Promoting Conflict – The Şemdinli Bombing

Trial Observation Report

September 2006

Kurdish Human Rights Project
Bar Human Rights Committee

Kurdish Human Rights Project
KHRP
Established 1992
Bar Human Rights Committee
OF ENGLAND AND WALES

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Acknowledgements

This report was written by barrister Ajanta Kaza, a member of the Bar Human Rights Committee of England and Wales and the legal team of Kurdish Human Rights Project (KHRP), and was edited by Lucy Claridge, Anna Irvin, Rachel Bernu Mustafa Gündoğdu, Oliver Ayyildiz, and Rebecca Sammut (KHRP).

KHRP gratefully acknowledges the financial support of:

The Big Lottery Fund (UK), The Sigrid Rausing Trust (UK), European Action Council for Peace in the Balkans (Netherlands), Ministry for Foreign Affairs of Finland (Finland), Oak Foundation (USA), Bishop's Subcommission for Misereor (Germany), ACAT Suisse- Action des Chrétiens pour I'Abolition de la Torture (Switzerland), Oakdale Trust (UK), Rowan Charitable Trust (UK), Stiching Cizera Botan (Netherlands), and The Bromley Trust (UK).

Layout & Design:	Torske & Sterling Lawyer Marketing www.lawyermarketing.co.uk
Keywords:	Turkey, EU, Şemdinli, trial observation, right to life, extra-judicial killings, failure to investigate, non-commissioned officers, deep-state

Printed in Great Britain
September 2006
Published by KHRP (London)
ISBN 1905592019

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Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

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Glossary

AKP	The ruling *Adalet ve Kalkınma Partisi* (Justice and Development Party)
ANAVATAN	Motherland Party
CHP	*Cumluriyetci Halk Partisi* (Republican People's Party), main opposition
DTP	Democratic Society Party
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HSYK	Supreme Board of Prosecutors and Judges
ICCPR	International Covenant on Civil and Political Rights
JİT	Gendarme Intelligence Organisation
JİTEM	Gendarme Intelligence Gathering and Anti Terror
KDP	*Partiya Demokrat a Kurdistanê* (Kurdistan Democratic Party)
PKK	*Partiya Karkeren Kurdistan* (Kurdistan Workers' Party)
TCK	Turkish Penal Code
TSK	Turkish Armed Forces
UDHR	Universal Declaration on Human Rights
UN	United Nations

Foreword

Upon receiving requests from our partner agencies in the Kurdish regions to observe the trial of 3 men accused of bombing the Umut (Hope) Bookstore in the Şemdinli district of Van, the Kurdish Human Rights Project (KHRP) contacted the Bar Human Rights Committee of England and Wales (BHRC) to send a joint mission.

Having collaborated for the last decade on documenting the human rights situation in the Kurdish regions, KHRP and BHRC believed that it was imperative to investigate the reasons for the widespread speculation that the accused were acting as part of a 'deep-state' organisation. The incident itself was not particularly 'unique' in that similar occurrences have persisted across the Kurdish regions for the last 15 years. However, the events surrounding the incident -- *including the capture of the accused by the public, the military profile of the accused, and the subsequent decision to dismiss the Public Prosecutor mostly because the indictment contained credible allegations against senior members of the military, including, General Büyükanıt who has since been appointed Chief of General Staff of the Armed Forces*– shed light on the multi-dimensional layers of the conflict which has blighted the Kurdish region of Turkey for the past two decades. The bookstore explosion and attacks which took place in the surrounding area in the six months preceding it, for us, exposed the many levels of state involvement in this conflict.

All evidence suggests that this bomb attack is another part of the wider administrative practice of extra-judicial killing by the Turkish state. Its widely documented history of extra-judicial killings can be seen in the damning court judgments in cases of this nature brought to the European Court of Human Rights by KHRP. The mission met with public officials from the region and the lawyers of the victims.

The plethora of evidence of incidents such as the Şemdinli bombing indicate the resistance to democratic change taking place in Turkey as a result of the EU accession process, which is seen as threat to the power of military hard-liners. Sections of the military are fundamentally opposed to a just, peaceful resolution of the Kurdish

question. In attempting to destabilise the region with renewed conflict, parts of the military present the main obstacle to reform – insisting on old-fashioned style of fight against so-called "terrorism," involving secrecy and guerrilla tactics. The government's reactions to the incidents also call into question the extent of political will to bring Turkey's law into line with European requirements, especially as regards to human rights legislation.

This trial observation highlights a number of important issues and makes recommendations to both the Turkish government and the EU. KHRP, the BHRC and its partners in the region will continue to follow the development of these issues. It remains vital to highlight the behaviour of ungovernable elements of the military involved with 'deep-state' groups which pose grave risks to the establishment of a vibrant human rights culture and a democratic future in Turkey.

We hope that both the Turkish state and the European Commission will seriously consider the findings of this report.

Kerim Yildiz
Executive Director, KHRP

Mark Muller QC
President, BHRC

1. Introduction

On 9 November 2005, the Umut bookstore in Şemdinli, Hakkari province was bombed, killing one person and injuring several others. This report constitutes the findings of a KHRP and BHRC mission to observe the trial of two non-commissioned military officers and a former PKK (Kurdistan Workers' Party) member turned state informant, who, following their apprehension at the scene, were indicted for their alleged involvement in the bombing. The bookstore is owned by Seferi Yılmaz, an individual of Kurdish origin who was convicted and imprisoned for involvement with the PKK in 1984. The first session of the trial of Ali Kaya and Özcan İldeniz, the non-commissioned military officers, and Veysel Ateş, the informant, took place on 4 and 5 May 2006 at the Van Heavy Penal Court.

The mission is concerned that the following international human rights standards may have been compromised in the investigation and trial concerning the Şemdinli bombing:

(i) The right to life

(ii) The obligation to conduct a prompt, thorough and impartial investigation into allegations of killing by state agents;

(iii) The obligation to conduct an effective investigation capable of identifying and punishing those responsible for the deprivation of life;

(iv) The independence of the prosecution and judiciary

These concerns arise from the events which the mission observed during the course of the investigation and trial, as follows:

- The findings of the Parliamentary Commission established to determine the identities of those responsible for Şemdinli were inconclusive;

- In particular, there was a failure to judicially examine local military officials who it was alleged were capable of providing material evidence regarding the alleged complicity of their military superiors;

- The Public Prosecutor carrying out the enquiry into the incident was eventually dismissed as a result of his indictment, which implicated a number of high ranking military officials;

- This dismissal apparently occurred at the behest of the military;

- There were a number of public statements made by officials which were potentially capable of compromising the judicial process;

- The conviction of the two non-commissioned military officers for murder, attempted murder and "establishing an illegal network";

- Following those convictions, the arrest of Seferi Yılmaz, the owner of the bookstore for alleged PKK involvement;

- The subsequent withdrawal of one of the judges from the case for lack of objectivity.

Viewed against the background of fourteen separate incidents of bombings in the Hakkari province in the two months preceding the Şemdinli bombing, the Şemdinli incident exemplifies the internal conflict present in Turkey today.

The 20-odd year armed conflict actuated in the mid 1980s is widely documented. The many reports of that era clearly establish the culpability not only of members of the military, civilian police, security forces and the judiciary for innumerable examples of gross violations of human rights of ordinary citizens, but also of leaders and members of insurgent organisations for serious acts of violence against both the state and civilians.

The conflict allowed both state and non-state organisations to employ unlawful methods to generate fear and loyalty within their respective constituencies, thus maintaining the authority and influence of those organisations. Today, there is strong evidence indicating that Turkey is backsliding in its effort to reform. Such evidence includes the recently drafted Anti-Terror laws, instituted in the name of national security, which have now been approved by both the Parliament and the President. Although the President has recently appealed to the Constitutional Court for an annulment of the 5th and 6th Articles of the new Anti-Terror Laws,

which cover issues of press freedom and the publication of 'terrorist propaganda', it is concerning that the remainder of the provisions are now in force.

Modest progress, by way of legislative reform in pursuit of EU membership and an insurgent ceasefire, contributed to the hope that Turkey was emerging from the 'conflict era' and was making a gradual ascent towards democracy. The democratic reform, however modest, has in-turn eroded the power bases of organisations seeking to maintain authority through armed conflict. In order to re-establish their pre-existing authority, organisations within the state apparatus and armed opposition groups are compelled to destabilise the democratic reform process. What we are witnessing in Turkey today are those efforts at destabilisation.

The Şemdinli incident and its aftermath is an illustrative and cogent example of conflicts in Turkey today and the questions which still remain unanswered.

2. The Şemdinli Incident In Context

Those interviewed by the mission generally agreed that the reforms introduced by the current government over the last few years have enhanced the security and human rights situation in south-east Turkey, to varying degrees bolstering a frail democracy, particularly with reference to the abolishment of the death penalty and the lifting of the state of emergency.[1] Yet, according to most, government-instigated democratic reform continues to be inhibited by anti-reform elements within the judiciary, the police and particularly the army[2]. Meanwhile, human rights advocates and defenders are still —more often than not— considered to be threats to the state rather than advocates for democracy.

However, in spite of these improvements, the south-east has witnessed a recent resurgence of violence which threatens to undermine the reform process. The use of unwarranted lethal force by the authorities during demonstrations, allegations of state complicity in fatal attacks, and political violence and fatal incidents for which the PKK and TAK (Kurdistan Freedom Falcons) claimed responsibility, are all constituents of this resurgence. The Şemdinli incident must be viewed against this backdrop.

In order to gain a complete understanding of the Şemdinli incident, the mission investigated why such violence has once again emerged as a *modus operandi* when democratic reform is being promised by the government.

According to Foreign Minister Abdullah Gül, the PKK is tactically provoking the government into conflict in order to derail the path to EU accession. According to him, credit was due to the government for instituting reforms that weakened the appeal of the PKK among the Kurds. He stated that this government believes that, "democracy will isolate the terrorists."[3] However, many with whom the mission

1 The mission held several interviews on 4-5 May 2006. See Annex 4 for full list.

2 Human Rights Watch: "Essential Background: Overview of Human Rights Issues in Turkey," 31 December 2005

3 Amberin Zaman "Rights Groups: Abuses on the Rise in Turkey's Kurdish Regions", VOA News.com,

met expressed a belief that Kurdish militants are not solely responsible for the deteriorating security situation and that there has been state provocation of the conflict.

While at the trial, the mission learned that the evidence uncovered during the investigation of the Umut bookstore bombing supports the claim that there are parties unaligned with Kurdish nationalism using unlawful political violence in the region. Further, the mission concluded that the events surrounding this particular incident —irrespective of the eventual verdict for or against the three accused— put into question the authorities' will to carry out an effective investigation to uncover the real facts of the case.

In addition, in the last few months, there have been frequent reports of the numerous incidents of Turkish police and military attacking demonstrators using tear gas, batons, tanks and other lethal weapons. Kurdish cities have seen a *de facto* return to a state of emergency. Kurdish trade unionists, human rights defenders and political activists have been imprisoned and shot or wounded by troops (see KHRP and BHRC Fact-finding Mission Report "Indiscriminate Use of Force: Violence in south-east Turkey, September 2006).

According to press reports, 240,000 troops were despatched to south-east Turkey in April 2006 by the government. With some 220,000 to 250,000 troops already in the south-east, the deployment of further troops has been justified as a routine measure to stop the infiltration of PKK operatives from Iraq. Turkey has renewed its request to the United States and Iraq to eliminate PKK bases in the mountains of north Iraq.

Diplomatic negotiations and increased security measures demonstrate that the issue of armed conflict is clearly at the top of the government's agenda. The Şemdinli incident, as a microcosm of the wider picture, is a test of the Turkish authorities' will to ensure the supremacy of the rule of law and due process as well as its will to establish a genuine and effective democracy.

19 April 2006, at <http://www.voanews.com/english/archive/2006-04/2006-04-19-voa41.cfm>(last accessed 5 September 2006).

3. Factual Basis Of The Case

The case concerns the bombing of the Umut Kitapevi (Hope Book house) in the Şemdinli district of Hakkari on 9 November 2005. The incident caused the death of one man, Mehmet Korkmaz, and the wounding of several others. Three men were apprehended at the scene by local inhabitants who witnessed their attempt to escape. Two of these, Ali Kaya and Özcan İldeniz, were non-commissioned military officers; whilst the third, Veysel Ateş, was a former PKK member turned state informant.

The factual matrix relied upon by the Van Public Prosecutor in the indictment alleges that the incidents occurred as follows:

On 9 November 2005, in Hakkari's Şemdinli district at around 11:30 am, two explosions occurred. Seferi Yılmaz is the owner of a bookstore called Umut Kitapevi in the Özipek Passage. He was having lunch in his store with his neighbour Metin Korkmaz and Mehmet Zahit Korkmaz (Metin's cousin) when he heard one of his windows being broken and saw that a hand grenade had been thrown into the bookstore. He shouted and jumped outside to escape. Metin Korkmaz and Mehmet Zahir Korkmaz were still inside. As he was escaping, Seferi Yılmaz saw a brown-haired man, wearing a brown coat and named Veysel Ateş running away from the bookstore. Then he heard the grenade explode. Yılmaz ran after Ateş and continued shouting that this man was the one who had thrown the hand grenade.

People came out of other stores in the passage and ran after Veysel Ateş. Seferi Yılmaz returned to his shop to help his friends. Both of the men were taken to hospital. Metin Korkmaz was wounded and Mehmet Zahir Korkmaz died in hospital.

According to the indictment, witnesses reported seeing two men, Veysel Ateş and Ali Kaya, running in the opposite direction of the bomb explosion towards a white car. Both were speaking on mobile phones. Veysel Ateş was heard asking Kaya where they were. Ali Kaya answered "Come ahead, I am here"; then he asked him

if the bomb had exploded and told his friend to get into the car.

Both Ali Kaya and Veysel Ateş went towards a white car with registration 30 AK 933. Veysel Ateş sat in the back of the car while Ali Kaya and Özcan İldeniz stood outside the car. A crowd surrounded the car in order to prevent the three suspects from leaving. When locals asked them who they were, the men pretended that they had been sent to the area on a government mission. The local inhabitants conducted a search of the boot of the car where it is understood they discovered many guns and much other military equipment, including three Kalashnikov assault rifles, a hand grenade, and maps. The maps related to the location of the bookshop and also to an area of Şemdinli where another device is said to have been detonated on 1 November 2005. It is alleged that the vehicle belonged to gendarmerie police.

Later, the police arrived. People were shouting and hitting the car and the suspects. In an attempt to calm people down, the police fired shots in the air, but one person was hit and died, whilst six others were wounded. It is understood that the local inhabitants handed the three men over to the custody of the police, but refused to move away from the scene, fearing that the authorities might attempt to destroy evidence. Ali Kaya, Veysel Ateş and Özcan İldeniz were arrested but shortly thereafter, Ali Kaya and Özcan İldeniz were released. Veysel Ateş was remanded in custody on 11 November 2005, whilst Kaya and İldeniz were re-arrested on 28 November 2005 and remanded in custody.

Following the bombing of his store, Seferi Yılmaz, the owner of Umut Kitapevi lodged a complaint against Ali Kaya, Özcan İldeniz and Veysel Ateş. He accused them of having made an attempt on his life and property.

4. The Criminal Case

a. The complainant and the defendants

There are three defendants in this case: Ali Kaya, Özcan İldeniz and Veysel Ateş. Kaya and İldeniz are non-commissioned military officers. They were reported to be serving as intelligence officers in the region. Ateş is alleged to be a former PKK member who then became a state informant. It is widely believed that Kaya and İldeniz are part of 'deep state' organisations such as JİTEM (Gendarme Intelligence Gathering and Anti Terror) or JİT (Gendarme Intelligence Organisation). The government denies the existence of such organisations.

The bookstore is owned by Seferi Yılmaz, who was accused of membership of the PKK and was convicted for his involvement in the PKK's first attack on the Şemdinli district in 1984, for which he was sentenced to 15 years imprisonment. Upon his release from prison, it is understood that he returned to Şemdinli and subsequently opened the bookstore.

b. Charges

The indictment prepared by Ferhat Sarıkaya, the Van Public Prosecutor, runs to well over 100 pages and contains 3 charges:

The principle charges are:

1. undertaking activities aimed at destroying the unity of the State and the territorial integrity of the country

2. murder and attempted murder

3. conspiracy/forming a gang to commit the offences above

c. Wider allegations

The indictment states:

> "*The court found that a terrorist organisation composed of public servants perpetrated the explosion in Şemdinli on 9 November 2005. This illegal organisation intended to kill Seferi Yılmaz and destroy his bookstore because he was believed to be a member of the PKK. Despite the fact that he is a member of the PKK, the actions of Ali Kaya and Özcan İldeniz remain illegal. They abused the power and weapons afforded to them as members of the military. The men killed Mehmet Zahir Korkmaz and wounded Metin Korkmaz and Seferi Yılmaz.*
>
> *Under:*
> - *Article 302/1 of the Turkish Penal Code (TCK)*
> - *Article 5 of the law number 3713*
> - *Article 302/2 and Article 82/1-c of the TCK*
> - *Article 302/2 and Articles 82/1-c and 35/1 (twice) of the TCK*
> - *Article 316/1 of the TCK*
> - *Article 53 of the TCK*
> - *Article 63 of the TCK*[4]
>
> *Ali Kaya, Özcan İldeniz and Veysel Ateş should be found guilty and will be punished for Disrupting the unity and integrity of State by bombing in Şemdinli*[5]*."*

It is understood that the indictment also alleges that Land Forces Commander General Büyükanıt and some other military officers with whom he served in south-east Turkey were involved in 'forming an illegal organisation to commit crime, misuse of positions and preparing fake documents'[6]. The indictment also alleges that Land Forces Commander General Büyükanıt 'attempted to influence a fair trial' by his words towards offender Ali Kaya.[7] Prosecutor Ferhat Sarıkaya's proposal to carry out further investigations to determine the substance of allegations made by one individual concerning the involvement of senior military included the suggestion that a motive for the attack may have been to,

"*bring the local [Kurdish] population to a state where it can be lured with ease into*

4 See relevant sections of Turkish Penal Code at Appendix 3.

5 Şemdinli Indictment page 106

6 Şemdinli Indictment page 73

7 Şemdinli Indictment page 73

action…then exaggerating this threat beyond its true level, in order to prepare the way for violent measures by the state and to permit emergency rule to take precedence over the administrative system in the region…permitting security chaos in the region to be used to apply pressure on the political authority, and thereby…to frustrate Turkey's fundamental political directions – the modernising project, the EU process – and to protect the power and place of the core political/bureaucratic governing elite."

d. Maximum penalties and appeal

Upon conviction, the defendants faced a sentence of life imprisonment.

The defendants are able to appeal the finding of the Van Heavy Penal Court to the High Court of Appeals[8] which is the only competent authority for reviewing decisions and verdicts of lower level judicial courts, both civil and criminal, including the State Security Courts. Turkey has no intermediate appellate court as is common in many jurisdictions around the world. With just a few exceptions, all decisions of the general courts may be appealed to the High Court of Appeals.[9]

e. Jurisdiction

The trial took place in the Van Heavy Penal Court. Heavy Penal Courts are composed of three judges, one of whom is the President, and are located in the provincial capitals. They have jurisdiction over serious crimes carrying sentences of heavy imprisonment and imprisonment for ten years or more.[10]

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8 Established by virtue of Article 154 of the Constitution. The High Court of Appeals is also known as the Court of Cassation or Yargitay.

9 The Court reviews the decisions and judgments given by courts of justice from the perspective of conformity with the law, so as to ensure a unity of legal practice and to enlighten the interpretation of provisions of legal codes.

10 Information Note on the Turkish Judicial System, Ministry of Justice, 4 July 2003, p. 1.

The court system in Turkey is comprised of five sections: the Constitutional Court, the Court of Jurisdictional Disputes, the General Courts (which include the High Court of Appeals as a court of last instance and various specialised and general courts of first instance, both criminal and civil), the Administrative Courts and Military Courts.

First instance courts can be sub-divided into "general" and "specialised" courts of first instance.

Both categories of first instance courts can be further sub-divided into criminal and civil courts of first instance.

Regarding the general courts of first instance, criminal courts of original jurisdiction consist of Justice of the Peace Courts (Sulh Ceza Mahkemeleri), Courts of General Criminal Jurisdiction (Asliye Ceza Mahkemeleri), and Heavy Penal Courts (Ağır Ceza Mahkemeleri).

Justice of the Peace Courts are comprised of a single judge and have jurisdiction over minor offences. They also have responsibility for matters pertaining to criminal investigations, such as the issuing of search warrants, and for matter relating to pre-trial detention.

Courts of General Criminal Jurisdiction also have one judge, are generally located in the capitals of sub-provinces (Ilçe) and have jurisdiction over all criminal cases not specifically indicated by law as being subject to the jurisdiction of the Justice of the Peace Courts or the Heavy Penal Courts.

5. Developments During the Course of the Investigation

a. Allegations against senior military personnel

The indictment, drafted by Ferhat Sarıkaya, was filed in February 2006[11] and dealt not only with the Şemdinli incident but also with explosions that occurred in the south-eastern province of Hakkari over a six month period in 2005.

The indictment alleged the existence of an illegal organisation composed of public servants responsible for perpetrating the explosion and, as a result, is reported to have caused serious political tensions. Following its publication, a request was made by the Van Prosecutor's Office for an investigation by the Office of the Chief of General Staff into the alleged criminal activities of Land Forces Commander General Yaşar Büyükanıt concerning the bombing. The Van Prosecutor's Office also requested the Office of the Chief of General Staff to consider filing charges against General Büyükanıt for interfering in the judicial process for making a favourable public statement about Kaya.[12] Many believed the allegations were an attempt by the government to prevent General Büyükanıt from taking up the post of Chief of General Staff in August 2006. Büyükanıt, a nationalist, is understood to favour a tougher line on the issue of Kurdish rebels. A strong defender of Turkey's secular traditions, he is expected to diverge in views from the Islamic-rooted government of Recep Tayyip Erdoğan. Büyükanıt is also widely considered an opponent of General Hilmi Özkök's reforms that curtailed some of the military's extensive influence and introduced measures that increased transparency in the military. However, his appointment on 1 August 2006 would appear to dispel these concerns.

In addition, the Van Prosecutor's Office accused three top commanders of

11 Turkish Daily News, 9 March 2006

12 .". That officer knows good Kurdish. He worked in North Iraq. When I was in Diyarbakır, he was close to me. He is a good soldier. . Of course we respect the current investigation. We wait for the conclusion" at < http://www.turkishdailynews.com.tr/article.php?enewsid=37393 > (last accessed 7 September 2006).

involvement in the Şemdinli bombings. The office alleged that the Şemdinli bombing and other previous explosions in the Hakkari province were linked and that the three accused of the Şemdinli bombing could not have carried out the attack without the knowledge of Van Public Security Corps Commander Lieutenant General Selahattin Uğurlu, Hakkari Commando Brigade Commander General Erdal Öztürk and Hakkari Regiment Commander Colonel Eren Kubat.

General Büyükanıt publicly responded by denying the allegation that the military high command ordered the bombing, but did not expressly deny the involvement of the soldiers in the attack, including himself, stating "If I am put on trial for such a reason, I will appear and defend myself." General Büyükanıt served in south-east Turkey between 1997 and 2000.

The Chief of General Staff, General Hilmi Özkök, responded by announcing publicly that he rejected the prosecutor's request. According to statements issued by his office, generals can only be prosecuted by military prosecutors with the permission of the General Staff[13]. This official response is said to have carried an implicit criticism of the Van Chief Public Prosecutor, Ferhat Sarıkaya and underlined that the General Staff should be notified in advance by public prosecutors of indictments which in some way implicate generals or admirals.[14]

The request to the Office of the Chief of General Staff reveals the inherent problems in what has been described as a "parallel system of justice.[15]" Turkish law does not allow for allegations of serious criminal offences made against military personnel to be tried in the civilian Heavy Penal Courts. A separate system of Military Courts (which include a Military High Court of Appeals, Military Courts of First Instance and a High Military Administrative Court of Appeals), is responsible for such matters.

The decision as to whether an investigation should be instituted against high ranking military officials is made by the Office of the Chief of General Staff, which is itself composed of and represents the senior military authorities. Where, as in the Şemdinli case, allegations of involvement in unlawful killings are made - particularly against senior military figures - the state has an obligation under Article 2 of the European Convention on Human Rights (ECHR) to ensure the prompt, thorough and effective investigation of the allegation.

The decision of the Office of the Chief of General Staff not to allow an investigation

13 Ibid

14 Ibid

15 By Amnesty International: "Turkey: No impunity for state officials who violate human rights. Briefing on the Şemdinli bombing investigation and trial." May 2006, AI Index: EUR 44/006/2006

into allegations against local senior military personnel and General Büyükanit, prevents fundamental questions being answered regarding the alleged complicity of military personnel of higher rank than the two accused officers. Without such an investigation, it is particularly concerning that the state may have failed in its obligations to mount an investigation capable of bringing those responsible to justice.

b. Investigation and dismissal of the Public Prosecutor

As regards their judicial functions, public prosecutors are empowered to oversee the investigation, indictment and prosecution of any case. The law gives prosecutors far-reaching authority to both collect and present evidence and safeguard the rights of defendants, including those detained for pre-trial interrogation. They are expressly empowered to conduct the preparatory investigation, determine the jurisdiction for the case and supervise the security forces during the pre-trial investigation period.[16]

According to casual conversations conducted/ overheard while waiting outside the courtroom, the mission learned that much of the general public believed that the indictment drafted by Public Prosecutor Ferhat Sarıkaya, which contained allegations against senior military figures, prompted Chief of General Staff General Hilmi Özkök to hold a series of private meetings with high-ranking government officials, including President Ahmet Necdet Sezer and Prime Minister Recep Tayyip Erdoğan on the day the indictment appeared in the press. The military high command subsequently called for the "punishment" of those responsible for the indictments, which it described as an "intentional onslaught ... aimed at wearing down the Turkish armed forces."

16 Prosecutors in Turkey discharge both a judicial and an administrative function. Their judicial function comprises carrying out criminal investigations, bringing legal actions against suspects, appealing against the decisions of criminal courts and ensuring the enforcement of criminal judgments. Their administrative functions are related to the administration of courthouses and prisons, meeting the needs of these institutions and ensuring correspondence for courts with related persons or institutions.

The system of preliminary investigation operates as follows. The public prosecutor, upon being informed of the occurrence of an alleged offence, makes a preparatory investigation in order to ascertain the identity of the offender and to decide whether it is necessary to institute a public prosecution. The public prosecutor may, for the purpose of his enquiry, demand any information from any public employee. He is authorised to make his investigation either directly or through police officers. The police are obliged to inform the public prosecutor immediately of events, detainees, and measures taken, and to execute orders of the prosecutor concerning legal procedures. The preparatory investigation is, in principal, secret, performed without the presence of the parties and in written form.

On 8 March 2006, following those meetings and in accordance with directives from Justice Minister Cemil Çiçek[17], the Justice Ministry Inspection Board initiated an investigation into the conduct of Public Prosecutor Ferhat Sarıkaya in drafting the indictment.[18] Ministry Inspectors were appointed to assess the conduct of the Prosecutor and determine the necessity for an investigation to be launched.

On 20 April 2006, following an investigation by the Justice Ministry Inspection Board, Ferhat Sarıkaya was disbarred under Article 69 of the Judges-Prosecutors Law for dishonouring the legal profession in a way that was deemed harmful to its public standing by the High Council of Judges and Public Prosecutors (HSYK). The HSYK, made up of a panel of senior judges, concluded that the indictment contained passages that politicise the judiciary and that the Prosecutor had provided, "propaganda material for supporters of terrorism".[19]

Six of the seven members of the HSYK voted for disbarment, and the seventh voted in favour of a reprimand only. Ferhat Sarıkaya consequently lodged an appeal against the decision of HSYK which was turned down. He has since lodged a second appeal which, at the time of going to press, is still pending. It is understood that the appeal will be assessed by a senior board consisting of seven HSYK members and five associate members.

The HSYK is presided over by the Minister of Justice and is made up of several members chosen by the President of the Republic and nominated by the General Assembly of the Court of Cassation and the General Assembly of the Council of State. The fact that the Minister of Justice is the head of the HSYK, that the Council is dependent on civil servants from the Ministry of Justice to do much of its research and administrative work, and that it does not have an independent budget, have all raised concerns that it is not as independent as it should be - i.e. that it is too closely associated and influenced by political power[20].

However, in spite of this, the Court accepted the indictment and chose to proceed with the case. Some legal analysts agree that Ferhat Sarıkaya overstepped his authority in light of the existence of a separate system of courts for the military in Turkey. Many human rights organisations on the other hand, describe Mr. Sarıkaya's dismissal as "a flagrant assault on the independence of the prosecution

17 Turkish Daily News, 9 March 2006

18 Turkish Daily News, 9 March 2006

19 Nicholas Birch, Washington Times, 15 May 2006

20 Richmond, Paul. 'Turkey-Presentation on the Independence of the Judiciary and the Legal Profession in Turkey.' Independence of Judges and Lawyers-Network News, 26 April 2004., at <http://www.icj.org/news.php3?id_article=3314&lang=en> (last accessed 7 September 2006).

in Turkey today."[21]

According to Hamit Geylani[22], an advocate representing the victims, Ferhat Sarıkaya had found support in the AKP government for the allegations contained in the indictment. He considered that, in the context of EU accession negotiations, the government was anxious to improve its profile and so offered its support for the indictment as a demonstration of its willingness to comply with relevant human rights standards regarding the investigation of killings alleged to have been perpetrated by state agents. It was only upon the intervention of the military that an investigation of the Prosecutor was instituted.

However, according to the opposition Republican People's Party (CHP) leader Deniz Baykal, the opposition has welcomed Mr Sarıkaya's dismissal and has seized the opportunity to accuse the governing party of staging a coup against the military in order to mitigate the latter's influence and authority[23].

Irrespective of a technical, legal assessment of the decision, what objectively causes concern is the severity of the action, which caused widespread surprise both domestically and internationally. Only one other prosecutor in Turkey has suffered the same fate, after seeking to prosecute the former General Chief of Staff, Kenan Evren who led Turkey's military coup on 12 September 1980. Against that background, the severity of the sanction does little to assuage fears that the independence of the prosecution has been compromised, and contributes to concern that the authorities have failed to comply with international standards regarding the functions of prosecutors[24]. In particular, the European Commission 2005 Regular Report on Turkey's progress toward EU membership indicates that the HSYK is not reliably independent from political influence.

Despite the existence of an appeal procedure and the fact that the government may accurately claim that it does not have the right to interfere with the decision of such a body as the HYSK, many will continue to view the sanction as the work of political will[25]. Certainly, the imposition of such a severe sanction conveys a message to outside observers that Turkey contains officials who are 'untouchable' and are extremely unlikely to be brought to account for their actions, an impression that Turkey can ill-afford to make.

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21 See, for example, Amnesty International: 'Turkey: No impunity for state officials who violate human rights. Briefing on the Şemdinli bombing investigation and trial.' May 2006, AI Index: EUR 44/006/2006

22 Interview with Hamit Geylani, Lawyer for victims, 4 May 2006, Van.

23 "A coup against the military," 7 March 2006, Turkish Daily News

24 See relevant international standards at Appendix 1.

25 Mete Belovacıklı, "The Şemdinli Effect" The New Anatolian, 21 April 2006, at < http://www.thenewanatolian.com/tna-5223.html> (last accessed 5 September 2006).

c. Parliamentary Commission of Investigation

At the end of 2005, the Grand National Assembly of Turkey - the Parliament - voted to establish a Parliamentary Investigative Commission into the Şemdinli incident. The investigation and the compilation of a report detailing the Commission's findings took four months. The 600 page report is said to address the Şemdinli bombing on 9 November 2005 and related incidents and issues; the PKK and its activities and resources and information regarding the origin of PKK weapons. During its four month investigation, the Commission heard testimony from 43 military and civilian officials in Ankara and further witnesses in Van, Hakkari, Şemdinli and Yüksekova. Although it has not yet been fully released, several excerpts have been published, and almost all interviewed by the mission referred to its findings.

The report is said to have failed to identify either legitimate state institutions or 'deep state' illegal organisations as responsible for the incidents:

> There is no evidence of a group which accepted illegality within the state; was guided by illegal ways and methods in the fight against terrorism; used this struggle as a base for deviating from the European Union bid; or created artificial tension and escalated it, thus trying to impose an extraordinary administration in the region through preparing extraordinary conditions….Our commission hasn't found any evidence of an illegal formation within the gendarmerie. There are no illegal formations in either the gendarmerie or the other security units of the state that would allow unlawful actions.[26]

Further, it did not support the claim that the PKK planned the bombings. In essence, the report failed to come to any conclusions regarding the parties and motives responsible.

The cause of the Commission's inability to reach conclusions as to allegations of military involvement in Şemdinli was described by the Commission as an exercise in, "…tracking leads in fog."[27] The Commission explained in its report that some information needed to elucidate the incidents was not made available to it by the [Hakkari] Provincial Gendarmerie Command on the grounds that it pertained to state secrets, that not all the incidents were perpetrated by the PKK, that evidence given to the Commission was confusing and that for those reasons it had not been possible to assess where the incidents led.

26 Ayla Ganioglu, 'Parliament Acquits State in Şemdinli incidents,' The New Anatolian. 13 April 2006, at < http://www.thenewanatolian.com/tna-4700.html> (last accessed August 2006)

27 Ibid

Esat Canan, MP for Hakkari and Member of the National Security Committee, who gave evidence before the Parliamentary Commission, reported to the delegation that he protested against the law which prohibits the disclosure of security information regarding the military and the government and lobbied for a change in this law[28].

The Commission did however conclude that 12 out of a total of 17 bombings, not including the Şemdinli incident on 9 November 2005, were carried out by the PKK between June and December 2005 in Hakkari, Yüksekova and Şemdinli. The indictment, however, states that the PKK only claimed responsibility for 2 out of the 17 bombings.[29] The Commission also concluded that *de facto* authority in the south-east is assumed by the Democratic Society Party (DTP)

Controversy was sparked when a sub-commission accused General Büyükanıt of interference with the judicial investigation by making public statements describing Ali Kaya as, "a good soldier." This accusation was subsequently withdrawn since, according to AKP Deputy Faruk Ünsal, sub-commission members were fearful of making such accusations[30]. There was further argument over the inclusion of the statement, "Public servants need to refrain from actions that could be construed as interfering in a judicial process" which, according to some, was an implied warning to General Büyükanıt[31]. Abstentions from the votes to decide whether the statement should be included led to its exclusion.

Claims that the Commission's AKP members worked closely with the AKP administration has led to allegations that the report represents the views of the AKP administration. This is inconsistent with public statements made by the Prime Minister that the incident was not local, that the military are the prime suspects, and that the government would shed light on the military involvement. Whilst the majority of the Commission members are deputies of the ruling AKP, the main opposition CHP are represented in the Commission, as are the Motherland Party (ANAVATAN).

The Commission's findings are said to underscore the long existing tension between the police and the military, demonstrated by the absence of clear negative responses by police officers when asked questions relating to the identity of those responsible for the Şemdinli incident. Former Director of the Police Security Intelligence Bureau Sabri Uzun accused the military of involvement in the incident, saying, "When the thief is inside the house, it is no use locking the door." In giving evidence before the Parliamentary Commission, Sabri Uzun implied that Ali Kaya and Özcan İldeniz

28 Interview with Esat Canan, MP for CHP, 4 May 2006, Van

29 See pages 46 and 47

30 "Büyükanıt crisis in parliamentary commission," Turkish Daily News, 3 March 2006,

31 Ibid

could not have acted without the knowledge of higher ranking officials.[32] He gave evidence before the Commission in late February 2006 and within one month was removed from his post by means of an administrative sanction. This is a move regarded by many as intimidation of public officials who are considering providing information to the Commission.

Allegations as to the lack of independence of the enquiry, official interference and lack of power to compel the production of material evidence all give rise to serious concerns that the investigation has not been conducted in accordance with international standards for the investigation of serious allegations of extra-judicial killings.[33]

32 'Is Police Officer Uzun a Scapegoat or Culprit', The New Anatolian, 24 March 2006, at < http://www.thenewanatolian.com/tna-3336.html> (last accessed 5 September 2006).

33 See relevant international standards set out at Appendix 1

6. The Criminal Trial

a. Security and access to the trial

The delegation attended the first session of the trial on 4 and 5 May 2006.

Upon arrival at the building that houses the Van Heavy Penal Court, the mission found the strong presence of civil police and military to be striking. The mission observed that at least 40 military and police officers were present. The imposition of such tight security measures reflected both the controversial nature of the trial and the level of attention from the media and the outside world that the Şemdinli incident had attracted. Armoured vehicles for the transportation of prisoners, police vehicles and two tanks lent visual significance to the day's events at the courthouse.

Members of the local and international press, civil society groups and international observers also populated the crowd outside the courthouse early on the morning of 4 May 2006. The mission observed that they were forced to wait outside the building for some considerable time before being issued with a response to their requests to the President of the Court to be granted access to the proceedings. The press quota issued by the court only allowed access to five journalists.

The defendants had been transported to court at 4.30 a.m. for security reasons. The mission noted that the arrivals of the Prosecutor, lawyers for the victims and lawyers for the defendants, the victims, politicians and significant figures each created a frenzy of media attention.

Later in the morning, the delegation was eventually granted access into the building, along with some observers and representatives of human rights groups. Upon entry to the building the delegation was subject to two extensive security searches and those entering the courtroom were subject to a third security search.

Once inside the building, at the end of a long climb of several flights of stairs, the mission was met with the information that access to the courtroom itself was contingent upon the availability of seating after those granted specific permission,

such as the members of the victim's families and lawyers for the victims. Along with numerous others, including lawyers for the victims, representatives of NGOs and civil society groups, a watchful waiting began that was to last several hours. Amongst the many people conducting a near vigil outside the courtroom sat the widow of Mehmet Korkmaz, demure in both dress and manner, wearing a headscarf and accompanied by her young son. In what appeared to the mission as a sign of respect for the trauma the entire ordeal had clearly taken on her, neither journalists nor other observers requested formal interviews with Ms. Korkmaz. However, the mission did ask her what she hoped would happen, and she replied very simply, 'Justice'.

The delegation was eventually allowed access to the courtroom at 7.15 pm, whereupon it discovered that the proceedings were to be adjourned to the following day, in recognition of the late hour. The mission was granted access to the courtroom the following day, when it was able to hear the continuing evidence of the defendants. Converse to the significance of the proceedings and the level of media and political attention they have received, the mission noticed a marked contrast in the dimensions of the room and its capacity, both of which were very limited. Acknowledgment of the significance and gravity of the proceedings by the authorities was clearly reflected by the considerable security measures imposed, yet that was not extended to the facilities allocated for the proceedings.

Professor Baskin Oran, one of a number of observers staging the near vigil outside the courtroom, holds a more critical view of the authorities' choice of venue for the proceedings. He feels that the choice was an indication that the authorities had little will for the trial to be an open process, as evidenced by the existence and potential availability of larger courtrooms in the building. He informed the mission that attempts to petition the court to allocate a courtroom with greater capacity had come to no avail. In his view the same approach had been adopted by the authorities with regard to the proceedings in which he was indicted (see further the KHRP and BHRC Trial Observation Report 'Suppressing Academic Debate: The Turkish Penal Code', June 2006).

Upon entry to the rectangular courtroom, the mission observed that the main arena of the courtroom was to the right, whilst to the left and back of the courtroom was an area for the public gallery. Facing the judicial platform at the front of the room, against the left wall was an area for the victims' lawyers and against the right wall, directly opposite them, seating for the defendants' lawyers. The President of the Court, flanked by his two colleagues sat on a raised platform looking over the room. The Public Prosecutor enjoyed the benefit of the raised platform to the right of the judges. Directly facing the judicial platform was the dock, surrounded by white metal railings. The public gallery was located directly behind the dock and was furnished with a number of rows of wooden benches, ill-designed to comfortably

facilitate observers seated for extended periods of time.

Nothing adorned the white washed walls of the courtroom except for two raised flags either side of the judicial platform and a sign bearing the inscription, "Adalet Mulkun Temelidir," (translates as: Justice is the foundation of the State) hanging above the President of the Court.

Members of the victims' families were granted access to the proceedings, including Seferi Yılmaz and the family of Metin Korkmaz, as well as relatives of the accused. The head of the Parliament Human Rights Commission, Mehmet Elkatmış, CHP MPs Esat Canan and Mesut Değer, the mayors of Hakkari (Metin Tekçe) and Şemdinli (Hurşit Tekin) were also among those following the proceedings, as well as a representative of another international human rights organisation.[34]

The mission observed that there was heavy security not only outside the court and the courtroom, but also within the court. A wall of military officers standing elbow to elbow within the dock behind the defendants virtually obscured the view of the main area of the courtroom entirely for those seated in the public gallery.

Those awaiting entry to the courtroom received reports from those present in the courtroom at the time,[35] stating that the presence of commissioned gendarmes in the court room was the subject of argument between the parties and the court. Nine members of the gendarme intelligence organisation who were admitted without an identity check caused immediate controversy and resulted in the reduction by the court of the number permitted to remain.

b. The hearing

The trial commenced on 4 May 2006 at approximately 11.00 am and proceeded until approximately 7.15 pm, adjourning for one hour at lunchtime. On 5 May 2006, proceedings recommenced at 9.30 am and did not conclude until some time after midnight.

According to reports of the hearing[36] and later reiterated by Hamit Geylani[37], the Court followed regular procedures and made its initial, customary enquiries of the accused regarding their names, occupations and education.

34 See fuller details of interviews conducted by the mission at Appendix 4

35 Ercan Acar, 'Şemdinli Trial Reminiscent of Hollywood Scene,' Zaman Daily News, May 07, 2006

36 Nursun Erel, "Explosive trial begins" the New Anatolian, 5 May 2006, at <http://www.thenewanatolian.com/tna-6158.html> (last accessed 5 September 2006).

37 Interview with Hamit Geylani, Lawyer for victims, 4 May 2006, Van.

Before the session started, Hamit Geylani, speaking on behalf of the victims' lawyers, made the following statement: "Over 300 lawyers applied to the Van Bar to represent the victims of Şemdinli. We chose 20 of them as attorneys. Today we're all here but they claim there's not enough room for all of us, so we don't know what we'll do. Our first request will be to have the whole indictment read aloud at the beginning of the hearing."

Therefore, at the beginning of the proceedings on the first day, lawyers acting for the complainants raised objections to Judge İlhan Kaya's decision to summarise the indictment, rather than state it in full. The lawyers made an application for the withdrawal of Judge İlhan Kaya from the case on the basis that, in summarising the indictment and omitting references to controversial charges and aspects of the case relating to General Büyükanıt and the role of the Gendarme, the judge had demonstrated his lack of impartiality. The lawyers are said to have argued[38] that there was too much pressure on the court and impressed upon Judge Kaya that he had a right to withdraw from the case. The application for his withdrawal is said also to have been based on his comments about the huge number of advocates who had attempted to attend the trial, which he alleged was intended to show support for the PKK. In response to this application, lawyers for the defendants accused the complainant's lawyers of attempting to politicise the trial. Judge Kaya did not withdraw from hearing the case.

c. Evidence heard prior to the trial

The evidence of a number of witnesses had been heard prior to the hearing on 4 May 2006. Much of the evidence was that of witnesses who were not resident in Van and so were not able to give testimony before the Van Heavy Penal Court. Their evidence was heard by a local judge in their area.

Selçuk Kozağaçlı, a lawyer for the victims, reported to the delegation that 35 witnesses and one of the complainants had given evidence before a local judge as part of this exercise.[39] Mr Kozağaçlı's assessment of their evidence revealed that no inconsistencies were to be found between their testimonies. In summary, Mr Kozağaçlı noted that the witnesses reported that the three defendants had been observed in Şemdinli two days before the incident; that the exact timing of the explosion and telephone conversations alleged to have taken place between Ateş and Kaya was not noted by the witnesses; and that the defendants were apprehended by witnesses who heard Seferi Yılmaz shouting that these people had thrown the bomb.

38 'Şemdinli trial gets under way' Turkish Daily News, 5th May 2006

39 Selçuk Kozağaçlı, Lawyer, sent his opinion by e-mail on 11 May 2006

It is understood that witnesses giving evidence during this procedure were isolated from each other on the day of their evidence and each was not present during the evidence of the others.[40] The evidence gathering process was conducted over the course of a whole day beginning at 8.30 am and concluding at 7.30pm.

Whilst conceding that the process was a successful one, Selçuk Kozağaçlı expressed concern that the evidence of the witnesses was not heard directly by the tribunal of fact (the court) which was seized of the matter and which was to determine the final outcome of the criminal trial.[41] He also expressed concern that the tribunal of fact had not visited the site where the events took place. Certainly, it is a reasonable expectation that a tribunal seized of criminal proceedings which has a duty to assess the evidence and arrive at a determination based on that evidence - which includes any assessment made by the tribunal as to the demeanour and credibility of the witness as, a factor to be considered in deciding the weight to be accorded to that evidence - should have the opportunity of hearing the evidence of the witnesses directly. Selçuk Kozağaçlı also asserts that witness intimidation took place, alleging that the PKK had exerted pressure on witnesses to testify in support of the prosecution case, a claim which makes these concerns even more pertinent. It cannot be said that a visit by the tribunal of fact to the place of the bombing would not assist the decision making and assessment of the evidence of the witnesses and defendants.

d. Evidence at the trial

The mission heard from casual statements made by those exiting the courtroom, and was later reported in the press.[42] Ali Kaya gave evidence for several hours regarding the day of the incident and its aftermath. He denied responsibility for the bombing and receiving any orders to carry out the bombing. "We did not place any bombs," he said, insisting that "there was no involvement of security bodies such as the army, the police or the secret services -- or of the mafia or criminal gangs."

According to Kaya, the incident was an attempt at provocation by the PKK. His explanation for his presence in Şemdinli was limited to the government's lawful counter-terror intelligence efforts.

Specifically in response to the facts of the case as presented in the indictment, Kaya said that Ateş had been on the street when the explosions were heard. He said that

40 Ibid

41 Ibid

42 Ercan Acar: "Şemdinli Trial Reminiscent of Hollywood Scene," May 07, 2006 Zaman Daily News

local people present then began to attack them and so, in an attempt to defend themselves, Kaya had told Ateş to get into their vehicle. He claimed that Ateş was still being subjected to an attack by local people as he tried to hide in the car and that it was at this time that witnesses saw his brown jacket. This was a response to the allegation in the indictment, supported by witness testimony, that a man in a brown jacket had been observed trying to flee the area immediately after the explosion.

Kaya suggested that the German-made grenades found in the boot of the car - alleged to be of the same provenance and make as the grenade used to bomb the bookstore - had been planted there after they had been escorted away from the car and whilst the car remained at the scene.

Questions regarding working principles and organisational details of the Gendarmerie elicited a response from Kaya to the effect that the existence of groups such as the PKK, political units and worker's unions was evidence of the non-existence of illegal 'deep state' organisations.

Ali Kaya was also questioned by lawyers representing the victims. These questions related to issues regarding his relationship to military figures such as General Büyükanıt, the type and quantity of weapons issued to officers in the military, and the nature and purpose of meetings he was alleged to have held with individuals in Diyarbakır. Kaya's representatives raised repeated objections to many of these questions on the grounds of relevance or privilege regarding military and state security information.

The Court also heard the testimony of Özcan İldeniz and Veysel Ateş the following day. Both denied the charges. During Ateş' interrogation, the prosecution asked that the other two defendants leave the court room, a request which the court accepted. Controversially, it emerged that Ateş had links not only to the PKK but also to two other organisations, including the Kurdistan Democratic Party (KDP).

e. Subsequent sessions of the trial

In his closing submissions made at the last session of the trial, the Public Prosecutor invited the court to consider a 50 year prison term for, "membership in an armed gang and attempted, premeditated murder."[43]

Closing submissions were made at the second hearing of the trial unexpectedly early. The Prosecutor submitted to the court that all relevant evidence had been

43 'Şemdinli trial nears end', Turkish Daily News, 14 June 2006

heard. Trials of this nature normally last for months or years in Turkey. The speed of this trial indicates a desire to conclude the proceedings with expedition.

f. The verdict

On 19 June 2006, the court sentenced Kaya and İldeniz to 39 years and 10 months imprisonment each, after finding them guilty of inciting violence and murder. The two were sentenced for "forming a criminal organisation, killing people, attempting to kill people and causing injury". The trial of Veysel Ateş was adjourned to 3 August 2006 due to the absence of his lawyer. However, the verdict was again postponed to 24 August 2006 after Ateş' lawyer called for a mistrial to be declared.

Kaya and İldeniz were each sentenced to 1 year 11 months and 10 days imprisonment for founding a gang, 25 years each for the murder of Mehmet Zahir Korkmaz and 12 years for the attempted murder of Seferi Yılmaz and causing injury to Metin Korkmaz. However, the Public Prosecutor in Van has recently appealed the court's verdict, calling for their sentences to be reduced.

Although these sentences can be viewed as a positive development, particularly as they represent the first time a verdict has been passed so quickly in relation to actions of the military, the delegation is concerned that the trial failed to adequately investigate and expose the existence and involvement of a larger 'deep state' organisation, which is widely believed to be composed of many more than these three people.[44] Indeed, after the verdict, EU-Turkey Joint Parliamentary Commission Chair Joost Lagendijk stated that those sentenced did not act alone, but were part of a network.[45] The complainants are believed to be appealing the verdict, on the grounds that they should have been charged under Article 302 of the TCK, rather than Article 220, as was indicated in the indictment. Article 220 covers the offence of "forming an organisation to commit acts that are described as offences by law". An offence under Article 302, on the other hand, is more serious, since it covers "anyone who commits an act aimed at undermining the independence of the nation, destroying its unity, or separating a portion of those territories under the sovereignty of the country from the country's administration". It is of further concern that the Public Prosecutor is attempting to reduce Kaya and İldeniz's sentences.

44 'Şemdinli gang not only three people', BIA News Center, 21 June 2006

45 'Şemdinli Ruling Points to Rule of Law', Zaman Daily News, 21 June 2006

g. Withdrawal of Judge Erbaş from case

On 3 August 2006, Ates's lawyer, Yurdakan Yildiz, filed a motion that two of the judges, Muharrem Balli and Ferhat Erbaş, be disqualified from the judgment panel. Later that day, Judge Ferhat Erbaş withdrew from the case saying that he felt he could not be impartial[46]. Erbaş also claimed to have been disturbed by reports that the verdict against Kaya and Oldeniz had been made while he was on leave and that this was because he had earlier requested their acquittal[47].

h. Arrest of Seferi Yılmaz

On 20 June 2006, Seferi Yılmaz was arrested in Hakkari and transferred to a local prison on the basis of allegations made by PKK member turned state informant Hasan Sağlar that Yılmaz had connections with some of the PKK's rural leaders.

The arrest of the victim and most important witness of the Şemdinli incident on the eve of the announcement of the verdict against Kaya and İldeniz has raised understandable suspicion. At the time of going to press, Seferi Yılmaz remained in prison, and there have been reports that he was held in solitary confinement for several weeks.

46 'Judge withdraws from Semdinli case, saying he lacks objectivity', The New Anatolian, 4 August 2006, at < http://www.thenewanatolian.com/tna-12208.html> (last accessed 6 September 2006).

47 Ibid

7. Conclusions

> *[I]t is only by breaking the vicious circle of provocations and violence that there is a realistic prospect of development for south-east Anatolia and full cultural and political rights for the Kurds.*
>
> Joost Lagendijk, 21 April 2006. [48]

Chairman of the EU-Turkey Joint Parliamentary Committee in the European Parliament, Joost Lagendik urges the resolution of the socio-economic underdevelopment of the south-east, the advancement of the Kurds' cultural rights and more Parliamentary representation for the Kurdish minority. However, he emphasises that the solution is incapable of achieving resolution without a cessation of violence by the PKK. Only by the renunciation of violence does the PKK become a respectable partner for negotiation. Equally, he points out that the Turkish government must acknowledge that the imperative for enduring peace is the assurance of the rule of law. "A recent study into sources and settlements of ethnic conflicts in the world underlined the absolute necessity of the state to be a trustworthy actor as a prerequisite to any confidence-building between the parties: there is no substitute for good governance, accountable- democracy, and normal politics when it comes to ending internal conflict."

Cuneyt Cangir, President of the Van branch of IHD and lawyer for the victims[49] also acknowledges that the Turkish authorities and the PKK must each make their own efforts to resolve the issue, but in his view, the resurgence in violence can only be resolved if the EU also takes an active and effective role in the Turkish problem. He conceded that no-one is under any illusion about the difficulty of finding a lasting solution quickly.

Some of those interviewed by the delegation were more circumspect on the issue as

48 Joost Lagendijk, "Trouble in the South-East: Will the Reformers Please Stand Up?" Zaman Daily News Online, at <http:www.zaman.com/?bl=commentary&alt=&trh=20060421&hn=32291> (last accessed 6 September 2006).

49 Interview with Cüneyt Cangir, President of the Van branch of İHD, 5 May 2006, Van.

to how amelioration of the situation would come about[50]. They were of the view that only an accumulation of similar incidents would generate any reform and answer critical questions. In the light of the modest and slow-paced reform in Turkey on other fundamental issues of human rights such as torture, their predictions have a firm basis.

Many agree that continuing violence perpetrated by the PKK would only play into the hands of those who wish to preserve the pre-existing status quo and undermine Turkey's membership negotiations with the EU. Violence against innocent civilians by armed militants must be condemned. However, such actions cannot provide the basis and justification for grave human rights abuses committed by the state, nor the failure of the state to bring to justice those responsible for such abuses.

The Şemdinli incident, as a microcosm of the wider picture, is a test of the Turkish authorities' will to ensure the supremacy of the rule of law and due process and its will to establish a genuine and effective democracy.

- The Şemdinli bombing involved an unacceptable violation of the right to life. Efforts must be made to curtail this occurring in future
- The investigation by the prosecution and the trial itself raises serious concerns about the ability and willingness to conduct a prompt, thorough and impartial investigation into allegations of killing by state agents
- The swift punishment and removal of the Prosecutor for the indictment is a clear indication of the above, whilst also highlighting serious failures in the independence of the prosecution and judiciary
- The bombing of the Umut Bookhouse cannot be seen as an isolated incident but rather in the context of a cycle of violence perpetuated by the Turkish government and armed separatist movements
- Evidence from this trial suggests that the recent upsurge in hostilities can be directly linked to groups who want to hamper Turkey's democratic reforms in line with EU accession
- Such groups derive from varying ideologies which includes both Turkish and Kurdish nationalist extremists

50 Interview with Hamit Geylani, Lawyer for victims, 4 May 2006, Van and interview with Professor Baskin Oran, 4 May 2006, Van.

- Violence against innocent civilians by armed militants must be condemned

- At the same time, such actions cannot provide the basis and justification for grave human rights abuses committed by the state, nor the failure of the state to bring to justice those responsible for such abuses.

8. Recommendations

This report urges the state of Turkey to:

- Establish an effective independent judiciary and prosecutorial system which reflects international human rights standards and incorporates due process guarantees;
- Conduct a full investigation of the allegations of military involvement in both provoking the conflict through its involvement in the bombing and similarly its influence on the dismissal of Prosecutor Ferhat Sarıkaya;
- Ensure that similar allegations of state involvement in violations of the right to life are fully investigated and the perpetrators appropriately sentenced;
- Seriously consider the inherent flaw in its current dual judiciary system, civilian and military;
- Introduce further training for the judiciary, prosecutors and state officials regarding international human rights standards and the importance of independent investigations;
- Recognise the effect of the ongoing conflict on the reform process and take steps to end it, including entering into dialogue regarding its resolution.

This report urges the European Union to:

- Continue to closely monitor both the conflict in south-east Turkey and the instances of state implicated violations of the right to life, as it has done in its progress reports on Turkey;
- Continue to exert its considerable influence on Turkey to step up the pace of its compliance with and implementation of the Copenhagen Criteria.

Appendix 1: Relevant International Standards[51]

Right to Life

The right to life is a fundamental tenet of international human rights law. It is enshrined in several treaties and is well established as a rule of customary international law. It should however be noted that the right to life is not an absolute right, unlike the prohibition on torture. There are several limited exceptions, including punishment as prescribed by law (the death penalty) and other prescribed circumstances, where the use of lethal force may be absolutely necessary. Nonetheless, the right to life is non-derogable and no one can be arbitrarily deprived of this right.

International Instruments

Article 3 of the Universal Declaration on Human Rights (UDHR)[52] protects the right to life stating that: "Everyone has the right to life, liberty and security of person."

Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR)[53] states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Regional Instruments

Article 2 of the European Convention on Human Rights

In the European system, the right to life is enshrined in Article 2(1) of the European Convention on Human Rights which provided that: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which

51 Please note that owing to the inherent limitations in any publication of this type, this section is not intended to be and cannot be exhaustive in relation to every aspect of international law that may be applicable. Similarly, any analysis of the relevant law is subject to the same caveat.

52 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

53 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

this penalty is provided by law." It should be noted that the second sentence of this provision was superseded by Article 1 of Protocol No 6 to the ECHR, which prohibited the imposition of a sentence of death or any such execution.

Article 2(2) of the ECHR provides additional qualified exceptions to the right to life and states that: "Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection".

The exceptions delineated in Article 2(2) do not primarily define instances where it is permitted to intentionally kill an individual, but instead describes situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The European Court of Human Rights (ECtHR) has reiterated that the use of force "must be no more than 'absolutely necessary' for the achievement of one of the purposes set out in sub-paragraphs (a), (b), or (c)."[54]

Additionally, the right to life under Article 2 of the ECHR imposes both negative and positive obligations on a state contracting party. The state is obliged not to take life, save in certain prescribed situations where lethal force is absolutely necessary, but is also under a positive obligation to protect life.

The ECtHR has held that Article 2, "ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed."[55] The Court's "approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."[56]

Ancillary to the positive duty to protect life is a duty on the state to undertake effective investigations where a potential violation of Article 2 has occurred. [57] Furthermore, the ECtHR has indicated that deprivations of life must be subjected "to the most careful scrutiny, particularly where deliberate lethal force is used,

54 McCann v UK (1996) 21 EHRR 97 at 148.

55 McCann v UK (1996) 21 EHRR 97 at 147.

56 Id. at 146.

57 See, McCann v UK (1996) 21 EHRR 97; Yasa v Turkey (1999) 28 EHRR 408; Ergi v Turkey (2001) 32 EHRR 18.

taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination."[58]

Article 2 requires an effective independent investigation that is independent both "institutionally and in practice".[59] Where Article 2 is engaged the duty of investigation may be discharged though various methods of inquiry.

The criteria for an Article 2 compliant inquiry were delineated by the ECtHR in the case of *Jordan v UK*[60]:

i. The inquiry must be on the initiative of the state;

ii. It must be independent;

iii. It must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death;

iv. It must be prompt and proceed with reasonable expedition;

v. It must be open to public scrutiny to a degree sufficient to ensure accountability;

vi. The next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.[61]

The Right to Life and the Duty to Investigate: Other international Instruments

The right to life and the duty to investigate are also enshrined in international law relating to both extra-legal, arbitrary and summary executions and forced disappearances. In the context of this report, the most pertinent legal framework can be found in the law relating to extra-legal, arbitrary and summary Executions.

The UN Principles on the Effective Prevention and Investigation of Extra-legal,

58 McCann v UK (1996) 21 EHRR 97 at 150.

59 Gulec v Turkey (1999) 28 EHRR 121; Ogur v Turkey (2001) 31 EHRR 40; Ergi v Turkey (2001) 32 EHRR 18. See, Joint Committee On Human Rights - Fourth Report, 12 January 2005 at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/26/2602.htm

60 Jordan v UK, (2003) 37 EHRR.

61 See, Joint Committee On Human Rights - Fourth Report, 12 January 2005 at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/26/2602.htm

Arbitrary and Summary Executions ("the Principles") specifically deal with killings by state agents or those affiliated to the state. Paragraphs 1 and 2 of the Principles place an obligation on states to prohibit such executions and ensure that they are considered as a criminal offence in domestic law and thus subject to subject to appropriate penalty. The Principles make it explicit that such executions "shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority."

The Principles demand that a clear chain of authority is in place to prevent such executions:

> *2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms*
>
> *3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.*

The Principles also enshrine the concept most frequently seen in international humanitarian law in that:

> *19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.*

Paragraph 4 of the Principles places an obligation on states to provide effective protection through judicial or other means to those "in danger of extra-legal, arbitrary or summary executions, including those who receive death threats."

Effective independent investigation by the state in such circumstances is also demanded by the Principles:

> *9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.*
>
> *10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.*
> *11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.*

Of note, the Principles demand that "Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall cooperate fully in international investigations on the subject."

In addition to these obligations in the investigatory process, paragraphs 16 and

17 of the Principles also provide for the involvement of the family and their legal representatives and for the methodology and findings of any such investigation to be made public in a written report:

> *16. Families of the deceased and their legal representatives shall be informed of, and have access to. any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.*
>
> *17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.*

Paragraphs 18 and 20 of the Principles provide for legal proceedings in cases involving extra-legal, arbitrary or summary executions and for fair and adequate compensation for the families and dependants:

> *18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.*
>
> *20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation*

within a reasonable period of time.

2. Independence of the Judiciary

Article 14(1) of the ICCPR provides that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law…".

The UN has created a body of Basic Principles on the Independence of the Judiciary,[62] which outline in detail state obligations and the relationship between the state and judiciary. In particular, they provide that:

> *1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
>
> *2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
>
> *3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
>
> *4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*
>
> *…*
> *7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.*
>
> *…*
> *17. A charge or complaint made against a judge in his/her judicial*

62 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

3. The Role of Prosecutors

As with the judiciary, the UN has promulgated Guidelines on the Role of Prosecutors.[63] The most pertinent guidelines are as follows:

4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

…

10. The office of prosecutors shall be strictly separated from judicial functions.

11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

12. Prosecutors shall, in accordance with the law, perform their duties

63 Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc.

fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

…
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
…

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.

22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines. Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.

24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Appendix 2: List of Defendants, Victims, Lawyers and Judges Who Took Part in the Trial

Judges

President of the Court – İlhan Kaya
Co-judges – Muharrem Ballı and Ferhat Erbaş

Clerk

Abdülvahap DEMİR

Public Prosecutor

Ferhat SARIKAYA who was dismissed following the drafting of the indictment and replaced by Metin DİKEÇ

Defendants

Ali KAYA
Özcan İLDENİZ
Veysel ATEŞ

Lawyers for the defendants

Orhan NALCIOĞLU
Mahmut GÜLER
Vedat GÜLŞEN
Yurdakan YILDIZ
Zülküf ULUFER

Victims

Seferi YILMAZ
Metin KORKMAZ

Hamide KORKMAZ

Lawyers for the victims

Mehmet EKİCİ
Cüneyt CANİŞ
Cemal YÜCEL
Selçuk KOZAĞAÇLI
Mehmet BAYRAKTAR
Rasim ÖZ
İbrahim BİLMEZ
Ayla AKAT
Aygül DEMİRTAŞ
Murat BEKTAŞ
Bengi YILDIZ
Servet ÖZAN
Filiz KALAYCI
Mensur IŞIK
Hafize ÇOBANOĞLU
Nergis Tuğba ASLAN
Gökçe YENERSU
Canan UÇAR
Bahattin ÖZDEMİR
Aysun SOLAKOĞLU
Mehmet AKDÖL
Murat TAŞKIRAN
Şehnaz TURAN
Emin BAŞAR
Aysun KOÇ
Ahmet YEŞİL
Hamit GEYLANİ
Necip KORKMAZ
Sedat TÖRE
Fuat COŞACAK
Nevzat ANUK
Abdurrezzak ERTAŞ
Muharrem ŞAHİN
Av.Sinan ARAZ
Av.Abdülkadir GÜLEÇ
Ayhan Çabuk, Av.Sezgin TANRIKULU
Yusuf ALATAŞ
Fahri BAYRAMBELEN
Metin İRİZ

Deniz TUNAGÜLDOĞAN
Murat TİMUR
Dincel ASLAN
Ercan KILIÇ
Mehmet EKİCİ
Hasip KAPLAN
Tahir ELÇİ

Appendix 3 – Relevant Sections of Turkish Penal Code

Article 302/1 of the Turkish Penal Code (TCK): Anyone who commits an act aimed at placing the territory of the nation wholly or partially under the sovereignty of a foreign country, undermining the independence of the nation, destroying its unity, or separating a portion of those territories under the sovereignty of the country from the country's administration, shall be sentenced to strict life imprisonment.

Article 5 of the law number 3713: Penalties of imprisonment and fines imposed according to the respective laws for those committing crimes as described in Articles 3 and 4 above shall be increased by one half. In doing so the penalties may exceed the maximum penalty for that or any other crime. However, in the case of the rigorous imprisonment the penalty may not exceed 36 years', in case of (ordinary) imprisonment 25 years', and in case of light imprisonment 10 years' imprisonment.

Article 302/2 and Article 82/1-c of the TCK:

Where other crimes are committed during the commission of this crime, relevant provisions shall also apply for the punishment of such offences.

If the act of homicide is committed; by means of fire, flood, destruction, sinking or bombing, or by using nuclear, biological or chemical weapons,

Article 302/2 and Articles 82/1-c and 35/1 (twice) of the TCK:

Where other crimes are committed during the commission of this crime, relevant provisions shall also apply for the punishment of such offences.

If the act of homicide is committed; by means of fire, flood, destruction, sinking or bombing, or by using nuclear, biological or chemical weapons,

If a person is in a motion to carry out an offence, but for some reason cannot carry out the offence, still be tried for the attempted offence *(Mens Rea)*.

Article 316/1 of the TCK:

If one or more parties reach the agreement for the economic loss, which resulted because of the breach of 1st and 4th sections of this article, within the frame of remoteness degree, can be given between 3 to 12 years imprisonment.

Article 53 of the TCK:

(1) A person as a result of its statutory punishment (imprisonment) for the offence attempted can be deprived;

a) Continuously, in case of undertaking a permanent or temporary public duty; in this extent (could be drawn from); appointment or civil servant jobs granted by election within administrative province, municipality, village or institution and establishments, from a membership of Turkish Grand National Assembly or State, and employment from these services.

b) From right to elect and to being elected and using other political rights,

c) From rights of guardianship; wardship or caretaking of a mosque,

d) Charity, association, trade union, company, cooperative, management of a political party,

e) Can also be derived from being a self-employment of a profession or art within a public institution or establishment equal to public institution.

(2) A person cannot have any of these rights until the prison sentence for the offence is completed.

(3) Law paragraphs above do not apply to guardianship, wardship, and caretaking of a mosque if the imprisonment postponed or conditionally charged. A convict can be exempt from being subjected to subsection (e) of first paragraph.

(4) Subsection 1 cannot be used against persons under 18 where a sentence is real or postponed.

(5) In case of given punishment for misuse of rights and powers in paragraph 1, and, after the execution of given punishment, rights and powers given in paragraph 1 can be prohibited for the half or entire punishment. In case of Amercement for the offences committed by the misuse of rights and powers in paragraph 1, the rights and powers given in paragraph 1 can be prohibited for from half to entire duration of punishment. The enforcement of prohibition starts right after from the execution

of Amercement.

(6) **In case of** Imprisonment because of committing to an offence for breach of obligations of any profession or traffic orders, a person can be prevented from continuity of its profession or driving licence. Prohibition and disqualification comes into the force immediately after the execution of punishment.

Article 63 of the TCK:

Time that had been spent during the determination of sentence, which created limitations in one's rights, will be deducted from the sentence given. In case of fine, one day will be valued at 100 Turkish liras.

Article 220 of TCK:

1) Anyone who establishes or directs organisations for the purpose of criminal activity shall be sentenced to imprisonment of from two to six years provided that the structure of the organisation, the number of members and the quantity of equipment and supplies are sufficient to commit the intended crimes.

2) Anyone who becomes a member of an organisation established for the purpose of criminal activity shall be sentenced to imprisonment of from one to three years.

3) If the organisation is armed, the sentences stated above shall be increased from one fourth to one half.

4) Any offence committed within the framework of the organisation's activities shall be punished separately.

5) The heads of the organisations shall also be sentenced as the perpetrators of all crimes committed within the framework of the organisation's activities.

6) Anyone who commits a crime on behalf of the organisation, even if they are not a member of that organisation, shall also be punished for being a member of the organisation.

7) Anyone who aids and abets an organisation knowingly and intentionally, even where they do not belong to the hierarchical structure of the organisation, shall be punished as a member of the organisation.

8) Anyone who makes propaganda for the organisation or its objectives shall be punished by imprisonment of from one to three years. If the said crime is committed through the media and press the sentence shall be increased by one half.

Appendix 4: Interviews and Meetings Held by the Mission

- **Cüneyt Cangir** – President of *Insan Haklari Dernegi* (the Human Rights Association of Turkey), Van Branch, 5 May 2006, Van.
- **Hamit Geylani** - Lawyer for victims of the Şemdinli incident, 4 May 2006, Van
- **Esat Canan** - MP from the main opposition party *Cumluriyetci Halk Partisi*
  (Republican People's Party – CHP) representing Hakkari district, 4 May 2006, Van.
- **Professor Baskin Oran** – Human Rights Defender and former member of the Human Rights Advisory Board of the Prime Ministry (BIHDK)
- **Selçuk Kozağaçlı** - Lawyer for victims of the Şemdinli incident, sent his opinion by e-mail, 11 May 2006

Appendix 5: Military Investigation and Trial

1. **Case file is sent to Commander.**

   Commander, with assistance of his/her legal adviser signs an investigation order and sends case file to the Office of the Military Prosecutor

2. **Complaint is lodged with the Office of the Military Prosecutor (OMP)**

   Military Prosecutor
   - Opens an investigation
   - Prepares all indictments
   - Represents the Republic of Turkey and TAF versus the suspect(s) during trials in court

In certain circumstances, military prosecutors can open a case file on their own initiative without having an investigation order. These are:

- *If the charge carries a heavy punishment under Military Penal Code or Penal Code*

- *If there is an urgent situation, or if precautions are necessary to collect evidence, or if a suspect is in custody*

- *If the prosecutor or a vice prosecutor is a witness of the event*
- *If a homicide or suicide is involved.*

It is the military prosecutor who decides whether the above reasons exist in a particular situation. A commander cannot stop the investigation.

3. **The Investigation**

The military prosecutor then proceeds with the investigation. Within this, he may

demand any information from any individual, including the police.

The military prosecutor collects evidence both in favour of and against the suspect(s).

At the end of the investigation the military prosecutor must decide:

a) If there are sufficient grounds for legal action or
b) Whether to prepare an indictment, or
c) Delay the investigation temporarily.

a) If the prosecutor is not satisfied that the case file sent to them by the Commander contains enough evidence to charge the suspect, he/she issues an order of 'Lack of grounds for legal action'
The suspect, victims and/or the Commander has the right to object. The final decision is reached by the nearest military court.
b) If a military prosecutor finds that there is enough evidence to open a case file, or she/he is convinced that there are reasons enough to accuse a suspect, he/she prepares an indictment and sends it to the military court.
No-one can object or appeal against an indictment until jurisdiction begins.
c) If the suspect is missing, of they have a mental illness, or if the right of petition has to be used by the victims for an investigation and that the right has not been used within the deadline, then the prosecutor delays the investigation temporarily.

The Minister of Defence can order the prosecutor to continue the investigation when an indictment has not been prepared.

4. The trial and hearings

- The authority for the establishment and abolition of military courts lies with the Ministry of National Defence.
- Military personnel consist of generals, admirals, officers, **non-commissioned officers**, privates, corporals, soldiers and cadets.
- There is a minimum of three judges, usually two military judges and one officer.
- Military Courts handle cases related to military crimes committed by military personnel and crimes committed against military personnel or at military locations or related to military service and duties.
- All proceedings at the military courts are public. If the Court decides to, trials can be held in camera.
- The accused has the right to legal counsel paid for by the government if the

accused is enlisted military personnel.
- If the accused requests a lawyer, the Court has to send a written demand to the local Bar and the Bar must provide a lawyer. The victim/ the victim's family can be informed of this.
- Generally, the accused must be present during the trial. The accused can choose to be tried in absentia unless the crime carries a long prison-term, whereby they must be available to attend the defence part of the trial.

5. Sentencing

- Sentences declared by the Court are carried out by the Office of the Prosecutor.
- Once sentencing has become final, it is sent to the Prosecutor to be carried out. After the decision has been executed, the Prosecutor sends the file back to the Court which is then archived.
- A case can be re-opened after final sentencing

6. The appeal process

- The Military High Court of Appeals has the authority of the annulment of verdicts. It has a president, usually a Brigadier Gen. and a Chief Prosecutor usually a colonel.
- The Military Court of Appeals (MAC) is the court of last resort of the decisions and judgments given by military courts. It also handles certain cases specified in the laws of military persons as the court of first instance and last resort.
- Appeals can sent to the MAC by the accused, the prosecutor, the Commander or the victim.
- Appeals must be made within seven days; otherwise, the sentence becomes final.
- When the accused or the victim choose to appeals a decision, the Prosecutor must send the case file to the MAC.
- The MAC decides whether to re-open the case.
- If the accused is found guilty of a crime and has been sentenced to more than fifteen years imprisonment, the case file if sent to MAC by the Court automatically.

Appendix 6: Criminal Investigation and Trial

1. Complaint is lodged with the prosecutor: state prosecutorial investigation

The public prosecutor's investigation will be limited to the grounds on which the charges are based

An investigation will be triggered in three ways:

- The reporting of a crime
- A suspicious death
- By order of the Minister of Justice

The public prosecutor then proceeds with the investigation. Within this, he may demand any information from any individual, including the police.

Following the investigation, a decision will be made whether or not to prosecute:

- If a decision to prosecute is made, this will lead to a preliminary investigation in the case of serious felonies.
- If the prosecutor declines to prosecute, the victim may object. The objection then passes to the Aggravated Felony Court who will decide whether or not to prosecute

2. Preliminary investigation

In the case of serious felonies, the Public Prosecutor will demand a preliminary investigation based on the charge(s) against the accused.

- An accused can object and this will be decided by a judge.
- The preliminary investigation will be conducted by a judge.

3. The trial and hearings

The investigating judge is authorised to render a decision concerning the commencement of trial or the dismissal of charges.

The Public Prosecutor will file the investigation documents and his petition with the investigating judge. The petition must be in the form of an accusation, indicating:

- The particulars of the offence
- The legal elements of the crime
- The applicable statutory provision
- The evidence
- The name of the court where the trial will take place.

This will be forwarded to the accused.

Jurisdiction:

- Military personnel can be tried in Aggravated Felony Courts (for serious felonies): "offences committed by military personnel, not involving a military duty and which are not otherwise military offences and which are not committed against military personnel, are tried by the ordinary courts"

The accused and witnesses will be summoned to appear in the hearings by a court-ordered subpoena

- **Professional privilege**: lawyers, physicians, and midwives are exempt from having to testify regarding matters of their professional status. If so, they must assert privilege and explain grounds upon which it is based.
- A witness can refuse to testify against himself
- **Interrogation of the accused** – the accused will be advised of the nature of charges against him and asked if he wants to answer any charges against him

The sentence must be related to the crime committed

Expert testimony

- The judge determines the acceptable number of experts allowed to testify (judge may examine the fitness of the expert)
- If the expert is engaged in science (for example, those conducting the

autopsies) there is an obligation to testify as an expert. An autopsy shall be performed by two physicians in the presence of the Public Prosecutor, at least one of the physicians being a forensic practitioner

Defence

The accused has the right to select defence counsel, failing which one will be appointed by the court

Judgment

Judgments are rendered in unanimity or by the majority of the court. Reasons for the dissenting votes must be entered on the records.

If the accused is convicted, the justification of the judgment must include the facts which constitute the legal proof of the offence.

Appeal

The right to appeal against judicial decisions is open either to the Public Prosecutor or the accused. The defence counsel may also appeal, provided it is not contrary to the explicit desire of the accused.

Any appeal must be made within one week.

Publications List

Other materials available from the Kurdish Human Rights Project include:

- A Fearful Land: Fact-Finding Mission to Southeast Turkey (1996)
- A Delegation to Investigate the Alleged Used of Napalm or Other Chemical Weapons in Southeast Turkey (1993)
- Advocacy and the Rule of Law in Turkey (1995)
- After the War: Fact-Finding Mission to Iraqi Kurdistan (2003)
- *Akduvar v. Turkey* - The Story of Kurdish Villagers Seeking Justice in Europe (1996)
- Aksoy v. Turkey & Aydin v. Turkey: Case reports on the practice of torture in Turkey -volume I (1997)
- Aksoy v. Turkey & Aydin v. Turkey: Case reports on the practice of torture in Turkey - volume II. (1997)
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