of defendants, and the extremely lengthy periods of detention before and during trials constitute a clear violation of the right to liberty and the principle of presumption of innocence.

As originally drafted, the new Criminal Procedure Code proposed that the maximum length of custody in pre-trial detention and during trial should be two years for the most serious offences, without any provision for extension. This limit was set specifically to meet the requirements of European law and to address rulings against Turkey by the European Court of Human Rights.(23) However, as adopted by the Grand National Assembly, the Code allowed detention before and during trial for up to five years (Article 102(2)), and doubled this time limit for people tried in the special Heavy Penal Courts (Article 252(2)). Though an improvement on a situation which saw a complete lack of restriction on pre-trial detention periods or on length of proceedings for those facing prison sentences of over seven years, (24) this was an inadequate reform which failed to address the concerns of the European Court in its rulings. However, the implementation of even this flawed version of the original plan to impose a statutory limitation on pre-trial custody and length of proceedings would have resulted in the immediate release of several detainees already on trial for over 10 years. It came as a serious setback, then, when parliament subsequently delayed the provision's implementation until 1 April 2008, effectively giving the courts 13 years in some cases to complete long-running trials.(25)

Reminding the Turkish authorities of their obligation under the ECHR to ensure respect for the rights of all persons charged with a criminal offence to trial without delay, to completion of criminal proceedings within a reasonable time, and to release pending trial if the time deemed reasonable in the circumstances is exceeded, Amnesty International calls on the Turkish authorities to revise the law which sets a 10-year maximum period of pre-trial detention for persons being tried by the

special Heavy Penal Courts. Amnesty International views the not-yet-enforced law as inconsistent with Turkey's obligations to ensure completion of criminal proceedings within a reasonable time.

- ***Failure to conduct thorough and impartial retrials after European Court rulings finding Turkey in violation of fair trial principles laid out in the ECHR***

Rulings by the European Court of Human Rights in cases brought by individuals have played an important role in raising concerns with the Turkish authorities about the conduct of trials for those accused of crimes punishable under anti-terrorism legislation, and have influenced many of its recent legal reforms. In 1987, Turkey recognized the right of its nationals to make individual petitions to the Court.(26) In 1990 it accepted that the Court had compulsory jurisdiction, effective from 1991.

Since then, some 3,000 individuals a year have complained to the Court and a high proportion of its judgments have concerned Turkey.(27) This is despite the requirement that complaints can only be made to the Court if national remedies have been exhausted – and national court decisions not to charge or to acquit alleged torturers, for example, may take several years. Also, the Court will only consider a complaint of torture or other ill-treatment if medical reports exist to support such an allegation.

In 2002 Turkey gave many, but not all, of those convicted by a Turkish court the right to a retrial in Turkey if the European Court of Human Rights found a violation of the fair trial principles laid out in the ECHR in the first trial, and if the consequences could not be compensated monetarily.(28) While Amnesty International views the right to a retrial on this basis as a positive development, the organization considers that both the in-built restrictions, which mean that this law is applied selectively, and the practical implementation of this law to date, provide serious grounds for concern.

Regarding the selective application of the law on retrial following European Court of Human Rights judgments finding Turkey in violation of fair trial principles, Article 311, paragraph 2, provides that there will be no right to a retrial in Turkey for those cases pending before the European Court of Human Rights on 4 February 2003.(29) The motivation for this was to find a way to avoid the retrial of Abdullah Öcalan. The measure thus has a discriminatory effect on all the other cases which, along with that of Abdullah Öcalan, were pending at the Court on 4 February 2003. Amnesty International considers that the Turkish government should take immediate steps to amend Article 311(2) of the Criminal Procedure Code, so that all cases in which the European Court of Human Rights finds a violation of fair trial principles laid out in the ECHR should be provided with the right to retrial in Turkey.

The Committee of Ministers of the Council of Europe has challenged this denial of the right to retrial, referring to the case of *Hulki Güneş v. Turkey*. The European Court of Human Rights ruled that Hulki Güneş had been subjected to an unfair trial in Turkey.(30) Because the Court had delivered its judgment in June 2003, and the case had thus been pending at the Court on 4 February 2003, Hulki Güneş was automatically denied the right to retrial in Turkey. On 30 November 2005 the Committee of Ministers called on Turkey to redress the violations of the right to a fair trial found by the European Court of Human Rights in the *Hulki Güneş v. Turkey* case. Particularly in view of the life sentence Hulki Güneş had received and which he was serving, the Committee called for the reopening of the impugned criminal proceedings or other appropriate *ad hoc* measures to redress the violations found.(31)

Amnesty International's second major area of concern relating to this retrial provision lies in the practical implementation of the law to date. The first case of retrial following a European Court ruling (in July 2001) that the original Turkish court proceedings had violated the ECHR began in relation to four former Democracy Party (DEP) parliamentarians – Leyla Zana, Selim Sadak, Orhan Doğan and Hatip Dicle. They had received 15-year prison terms in December 1994 for membership of the PKK. Their retrial began at Ankara State Security Court No. 1 in April 2003, but on 21 April 2004 the court once again sentenced the four to 15 years' imprisonment for membership of the PKK in proceedings which Amnesty International considered to constitute a replay of the original trial, designed to uphold the original verdict.(32)

On 10 June 2004, the four former parliamentarians were released from prison, following the chief prosecutor's application to the Court of Cassation to quash the verdict of Ankara State Security Court No. 1. The Court of Cassation proceeded on 14 July 2004 to overturn the Ankara court's verdict and a second attempt at retrial of the four parliamentarians began at Ankara Heavy Penal

Court No. 11 (which had replaced the now abolished State Security Court) on 22 October 2004 and continues.

In April 2004, Amnesty International expressed concerns over the deficiencies in the first retrial of the four former DEP parliamentarians. Among the serious violations of the principle of fair trial noted were: the pre-formed opinion of the case by a chief judge and his opposition to retrial, despite which he continued to preside over the case, in violation of the presumption of innocence; repeated refusal of the court to release the four parliamentarians pending the court's verdict; and denial of right to cross-examine prosecution witnesses.(33) The progress of the second retrial of the four parliamentarians – now being tried in a special Heavy Penal Court – has to date been flawed. (34)

Amnesty International has come across another example of a retrial on the basis of European Court of Human Rights judgment which has been similarly mired with problems. The case of Mehmet Aytunç Altay in this report (see below) demonstrates: the failure of the court to re-examine original evidence; the refusal to guarantee the accused the right to have prosecution witnesses brought to court to testify and be cross-examined; the refusal to examine allegations that statements used as evidence in court were extracted by illegal methods; refusal to declare evidence inadmissible on such a basis. While, in a high-profile case, the four former parliamentarians were released from prison pending the verdict of their retrial after around nine and a half years in prison, Mehmet Aytunç Altay has remained in prison. Amnesty International considers that refusal by courts of all requests by a defence lawyer for his client's release through two protracted retrial attempts constitutes a grave violation of principles of fair trial.

Cases illustrating violations of the right to fair trial
The cases included here are on-going in the special Heavy Penal Courts or have gone to appeal at the Court of Cassation. All cases but the last began in State Security Courts. They have been included here to illustrate starkly the extent of violations of fair trial rights in Turkey.

The case of Mehmet Aytunç Altay

- failure to independently investigate allegations of torture or ill-treatment in police custody
- court's rejection of defence requests that prosecution witness be heard in court
- admission of evidence allegedly obtained under torture or ill-treatment as sole evidence
- two failed attempts at retrial on the basis of European Court judgment
- 13 and a half years in pre-trial detention and trial is ongoing

The case of Mehmet Aytunç Altay is one of the most long-running and disturbing examples from Turkey reported to Amnesty International.

Mehmet Aytunç Altay was detained in Istanbul on 2 February 1993 on suspicion of being a leading member of an armed oppositionist organization, the Turkish Communist Party/Union-Union for Armed Action (TKP/B-SHB), and of having ordered acts such as robbery and bombings. He was interrogated for over two weeks at the Anti-Terrorism Department of the Istanbul Police Headquarters, where he maintained his right to remain silent and resisted pressure to sign a "statement"; he was given a medical examination on 15 February which documented injuries to the head, and was brought before a judge and placed in pre-trial detention on 16 February. On 4 March 1993, the public prosecutor at the Istanbul State Security Court formally charged Mehmet Aytunç Altay under Article 146/1 of the Turkish Penal Code for leading an armed group whose purpose was the destruction of the constitutional order. He was sentenced to death, commuted to life imprisonment, on 26 May 1994. On 2 June 1995 the Court of Cassation upheld that judgment. Mehmet Aytunç Altay and his lawyer appealed to the European Court of Human Rights.

On 11 May 1993 Mehmet Aytunç Altay lodged an official complaint, alleging torture by the police officers who had been on duty during his time in police custody. The medical report resulting from a medical examination on 15 February had recorded a pinkish scar, from a recent injury, measuring one centimetre on the left-hand side of the applicant's forehead and two scars measuring two and three centimetres in the region of his left temple. The public prosecutor forwarded Mehmet Aytunç

Altay's complaint to the Istanbul Governor's Office. The Governor instructed the chief of Istanbul Police to investigate the complaint of torture, but in a letter of 21 June 1993, the chief of Istanbul Police requested the Istanbul Governor to discontinue the investigation into the torture allegations on the grounds that there was insufficient incriminating evidence. The Governor granted that request, but Mehmet Aytunç Altay was not informed of the decision to drop the investigation.

Flawed retrial process after the verdict of the European Court of Human Rights
In his application to the European Court of Human Rights Mehmet Aytunç Altay complained that Articles 3, 5(3), 6(1) and 6(3)c of the ECHR had been violated. It took the European Court almost six years to reach a decision and, on 22 May 2001, the Court found violations of Articles 3, 5(3), 6(1) and did not therefore rule on Article 6(3)c. The court ordered Turkey to pay compensation of 110,000 French Francs to Mehmet Aytunç Altay.

Mehmet Aytunç Altay's lawyers applied for a retrial in Turkey and, on orders of the Court of Cassation, Istanbul State Security Court No. 2 had to hear the case again.(35)

The incriminating evidence against Mehmet Aytunç Altay consisted of statements by his co-defendants, Atilla Kaya (acquitted), Ramazan Macit and Metin Köseoğlu, and by Arif Şen (tried separately). All these defendants (or "witnesses") stated before the prosecutor and during court hearings that they had been tortured in police custody and forced to sign these statements while blindfolded.

Only one of the acts (robbery) of which Mehmet Aytunç Altay was accused had been committed after April 1991 (on 31 May 1991). This is of vital importance, because for all offences committed before 8 April 1991 sentences were subject to reductions of one-fifth or one-third depending on the charge.(36) Had Mehmet Aytunç Altay not been implicated in the 31 May incident, the life sentence he received would have been reduced to eight years' imprisonment and he would have been released in early 2001.

The only incriminating witness for this incident of robbery (stealing a car on 31 May 1991) was the alleged co-offender: Arif Şen. Arif Şen had been tried separately at Istanbul State Security Court No. 1 but had not been sentenced for a political offence such as membership of an armed gang, but rather for the criminal offence of robbery. The verdict against Arif Şen was delivered on 13 October 1994, some five months after the verdict against Mehmet Aytunç Altay and the others.

During the first trial, the defence had repeatedly asked to combine the cases or at least to hear the testimony of this "witness" in court, but the Court had constantly rejected this demand in the hearings leading up to the first verdict.

During the retrial at Istanbul State Security Court No. 2, Arif Şen was heard as a witness at the hearing of 30 October 2003. He testified that his statement to the police had been extracted under torture, that he had not committed that crime and at the time in question he had not even known Mehmet Aytunç Altay. The testimony of Arif Şen did not change the Court's attitude, because once again the request to release Mehmet Aytunç Altay on bail pending completion of the trial was denied.

Further to this, after at least seven hearings at the court which had previously been Istanbul State Security Court No. 2 and had become Istanbul Heavy Penal Court No. 10, the court decided on 9 December 2004 that there were no grounds for a retrial. It called the defendant a convicted prisoner, whose sentence had been confirmed. The Court argued that the European Court had only found violations regarding the length of police custody and the presence of a military judge. It held that the conditions of Article 327(a) of the old Criminal Procedure Code had not been fulfilled (retrial only if damage cannot be compensated with money).
Appealing against the court's decision not to continue the retrial, Mehmet Aytunç Altay's defence lawyer presented his case on 3 January 2005, arguing that even though Mehmet Aytunç Altay had been held for 15 days in incommunicado detention and subjected to torture or other ill-treatment, he had not signed any statement to the police. The sole incriminating evidence against his client consisted of the statements of three defendants tried alongside Mehmet Aytunç Altay – of whom one was acquitted – and a fourth defendant (Arif Şen) tried separately. All these defendants (or "witnesses") had subsequently stated during their statements to the prosecutor and during court hearings that they had been tortured and forced to sign statements while blindfolded.

On 21 February 2005 the 9th Chamber of the Court of Cassation quashed the special Heavy Penal

Court's verdict stating that the lower court had to open the trial again and decide on confirmation or cancellation of the original verdict. Thus the case of Mehmet Aytunç Altay was submitted to a second retrial attempt.

During the second hearing of the second retrial attempt on 29 September 2005, Istanbul Heavy Penal Court No. 10 again ruled against a retrial with the same arguments and citing the same legislation as in the previous decision. Only the wording at the end was changed to make it appear as if the Court had confirmed its own verdict of 26 May 1994. As of 21 July 2006, the case was pending at the Court of Cassation.

Mehmet Aytunç Altay remains in Edirne F-Type Prison.

The case of Turgay Ulu

- failure to investigate allegations of torture in police custody, including denial of defence's request that defendant be medically examined after alleging torture in court
- prolonged pre-trial detention during protracted criminal proceedings (over 10 years)
- repeated failure by two courts over eight years to bring key prosecution witness (who allegedly identified the defendant from a photograph) to testify in court

Turgay Ulu (born 1973) was detained in Istanbul on 29 May 1996 and formally charged on 7 June after spending eight days in incommunicado detention with "attempting the violent overthrow of the constitutional order".(37) He was initially interrogated on charges of being an active member of the Marxist-Leninist Communist Party (MLKP), an armed organization formed in 1994. Once he was brought before the prosecutor and the arresting judge he was also confronted with separate charges relating to alleged activities on behalf of another armed political organization. Thus, although he had not been interrogated for activities on behalf of the Revolutionary Communist Union of Turkey (TİKB), he was charged with involvement in an attempt on 13 March 1995 to free Kenan Güngör, an alleged member of the TİKB's central committee, from police custody, while the latter was undergoing a medical examination in Şirinevler, Istanbul. He denied involvement in the escape attempt and pointed out that he was almost blind – at the time of his detention, he had severe myopia (between minus eight and nine degrees). He was also separately charged with supporting the MLKP, although involvement in two ideologically unrelated armed organizations seems highly improbable.

The charge of support for the MLKP eventually resulted in a 45-month prison sentence under Article 169 ("aiding and abetting an illegal organization"). This sentence was upheld in the Court of Appeal and has now been served.

In the second case, concerning the attempt to free the alleged TİKB central committee member, the first trial began on 9 December 1996 before Istanbul State Security Court No. 6 with neither Turgay Ulu nor his co-defendant present. At the second hearing on 26 February 1997, Turgay Ulu denied the charges and said he had been tortured in police custody (he had made no "confession" under torture). The court denied a defence request that he be medically examined.

In the course of 12 hearings up to 21 October 1998, with significant delays the court managed to hear two of the three witnesses who had identified Turgay Ulu as the man they saw aiding Kenan Güngör in the failed attempt to escape. The two plainclothed police officers and a gendarme had reportedly identified Turgay Ulu from photographs said to be "albums of suspected TİKB militants" shown to them during the prosecutor's initial investigation. In court, along with all other witnesses to the original incident, the two police officers stated that Turgay Ulu was not the man they had seen. The third key prosecution witness – the gendarme – was not brought to court to testify in person, although on 21 October 1998 the court was informed of his whereabouts and that he was easily accessible since he was discharging his military service duties at Bayrampaşa Prison in Istanbul. Once again Istanbul State Security Court No. 6 refused to summon the gendarme witness.

Despite refusing to summon the gendarme witness, Istanbul State Security Court No. 6 denied Turgay Ulu release on bail, and now made the decision to send Turgay Ulu's case to Istanbul State Security Court No. 2 to have it combined with a separate trial of alleged TİKB members.

The separate trial, involving 21 defendants before Istanbul State Security Court No. 2, had already started in 1997. In 30 hearings over the next five years, the court failed to give any reason for repeatedly extending the detention of Turgay Ulu and other defendants. The member of the gendarmerie, the only remaining prosecution witness who could testify against Turgay Ulu, was never heard by the court. The only additional evidence against him was the testimony of two other defendants, who alleged they had been tortured into making 'confessions' to the police in which they had named a militant known as "Ulaş" as having participating alongside them in the Kenan Güngör incident. With no evidence to support it, the court decided that "Ulaş" was the code name used by Turgay Ulu. When the prosecutor in this trial summarized the merits of the case on 4 July 2000, he said of Turgay Ulu:
The defendant has at no stage admitted the crime. İsmail Altıntaş [one of the police officer witnesses in the original trial], *who testified that he had identified the defendant from photographs, said in court that he could not identify him and that the person in question had been heavier... It was concluded that clear, concrete and credible evidence that the defendant committed the crime does not exist.*

However, at the next hearing on 26 September 2000 the court rejected, without reason, Turgay Ulu's request for acquittal and release. Astonishingly, at a hearing on 17 May 2001, another prosecutor, while saying he was merely repeating the previous prosecutor, concluded that Turgay Ulu was guilty. On 26 April 2002 the court convicted him and sentenced him to death. The sentence was commuted to life imprisonment for good conduct.(38) Among the other defendants, four were convicted for membership of an illegal organization and sentenced to 12 years and six months' imprisonment, and five were sentenced to death, of whom three had their sentences commuted to life imprisonment.

The case file was sent to the Court of Cassation, where on 19 November 2002 the prosecutor asked that the verdict on Turgay Ulu be quashed for lack of evidence. In particular he criticized the failure to call the gendarme to testify in court and the arbitrary attribution of the code name "Ulaş" to different people. The Court of Cassation quashed the verdict for all the defendants on 12 May 2003 and ruled that a retrial should take place. The Court stated that the defendants had to be heard on all pieces of evidence, but omitted the detailed views of the prosecutor on Turgay Ulu.

A retrial started on 26 August 2003 at Istanbul State Security Court No. 2 (which became Istanbul Heavy Penal Court No. 10 in June 2004). During the eighth hearing on 14 July 2005, the defence demanded to hear the testimony in court of the gendarme who had originally identified Turgay Ulu, but the court rejected this demand with the same words used by the first court when extending his detention: "according to the contents of the file and the existing evidence". It cited the seriousness of the charges when rejecting requests for release, as well as "the existing evidence and the view of the court that they will not appear in court, if they are released". On 13 October 2005 the prosecutor, in summing up the case, demanded the conviction of Turgay Ulu. The court refused his lawyer's request on 6 December 2005 to re-enter the stage when evidence could be heard. As of 26 July 2006, the case continued.

Turgay Ulu's defence lawyer has now made a submission to the European Court of Human Rights, complaining of length of proceedings.

Kenan Güngör, who himself spent over 10 years in pre-trial detention, was released from prison in January 2005. Turgay Ulu, however, remains in Kandıra F-Type Prison No.2 in Kocaeli.

The case of Mehmet Desde and nine others

- admission of evidence allegedly obtained under torture or other ill-treatment
- the court's refusal to hear defence witnesses
- failure to allow access to legal counsel while in police custody
- failure by the medical authorities to record fully the results of medical examinations of detainees

Mehmet Desde, a German national, and nine others were detained on 9 and 10 July 2002 in and around Izmir. On 13 July they were all charged before an arresting judge with membership of and/or support for an armed gang.(39) They were accused of being members or supporters of the Bolshevik Party (North Kurdistan/Turkey), an opposition group. Mehmet Desde, Hüseyin Habip Taşkın and Maksut Karadağ were remanded to prison; the other seven were released pending trial. On objection of the prosecutor two more of those released – Şerafettin Parmak and Mehmet Bakır – were remanded to prison several days later to await trial. On 22 October 2002 new charges were brought under Article 7 of the Law to Fight Terrorism: founding or supporting an illegal organization, a charge usually used in relation to organizations that have not used violence. On 21 January 2003 the five defendants still remanded in custody were released pending trial, on condition that Mehmet Desde and Mehmet Bakır (both resident in Germany) did not leave the country.

On 24 July 2003, after six hearings, the Izmir State Security Court convicted eight out of the 10. The convictions were based primarily on statements made by defendants to the police, allegedly under torture. Other alleged evidence included legal journals, leaflets and stickers urging support for public demonstrations on 1 May, apparently in the name of the Bolshevik Party (North Kurdistan/Turkey), not making any call for violent action, and the fact that some of the defendants had met in the town of Kuşadası on 8 July 2002. Mehmet Desde and the four others named above were fined 7.27 billion Turkish lira (about US$5,120) and sentenced to four years and two months in prison under Article 7/1 of the Law to Fight Terrorism. Three other defendants, Metin Özgünay, Ömer Güner and Ergün Yıldırım, were convicted of supporting an illegal organization, fined 662 million lira (about US$442) and given 10-month prison terms. Two other defendants were acquitted. The court did not lift the ban on Mehmet Desde and Mehmet Bakır leaving the country.

Some defendants appealed against their conviction on the grounds that they had signed statements made to the police under torture or other ill-treatment, had later retracted them in court, but that they had nevertheless been admitted as evidence by the court. On 7 April 2004 the Court of Cassation quashed the conviction and sent it back for retrial, pointing to recent changes in the law that the trial court should take into account: according to the revised Article 1 of the Law to Fight Terrorism unarmed illegal organizations could only count as terrorist organizations if they used methods such as intimidation or threats and, according to Article 7/2 of the same law, propaganda could only be punished if it called for the committing of terrorist acts.(40)

At the same time, the Court of Cassation made no comment on the allegation that statements extracted under torture or other ill-treatment had been used as evidence, although a trial of four police officers who allegedly tortured Mehmet Desde had not yet ended (see below). In other such cases, the Court of Cassation has quashed convictions because the trial court did not wait for the outcome of trials of alleged torturers (see pp.7-8 fn.14).

The retrial started before the same trial court, since renamed as a special Heavy Penal Court.(41) Only one judge had changed, and when the court made reference to the first trial before the State Security Court, it used the term "our court". At the end of the new round of hearings, the prosecutor asked for acquittal of the defendants, on the grounds that the Bolshevik Party had not used the methods required in law to be defined as a terrorist organization. Despite this, the court convicted the defendants for a second time on 12 October 2004. The first six pages of its verdict were identical to those of the earlier verdict. In addition, it argued that the Bolshevik Party fulfilled the legal definition of a terrorist organization for reasons of what the court termed – in a peculiar formulation – the "moral force" (manevi cebir; as opposed to physical force) contained in its acts of "indoctrination". The court mentioned the fact that several defendants had retracted their statements to the police, alleging torture, but made no comment on this, or on the continuing trial against the four police officers who had allegedly tortured Mehmet Desde.

The defendants again appealed against their conviction. In November 2005 the Chief Prosecutor at the Court of Cassation sent back the file to the Izmir Heavy Penal Court with a request that it consider the legal changes of 1 June 2005 (when amendments to the Criminal Procedure Code, strengthening detainees' rights of defence, came into force). The first and last hearing in the third round of the trial took place on 16 March 2006. Izmir Heavy Penal Court repeated its verdict of October 2004 and added one important new condition: Mehmet Desde and Mehmet Bakır would not be allowed to leave the country until the verdict had become legally binding. This means that if the Court of Cassation confirms the verdict and it becomes final, Mehmet Desde, Mehmet Bakır, Hüseyin Habip Taşkın, Maksut Karadağ and Şerafettin Parmak will serve prison sentences of a further 16 and a half months (this is calculated as 75 per cent of 30 months, equalling 22 and a half

months, of which six months have already been served) and the three others, Metin Özgünay, Ömer Güner and Ergün Yıldırım, convicted as supporters, would serve prison sentences of seven and a half months. If the Court of Cassation does not confirm the verdict, the case will have to be heard once again in Izmir, and Mehmet Desde and Mehmet Bakır will be forced to wait for the next verdict of the Court of Cassation before they can leave Turkey.

The trial of Mehmet Desde and nine others was unfair. Statements allegedly extracted under torture were used as evidence in court, and the court convicted them on the basis of a law that was amended in 2003 specifically to reduce the penalties for illegal but unarmed opposition organizations. Under international law, if legal reform reduces the penalty for an offence, states are obliged to apply retroactively the lighter penalty.

The trial took place in a political environment in which newspapers published unsubstantiated accusations against the accused. The daily newspaper *Sabah*, for example, described those arrested as leading members of the Bolshevik Party, which it called an armed opposition group. Complaints by the defendants that the police were behind such reports were dismissed.(42)

Another failure by the authorities to ensure the detainee's rights was to deny Mehmet Desde access, while in police custody, to legal counsel, to the German consulate in Izmir and to his relatives. Under the regulations in force at that time, the detainees should have had access to legal counsel after two days in detention. As has been frequently reported to Amnesty International in other cases, some of the detainees in this case were allegedly under torture or ill-treatment made to sign statements saying they did not want to see a lawyer. Mehmet Desde alleges that he did not sign and that a document bearing his signature was in fact forged. The detainees were subsequently questioned at the prosecutor's office without lawyers, and were not informed of their right to have a lawyer present or offered legal aid. It was fortunate that the relatives of one detainee did seek assistance from the Izmir Bar Association, so that lawyers were present when the detainees appeared before the arresting judge. Even at this stage the police tried to silence the detainees but, realizing that lawyers were present, Mehmet Desde had shouted out that he too wanted a lawyer present while he was giving his testimony to the judge.

The **European Convention for the Protection of Human Rights and Fundamental Freedoms** enshrines the right of a person charged with a criminal offence: "*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*" (Article 6(3)(c)).

Almost all the defendants made repeated allegations of torture or other ill-treatment, to which neither the judges nor the prosecutor gave any response. Mehmet Desde told the arresting judge: *At the police* [headquarters] *I was subjected to severe torture, they took off all my clothes and said that they would rape me. They would pour concrete over me and throw me into the sea. They insulted and threatened me heavily. Despite this I used the right to remain silent. I do not accept the charges, because I'm innocent...Once they had stripped me stark naked I was forced to bend forward, as if they would rape me... They hit me on my back and my chest with great force. Earlier I had seen the director of the department with open eyes and I recognized him* [when blindfolded] *during the beatings from his voice.*[Testimony before arresting judge, 13 July 2002]

On 22 October 2002 the German authorities requested an independent medical examination, which eventually took place following Mehmet Desde's release on 6 February 2003 at the hospital of the Aegean University medical faculty. The 11 March report of the examination stated that, after such a long delay, no traces of torture were found, but it concluded that findings of depression and post-traumatic stress disorder were consistent with the patient's account. Three experts from the Izmir Medical Association also examined him, and reported on 21 July 2003 that they were convinced he had been tortured physically as well as psychologically.

As a result of Mehmet Desde's complaints, four police officers were charged with torture.(43) Their trial started on 2 October 2003 before Izmir Heavy Penal Court No. 7. Only three of the accused appeared in court at the second hearing, when they pleaded not guilty. The fourth accused, the former head of the anti-terrorism department at Izmir police headquarters identified by Mehmet Desde, was not summoned to the court on the grounds that he had been assigned to duties at police headquarters in Aydın, some 100 kilometres away from Izmir. On 22 December 2004, the officers were acquitted for lack of evidence. Mehmet Desde's appeal against this verdict is pending.

Investigations into complaints of torture or ill-treatment by Mehmet Desde's co-defendant Mehmet

Bakır were dismissed with a decision by the prosecutor not to pursue investigation or bring charges and an upholding of this decision on appeal. Another defendant, Hüseyin Habip Taşkın, at the first hearing before the Izmir State Security Court on 24 October 2002, withdrew a statement he had made earlier to the police, prosecutor and judge, saying it had not been made of his own free will. He said that his partner had been brought in while he was in custody and subjected to a body search by a female police officer. One of the male police officers had remarked that the woman should be left to him, to which the female officer had replied that he could have the woman after the body search:
These words made me angry and I got quite stirred up. I wanted to walk toward the police officer. At that moment I felt a pain in my chest and numbness in my legs. I fainted and woke up in Yeşilyurt Hospital. The doctors said that I had to be treated because of problems with my heart, but the police officers took me back for interrogation. Because of my breakdown and the pressure inflicted by the police officers, I had to sign the statement [mainly accusing Mehmet Desde and Mehmet Bakır of being leading members of the Bolshevik Party] *and accept the charges. At the prosecutor's office and in front of the judge I was still under the influence of the breakdown.* [Testimony in court (esas no. 2002/241, 24 October 2002)]

Another defendant, Maksut Karadağ, told the court:
For three days I was subjected to severe torture. They brought my wife and said that they would rape her in front of me. They also said that they would rape me. They applied moral pressure and I was forced to sign the minutes and statements under force. [Testimony in court, (esas no. 2002/241, 24 October 2002)]

The accused were all medically examined at the beginning and end of police custody. The reports in the court file indicate that these examinations were carried out at Yeşilyurt Hospital, a large and well-equipped hospital in Izmir. However, the report forms bear little record of the examinations apart from the words: "no blows or force". Mehmet Desde and Mehmet Bakır and their lawyers repeatedly filed official complaints of torture and demanded additional, independent medical examinations. They cited an official Health Ministry directive of 20 September 2000, which requires medical reports to record full details of the examination, including the complaints of the patient and psychological symptoms, and the completion of additional forms in cases of sexual assault. However, the prosecutor failed to order further medical examinations, investigate the allegations or call alleged perpetrators to testify.

The **Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)**, recommended by UN General Assembly resolution 55/89 of 4 December 2000, says of medical reports:
6. (a) "...[E]*xaminations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials.*
(b) The medical expert shall promptly prepare an accurate written report, which shall include at least the following:
(i) Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors;
(ii) History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms;
(iii) Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries;
(iv) Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given;
(v) Authorship: the report shall clearly identify those carrying out the examination and shall be signed.

Two further issues should be mentioned here. The defendants were denied the right to call witnesses by the court. On 12 December 2002 the defence asked to call witnesses who would testify that the meeting at Kuşadası allegedly held for organizing illegal activities was in fact a social

gathering. The court refused the request.

Secondly, in response to a defence complaint on 28 March 2005 that Mehmet Desde's signature had been forged on a document, on 2 August 2005 the prosecutor rejected the claim, quoting an expert who had identified the signature as Mehmet Desde's. Mehmet Desde appealed against the prosecutor's decision on the grounds that he had not been asked to produce a sample signature and that the evidence by the alleged expert witness had not been tested in court. The appeal was turned down on 5 September 2005 by the Karşıyaka Heavy Penal Court.

The case of Metin Kaplan

- failure to investigate torture allegations
- the admission of evidence allegedly obtained under torture or other ill-treatment
- the court's rejection of defence requests that prosecution witnesses be heard and cross-examined in court, including those whose testimony in a previous trial formed part of the prosecution's case or was relied upon in the court's judgment

Metin Kaplan's extradition from Germany was justified by the German Minister of the Interior with the claim that the German government had secured guarantees from the Turkish government that Metin Kaplan would receive a fair trial in Turkey. (44) On 25 February 2003, the General Secretary of the German section of Amnesty International wrote to Otto Schilly, Minister of the Interior, urging against the German authorities' consent to extradite Metin Kaplan on grounds of risk of torture or ill-treatment on return. The letter presented as evidence the repeated allegations of torture made by other suspected members the Federal Islamic State of Anatolia (IFID), the former name of an organization headed by Metin Kaplan. Some suspected members of the organization had been tried in Istanbul State Security Court from 1998 to 2000, and 14 out of the 29 defendants had been convicted (see footnote 43 below) on the basis of evidence allegedly extracted by illegal means.

Subsequent to his extradition in October 2004, Metin Kaplan has not received a fair trial in Turkey. The central argument to support this is that the court has admitted as evidence statements allegedly extracted under torture and, secondarily, has failed to guarantee the right to an effective defence.

At the time of his arrest in Germany in March 1999, Metin Kaplan was head of Hilafet Devleti (Caliphate State, also known as the Union of Islamic Society and Communities (ICCB)), a political organization subsequently banned by the German government in December 2001 as unconstitutional and a threat to democracy. He was convicted by a German court of inciting the murder in 1997 of political rival Halil İbrahim Sofu, and sentenced to four years' imprisonment. On 12 October 2004 he was extradited to Turkey where he had been wanted since 7 July 1999 on terrorism charges. He was subsequently tried by an Istanbul special Heavy Penal Court on charges of "attempting the violent overthrow of the constitutional order" (Article 146 of the old Penal Code) and seeking to overthrow the secular government, charges he denied.(45) He was alleged to have declared holy war against the "oppressors of Turkey's Muslim population" in May 1998. He was convicted and on 20 June 2005 sentenced to life imprisonment.

The defence lodged an appeal on several grounds, including that statements extracted under torture had been used as evidence and that the court had failed to hear defence witnesses: during the hearing of 4 April 2005, the defence had asked for witnesses to be heard and the demand was rejected; on 30 May the defence had again requested that they be heard, and some of the witnesses were waiting outside the courtroom; during the hearing of 20 June seven witnesses were present and once again the court rejected demands to hear them.

On 30 November 2005 the Court of Cassation quashed the verdict on technical grounds: one of the panel of judges had not signed one page of the verdict. The Court of Cassation asked for the complete file on an earlier trial of 29 defendants, evidence from which had been used to convict Metin Kaplan.(46) It also ordered the lower court to compare old and new legislation vis-à-vis civil rights. The Court of Cassation's failure to deal with the defence's main objections about the use of torture evidence and the court's repeated rejection of requests to hear defence witnesses present in court left little prospect of these key objections being addressed in the retrial. The retrial started on 28 April 2006 and continues.

Concerning the use of torture evidence, Metin Kaplan had argued in his defence that the statements of defendants in the trial of the 29, which had ended in 2000, had been extracted under torture and could not be used as evidence. The judge at the Istanbul special Heavy Penal Court responded that the verdict in the earlier trial had been confirmed by the Court of Cassation, that the use of evidence from that trial was therefore valid, and that its judgment would rely mainly on the statements of four defendants who had confirmed (at least in part) their statements to the police when they appeared at the prosecutor's office and before the arresting judge. However, the court ignored the complaints of torture by those four defendants. Two had complained to the arresting judge that they had been tortured and improperly pressured into signing statements, and had denied back then that Metin Kaplan or anyone else had ordered them to commit acts of violence.(47) The other two had complained, during medical examinations, of physical and psychological torture in police custody, including by electric shocks and being suspended by the arms, and they had been found to have lesions and bruises on their bodies.(48) A further seven defendants, during medical examinations at the Istanbul Forensic Institute on 5 November 1998, had alleged they had been brutally beaten, hosed with ice-cold water, and had their testicles squeezed and in one case electrocuted; they had been certified as showing signs of blows and force.(49) At the first court hearing on 11 March 1999, several defendants had complained of being hosed with cold and hot water and forced to strip naked.(50) One defendant was to state years after his release:
We were forced to stand for two days – our eyes were blindfolded. The other six days they hosed each of us with cold and hot water, while listening to loud music. We were suspended [by our arms] and beaten - over six days.(51)

Despite the allegations by defendants and medical reports strongly indicating that statements at the trial of the 29 had been made under torture or other ill-treatment, neither the State Security Court trying the 29 (from 1998 to 2000) nor the special Heavy Penal Court trying Metin Kaplan (from 2004 to 2005) investigated the allegations before deciding whether the statements made to the police could be used as evidence.

In its judgment on 20 June 2005, the special Heavy Penal Court relied primarily on evidence obtained under torture or other ill-treatment from the trial of the 29 but also cited material evidence from the earlier trial that appeared to be irrelevant. This included publications, video and tape recordings purporting to show that the 29 had been members of armed political groups, and records of arms and explosives found between Ankara and Istanbul and in the garden of the mosque in Fatih. (Apart from confessions, there had been no forensic examination – such as finger-printing – to establish who possessed this cache.)

Furthermore after the trial of the 29 had ended back in December 2000, the General Security Directorate (the national police headquarters) in Ankara had continued to maintain that the Caliphate State/Union of Islamic Society and Communities/Federal Islamic State of Anatolia (HD/ICCB/AFID) was not an "armed gang" (punishable under the Turkish Penal Code) but a "terrorist organization" which had not committed violent acts (punishable under Article 7 of the Law to Fight Terrorism).(52) The consequence of such an argument is that Metin Kaplan in his own trial beginning in 2004 could have been convicted under Article 7 of the Law to Fight Terrorism if the court had followed the opinion of the General Security Directorate. In which case his sentence would have been 50 months' imprisonment rather than the sentence of life imprisonment he received with the June 2005 verdict.

It is also of concern that the judgment in Metin Kaplan's trial was made on the basis of evidence on which the judge had formed a view at an earlier trial but which, at Metin Kaplan's trial beginning in 2004, was not heard afresh or given in person by witnesses available for cross-examination by the defence.
Metin Kaplan remains in Tekirdağ F-type prison.

The case of the Şırnak 16

- legal detention period allegedly exceeded
- detainees allegedly forced to sign statements to the effect of not needing a lawyer while in custody

- failure of court to investigate torture or other ill-treatment allegations
- the admission of evidence by the court allegedly obtained under torture or other ill-treatment
- unequal treatment of prosecution and defence, in violation of the principle of equality of arms
- failure to ensure defendants the assistance of qualified interpreters

In October 2005 Amnesty International sent an observer to the final hearing in the trial of some defendants out of 14 people who had been detained in and around Şırnak, a town in south-eastern Turkey, in late November and early December 2004. The charges against them concerned an alleged attempt to recruit two minors into the PKK. Nine had subsequently been charged with membership of the PKK, and five with supporting an armed gang. The trial took place at (special) Heavy Penal Court No. 5 in Diyarbakır.(53)

At the first hearing on 31 January 2005, the two minors, S.D. and S.N., and three others among the accused rejected the signed statements admitting the charges against them before the court as having been obtained "under duress" (the term used in the minutes of the court hearings) while in police custody. The two minors said they had been blindfolded, threatened with death and made to repeat their statements before the prosecutor and judge with police officers present. Beşir Katar alleged that he had made the statement "under duress". His only interpreter before the court was a member of the prosecutor's department, a government employee. Hatice Şen said she had been detained without food or drink for six days, had signed a statement written for her "under duress", and had only confirmed it at the prosecutor's office and before the arresting judge after fainting and while she was "not herself"("kendimde değildim"). Kadri Bahşiş said he had been forced to sign a statement written by police officers under threat that his wife and child would be tortured, and had repeated it to the judge under pressure from the presence of police officers. Despite being required to do so under national and international law, the court did not investigate the torture claims and did not file official complaints requesting that the prosecutor's office carry out such an investigation.

At the eighth hearing, on 11 October 2005, the court delivered its verdict. The number of defendants had by then risen to 16. Defence arguments that statements to the police should not be admissible in evidence as they had been extracted under torture were rejected. The lawyer for defendant Kadri Bahşiş said that he had not been informed of his rights and was forced to sign a statement to say that he did not want a lawyer. After a consultation of half an hour, the court convicted Kadri Bahşiş, Salih Benzer and Beşir Katar of membership of an armed organization and sentenced them to six years and three months' imprisonment.(54) Five other defendants including Hatice Şen were convicted of being supporters of an armed organization and were sentenced to three years and nine months' imprisonment. Eight defendants, including the two minors, were acquitted, partly because the crime had not been realized and also for lack of evidence. In its verdicts, the court relied almost exclusively on the statements to the police that defendants said had been extracted under torture or other ill-treatment.

The hearing of 11 October 2005, attended by an Amnesty International observer, was scheduled for 9.45am but did not start until 3.40pm. In Diyarbakır and Izmir, court hearings rarely start on time. All hearings are scheduled for the morning so that defendants and lawyers often have to wait for long periods before their case starts. Poor organization is exacerbated by the time lost in transporting prisoners long distances from remote prisons to court.

The trial was marked by serious flaws, in particular the failure to address the allegations regarding the illegal methods used to obtain statements. Other flaws included the unequal treatment of prosecution and defence by the court, in violation of the principle of "equality of arms", and the failure to provide translation of the whole proceedings by qualified interpreters. As is the standard practice in Turkey, the prosecutor entered the court by the same door as the judges and sat with them on the bench. Although none of the defence lawyers were allowed to have their exact statements and arguments included in the record of proceedings, the prosecutor was not interrupted by the presiding judges when he dictated his exact formulations to the court recorder. The only interpreter available to assist two defendants with insufficient knowledge of the Turkish language to make their final defence statements was an employee of the prosecutor's office. He

was ordered to ask them only to comment on the charges. They said they were not guilty and asked for acquittal. They apparently did not have the assistance of an interpreter during their interrogations by the police, prosecutor or arresting judge, or during the trial apart from the 31 January and 11 October hearings when interpretation was needed to take their statements.

On 9 November 2005, a revised **Accession Partnership** presented by the European Commission, detailing the priority areas for Turkey's preparations for EU membership, called on Turkey, in its reforms of the judicial system, to: "*ensure equality of arms between the prosecution and defence during criminal proceedings, including the layout of courtrooms*" and to "*enhance the opportunities for effective defence such as access to legal aid and qualified interpretation services.*"

Under the **UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,** "*A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands* [the reason for his arrest or detention, any charges, the identity of law enforcement officials concerned, information on and explanation of his rights and how to avail himself of such rights] *and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest*" (Principle 14).(55)

Recommendations
Amnesty International calls on the government of Turkey to institute immediate measures to ensure compliance with international standards for fair trial:

Fully and promptly investigate allegations of torture or other ill-treatment
Fully and promptly investigate allegations of torture or other ill-treatment, in compliance with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In particular:

- undertake an investigation wherever there are indications that torture or ill-treatment might have occurred, even in the absence of an express complaint
- ensure that the investigation is conducted by competent and impartial experts, who are independent of the suspected perpetrators and the agency they serve. For example, an investigation into allegations of torture or other ill-treatment perpetrated by police officers cannot be conducted by other police officers
- stop basing decisions to pursue or drop investigations into allegations of torture or other ill-treatment on frequently deficient medical reports, but take evidence from all those concerned and arrange prompt on-site inspections and specialist medical examinations
- give detainees immediate access to independent, impartial and competent medical and psychiatric experts, for examinations that should be conducted in private under the control of the medical expert and outside the presence of security or other government officials, and with all necessary equipment for the medical investigation of different forms of torture and ill-treatment
- put into effect the "zero tolerance for torture" policy by taking urgent steps to combat the climate of impunity enjoyed by members of the security forces by ensuring that, if enough admissible evidence is gathered, suspected torturers are prosecuted in a fair trial.

End all use of evidence extracted under torture or other ill-treatment in court

- ensure that the courts investigate all allegations that evidence has been obtained by torture or other ill-treatment
- ensure that any evidence elicited as a result of torture or other ill-treatment is excluded at trial in compliance with Article 148(1) of the Turkish Criminal Procedure Code (Article 135(a) of the former CPC, applying to all detentions prior to 1 June 2005) and Article 15 of the UN Convention against Torture
- review all pending criminal proceedings to determine all cases where there are allegations that statements by defendants or witnesses were illegally extracted through torture or other ill-treatment

- drop all pending criminal cases where the main evidence against the defendant rests on "confession"-based evidence alleged to have been illegally extracted through torture or other ill-treatment.

Ban incommunicado detention

- incommunicado detention should not be allowed under any circumstances, particularly as it often facilitates the use of torture or other ill-treatment

- repeal a June 2006 amendment to the Law to Fight Terrorism (Article 9(b) of Law 5532) permitting restriction of access to legal counsel in the first 24 hours of detention.

Ensure the principle of "equality of arms" and the right to an effective defence
Ensure that prosecution and defence are treated before the courts in a way that gives them a procedurally equal position during the course of the trial and an equal position to make their case ("equality of arms"). This includes ensuring the right to adequate time and facilities to prepare a defence. In particular:

- repeal further June 2006 amendments to the Law to Fight Terrorism (Articles 9(d) and 9(e) of Law 5532) limiting the right to an effective defence and imposing restrictions on the right to confidential meetings between lawyer and client

- take measures to ensure that, where necessary, defendants enjoy the right to be assisted by qualified interpreters at all stages in the investigation and during court hearings

- ensure the defendant's right to call and examine witnesses. In particular, take steps to end the practice of courts ruling arbitrarily to reject legitimate requests by defence lawyers for prosecution witnesses (and defence witnesses) to be brought to court to testify and to be cross-examined

- ensure that the prosecutor is not seated with the judges but on a par with the defence.

End prolonged pre-trial detention and protracted criminal proceedings

- ensure respect for the rights of all persons charged with a criminal offence to trial without undue delay

- ensure that all persons detained pending completion of criminal proceedings are tried within a reasonable time, or released pending trial if the time deemed reasonable in the circumstances is exceeded

- revise the not-yet-enforced law which sets a 10-year maximum period of pre-trial detention for persons being tried by the special Heavy Penal Courts (Criminal Procedure Code Articles 101(2) and 252(2)), so that it is consistent with Turkey's obligations to ensure completion of criminal proceedings within a reasonable time

Address failure of courts to conduct thorough and impartial retrials after European Court of Human Rights rulings

- ensure that a thorough and impartial retrial takes place, including *de novo* examination of all evidence and its application to law, and recall of all witnesses to testify and to be cross-examined by both prosecution and defence

- consistent with respect for the right to the presumption of innocence, ensure that persons awaiting retrial on criminal charges are not automatically detained

- take steps to allow all cases in which the European Court of Human Rights finds a violation of fair trial principles the right to retrial in Turkey, lifting the present denial of retrial to those whose cases were pending at the Court on 4 February 2003.

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(1) Interview with Neşe Düzel, Radikal, 3 October 2005.

(2) In this report, Amnesty International uses the term pre-trial detention to indicate detention pending the completion of the trial.

(3) See Amnesty International, Unfair trial of political prisoners in Turkey (AI Index: EUR 44/022/1986); Turkey: Torture and unfair trial of political prisoners (AI Index: EUR 44/101/1989); Turkey: Continuing violations of human rights (AI Index: EUR 44/066/1990); Turkey: The trial against the deputies of the Democracy Party (AI Index: 44/085/1997); Turkey: Student campaigners tortured and imprisoned (AI Index: EUR 44/954/1997); Amnesty International calls for a retrial of PKK leader Abdullah Öcalan (AI Index: EUR 44/043/1999); Turkey/European Union: Open letter to EU Heads of State and Heads of Government (AI Index: EUR 44/064/2000).

(4) 1982 Constitution (Article 143) at www.tbmm.gov.tr/english/constitution.htm : "State Security Courts shall be established to deal with security offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State".

(5) The functioning, jurisdiction and trial procedures of the State Security Courts were specified under Law 2845 of 16 June 1983 on the Establishment and Prosecution Methods of State Security Courts.

(6) Law to Fight Terrorism, Law 3713 of 12 April 1991, amended at intervals, most comprehensively with Law 5532, published in the Official Gazette, 18 July 2006.

(7) In fact, by the time the military judge had been removed from the trial of Abdullah Öcalan in June 1999, all the prosecution evidence in the case had been heard. The trial of Abdullah Öcalan was found unfair by the European Court of Human Rights on this and other grounds: see European Court of Human Rights, Öcalan v. Turkey, Grand Chamber Judgment, 12 May 2005.

(8) For cases at State Security Courts that were conducted before the military judge was removed from the bench (in June 1999) the Court usually found a violation of the right to be tried by an independent and impartial tribunal because of the presence on the bench of a military judge. The Court then typically held that it was unnecessary to consider other complaints of procedural unfairness. See for example: European Court of Human Rights, Balçık v. Turkey (No. 63878/00.), Judgment, 26 April 2005.

(9) Law 5190 of 16 June 2004 repealed Law 2845 of 16 June 1983 on the Establishment and Prosecution Methods of State Security Courts, and provided for the replacement of State Security Courts by Heavy Penal Courts. The courts that have replaced State Security Courts were, between June 2004 and June 2005, identified as "Heavy Penal Courts competent under Article 1 of Law 5190".

(10) Thus for instance the former Diyarbakır State Security Court No. 3 is now Diyarbakır Heavy Penal Court No. 6.

(11) The 1982 Constitution of Turkey, as amended, provides that: "International agreements duly put into effect bear the force of law... In case of contradiction between international agreements regarding basic rights and freedoms approved through proper procedure and domestic laws, due to different provisions on the same issue, the provisions of international agreements shall be considered" (Article 90(5)).

(12) General recommendations of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, in E/CN.4/2003/68, 17 December 2002, par. 26 (k).

(13) Court of Cassation 9th Chamber (9. Ceza Dairesi) esas no. 2003/1046; and quoted by Ersin Bal, "Gözaltı ifadesi tek başına delil değil", Akşam newspaper, 9 April 2005.

(14) On 6 May 2003 Izmir State Security Court convicted Rojda Erdoğan (born 1980) for membership of the PKK and sentenced her to 12.5 years' imprisonment, mainly based on her "confession" to the police and the statements of defendants in other trials, allegedly also extracted under torture. The court in Izmir found that torture was not applied, because medical reports at the beginning and the end of Rojda Erdoğan's detention had not certified "traces of blows and force". This is an exceptional case, because the public prosecutor in Izmir indicted five police officers for having tortured Rojda Erdoğan. The prosecutor based the indictment on two medical reports by Yeşilyurt Hospital dated 18 and 27 December 2002, which certified bruises of 1.5cm. The time set

in these reports for the wounds to have occurred corresponded with the dates of detentions (9 to 11 December 2002). The trial against the five police officers was continuing at Izmir Heavy Penal Court No. 3 as of July 2006. On 20 October 2003 the 9th Chamber of the Court of Cassation quashed the verdict of Izmir State Security Court on the grounds that it should have waited for the outcome of the investigation into the torture allegations and the trial against alleged torturers before passing a guilty verdict.

Further cases, which the Court of Cassation sent back with an order to wait for the results of the prosecution against alleged torturers, include a verdict of Istanbul Heavy Penal Court No. 11 of 27 October 2004 against 10 alleged members of the armed group, Devrimci Sol (Revolutionary Left), who were sentenced to life imprisonment under Article 146/1 of the old Turkish Penal Code. The 9th Chamber of the Court of Cassation quashed the verdict on 20 July 2005, since a trial against alleged torturers of two of the defendants was continuing.

Such decisions may indicate increased sensitivity on the question of forbidden interrogation methods but do not provide sufficient guidelines for the lower courts. The decisions only indicate that the Court of Cassation might consider ruling out evidence if the defendant can prove that s/he was tortured because the perpetrators were convicted. It should be remembered that in less than 10 per cent of alleged cases of torture or other ill-treatment are alleged perpetrators brought to justice, and that only very few of these cases end with a conviction.

(15) There are examples of courts responding to requests to rule inadmissible evidence allegedly extracted under torture with such formulations. In one such case, for example, the court ruled: "The demand of some defence lawyers to remove the statements of E.K. to the police, the prosecutor and the arresting judge from the file, because they had not been obtained in a lawful manner and did not constitute legal evidence was rejected, because there is no provision in law to remove documents from court files." Istanbul Heavy Penal Court No. 14 (previously Istanbul SSC No. 6) in an interim decision during the hearing of a trial against six alleged members of the Revolutionary People's Liberation Party/Front (DHKP/C) on 30 July 2004 (esas no. 2004/75).

(16) Until March 1997 detainees suspected of offences punishable under anti-terrorism legislation had no right to legal counsel during the whole time in detention.

(17) On 29 June 2006, the Turkish Parliament passed a law (5532) revising articles of the 1991 Law to Fight Terrorism (3713).

(18) See, Turkey: Briefing on the wide-ranging, arbitrary and restrictive provisions of the draft revisions to the Law to Fight Terrorism (AI Index: EUR 44/009/2006).

(19) See Principles 8 and 22 of the UN Basic Principles on the Role of Lawyers. Principle 8 states: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." Principle 22 states: "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

(20) The case of Hulki Güneş v. Turkey (28490/95) at the European Court of Human Rights, which found violations of Article 6(1) and 6(3)d of the ECHR, "in that the applicant did not have the opportunity to examine or have examined witnesses against him", may have an important bearing on this matter in future cases. European Court of Human Rights, case of Hulki Güneş v. Turkey (28490/95), Judgment, 19 June 2003.

(21) Commission of the European Communities, Proposal for a Council Decision On the Principles, Priorities, and Conditions contained in the Accession Partnership with Turkey, Brussels, November 2005. See also: Council Decision of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey (2006/35/EC). It will be an enormous task for Turkey to secure qualified and independent interpretation not only during court hearings, but almost more importantly throughout investigations, in particular during interrogations at police or gendarmerie stations and when suspects testify before the prosecutor and the arresting judge. While qualified translators and interpreters exist in most towns for Western languages such as English, French and German, there is no education in the two main Kurdish languages spoken in Turkey (Kurmanca and Zazaca) which interpreters would be needed for in the eastern and south-

eastern provinces of Turkey and in places with a high population of internally displaced Kurdish people (notably Istanbul, Izmir, Adana and Mersin).

(22) In the Batı and others v. Turkey case (33097/96 and 57834/00) the European Court of Human Rights passed its judgment on 3 June 2004. It found violations of Article 3 (prohibition of torture) on behalf of 13 applicants and a violation of Article 5(3) (right to be brought promptly before a judge) for 12 applicants (the complainants had spent between 11 and 13 days in police custody; one had not complained). On the length of pre-trial detention:

The Court noted that Mr Kablan had been in pre-trial detention for one year, eight months and 15 days, Ms Öktem for two years, five months and ten days, Mr Erhan İl for three years, two months and two days and Mr Öktem for four years and 17 days. In ordering the applicants' continued detention, the National [sic] Security Court had used stereotyped phrases and on at least two occasions had not given any grounds. Its reasoning had not pointed to any factor capable of showing that the risks relied on actually existed and had failed to establish that the applicants posed such a danger. No account had been taken of the fact that the accusations against the applicants had been based on evidence which, with time, had become weaker rather than stronger.

In view of the circumstances of the case, the applicants had had a strong interest in securing their prompt release pending trial. As there were no compelling reasons for the above-mentioned periods of deprivation of liberty, the Court held that there had been a violation of Article 5 § 3 in respect of Mr Öktem, Ms Öktem, Mr Kablan and Mr Erhan İl. [Press release issued by the Registrar, Chamber Judgment in the Case of Batı and Others v. Turkey]

(23) See the case mentioned in the previous footnote. Other cases where Turkey was found to be in violation of Articles 5(3) and which could have expected to have informed the introduction of a limit to periods of detention before and during trials in the revised Criminal Procedure Code include Kaya and Güven v. Turkey (application no. 41540/98), friendly settlement, 17 February 2004; and also Ahmet Özkan and Others v. Turkey (application no. 21689/93).

(24) Under Article 110 of the old Criminal Procedure Code.

(25) Under Article 12 of Law 5320 of 23 March 2005.

(26) Under Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(27) In 2002, 3,879 complaints were from Turkey; in 2003, 2,944 complaints; and in 2004, 3,491 complaints. Out of 621 judgements in 2004, the highest number (156) concerned Turkey; out of 1,105 judgements in 2005, 290 were on Turkey.

(28) This provision was introduced under Harmonization Law No. 4771 (the third package) of 9 August 2002, and subsequently included in the 2005 Criminal Procedure Code (Article 311).

(29) 2005 Criminal Procedure Code, Article 311, para. 2.

(30) European Court of Human Rights, Hulki Güneş v. Turkey (application no. 28490/95), Judgment, 19 June 2003.

(31) Interim Resolution ResDH(2005)113, concerning the judgment of the European Court of Human Rights of 19 June 2003 in the case of Hulki Güneş against Turkey, Committee of Ministers, Council of Europe, 30 November 2005.

(32) See, "Turkey: Injustice continues despite welcome reforms", press release (AI Index 44/014/2004).

(33) Ibid.

(34) At the hearing of the retrial on 7 July 2006, it was revealed that tapes which allegedly constituted a key part of the evidence against the defendants in the original trial had been destroyed back in 1997 and could therefore not be transcribed. The defendants had requested the examination and transcription of this alleged evidence in their retrial.

(35) With Harmonization Law No. 4771 (package No. 3) of 9 August 2002 Turkey introduced the right to a re-trial, if the European Court of Human Rights had found a violation of fair trial rights and the consequences could not be compensated monetarily. This provision is now included in Article 311 of the Turkish Criminal Procedure Code.

(36) With the introduction of the Law to Fight Terrorism in April 1991 all death sentences were commuted and prison sentences became subject to reductions. However, the law distinguished between certain crimes and, for instance, differentiated between murder and politically motivated killings: while ordinary criminals sentenced to capital punishment had to serve 10 years of their sentence until release, those sentenced to death for politically motivated crimes were to serve 20 years. The reduction of prison terms varied between one-fifth (for ordinary cases) and one-third (for "political cases" relating to state security, and some other specified offences). The Constitutional Court ruled on this unequal treatment of prisoners, but only corrected part of the law: while sentences under Article 146 of the Turkish Penal Code – generally applied to those associated with revolutionary left groups in Turkey – were to be treated like those for ordinary crimes in being reduced to 10 years in place of the death penalty, sentences under Article 125 of the Turkish Penal Code – generally applied to those associated with the Kurdish movement and Kurdish separatism – were not subjected to a further reduction and remained at 20 years in place of the death penalty.

(37) Under Article 146/1 of the then Turkish Penal Code.

(38) Under Article 59 of the former Turkish Penal Code.

(39) Under Article 168 of the former Turkish Penal Code.

(40) The changes mentioned by the 9th Chamber of the Court of Cassation referred to the Law to Fight Terrorism (3713). In this law Article 1 (the definition of terrorism) had been changed with Law No. 4928 of 15 July 2003 and Article 7/2 of the Law to Fight Terrorism had been changed with Law 4963 of 30 July 2003 (the sixth and seventh reform packages).

(41) Izmir Heavy Penal Court No. 8 competent under Law 5190.

(42) Police regulations prohibit action by officers that undermines the presumption of innocence of detainees and people who have not been convicted by a court: "Until guilt is determined by a court, a person's innocence is the basis of the investigation, which is itself to be kept secret. Therefore no statement that a person in detention is 'guilty' may be made to the public or press during the period of investigation; no interviews given to the press; no images taken or the person exposed [to having their image taken]; or the investigation file published in any way."(Article 27), The Regulation on Apprehension, Detention and Interrogation of 1 October 1998, as amended on 1 June 2005.

(43) Article 243 of the Penal Code.

(44) See Der Spiegel, "The Turkish government has several times guaranteed the Federal Government a fair trial against Kaplan", 26 April 2004.

(45) He was tried at Istanbul Heavy Penal Court No. 14 (previously State Security Court No. 6).The main evidence against Kaplan consists of the statements of defendants tried at Istanbul State Security Court No. 2. The charges, under Article 146 of the old Penal Code, were initially brought against him in his absence on 7 July 1999.

(46) Metin Kaplan's conviction relied primarily on evidence given in two earlier trials. In one of the two trials, three judges at Istanbul State Security Court No. 2 tried 29 people who had been detained in October and November 1998 and charged with supporting the organization known as the Federal Islamic State of Anatolia (AFID) and planning attacks on the mausoleum of Mustafa Kemal Atatürk, founder of the Turkish Republic, in the capital, Ankara, and on the Fatih mosque, in Istanbul. On 11 April 2000, one of the accused was convicted (under Article 168/1 of the former Turkish Penal Code) of leading an armed gang; 10 were convicted of being members (Article 168/2) and three of being supporters (Article 169). Fifteen defendants were acquitted. The Court of Cassation confirmed the verdicts on 18 December 2000.

In the other trial, Istanbul State Security Court No. 6 convicted a married couple with the surname of Seven on 23 May 2001 on charges of bringing documents for the Federal Islamic State of Anatolia group into Turkey in 1999; the verdict was confirmed by the Court of Cassation on 19

November 2001.

(47) Minutes of interrogation by military judge Dr Adnan Yağcı of 21 defendants, 5 November 1998: of the defendants who allegedly confirmed the statements they had made to the police, Ahmet Coşman complained that he had been pressured into signing five statements, and Mehmet Demir, later convicted of being the leader of an armed gang, said he had been subjected to torture; Mehmet Demir admitted an intention of carrying out sensational acts, but said that an intended attack on a monument to Atatürk (not the mausoleum) in Ankara had been called off because of the risk of harming people.

(48) The Chief Prosecutor's Office at the Istanbul State Security Court, in a response of 10 August 1999 to a request by the Ministry of Justice for information about the case against the 29 defendants (Case No. 1998/425): a medical report of 12 November 1998 confirmed lesions and bruises on Kenan Bingöl who was quoted as saying that he was tortured while held in Erzurum for four days and in Istanbul for another four days, and was suffering from pain and bruises from electric shocks and being suspended by his arms; a medical report of 17 November 1998 certified lesions that might have been caused by a truncheon on Erkan Kuşkaya who complained of psychological and physical torture over a period of four days.

(49) Bayram Koç, Tuncay Göğ, Selami Boztepe, Tanju Pekdemir, Hacı Ahmet Özdemir, Muharrem Kavak and Ali Karataş

(50) According to the court records, defendant Tanju Pekdemir said, "five out of eight days I was tortured"; Selami Boztepe complained of being hosed with cold and hot water; and Tuncay Göğ said he was forced to strip naked.

(51) Seyit Ahmet Bal, interviewed on ARD (German television station) on 15 May 2005.

(52) In an expert report to a court in Adana the General Security Directorate stated on 27 November 2001 that more than 100 alleged members had been detained since 1994 and arms had been found since 1996, but that no violent act had been committed.

(53) Formerly Diyarbakır State Security Court No. 2.

(54) Under Article 314/2 of the 2005 Turkish Penal Code.

(55) Adopted by UN General Assembly Resolution 43/173 of 9 December 1988".