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\*2219 JUSTICE ON TRIAL: STATE SECURITY COURTS, POLICE IMPUNITY, AND THE  
INTIMIDATION OF HUMAN RIGHTS DEFENDERS IN TURKEY

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Report of the Joseph R. Crowley Program/Lawyers Committee for Human Rights: Joint 1998  
Mission to Turkey [\[FN1\]](#)

## INTRODUCTION

In recent years, Turkey's human rights record has emerged as a critical issue in its relations with its allies in Europe and North America. The Turkish government has been criticized for serious violations of human rights ranging from restrictions on <sup>2130</sup> speech and association to the use of torture. [\[FN1\]](#) To its credit, the government has expressed a commitment to improving its human rights record, despite difficult domestic problems including violent confrontation with the Kurdish Workers Party ("PKK") in southeastern Turkey. [\[FN2\]](#) Reflecting this commitment, Turkey has ratified a number of important human rights treaties including the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention" or 'Convention ') and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture"). [\[FN3\]](#)

Notwithstanding the government's expressed commitment to ending abuses and its international obligations to do so, serious human rights violations persist. Although this report documents a number of these violations directly, it focuses on obstacles<sup>2131</sup> within the Turkish legal system to the improvement of Turkey's human rights record more generally. These obstacles include the existence of specialized political courts, police impunity for human rights violations, and the harassment of lawyers and human rights advocates who seek to hold the state accountable for these violations.

Turkey's State Security Courts (or "SSCs") comprise a system of special courts operating throughout Turkey, the jurisdiction of which is limited to political offenses and serious criminal offenses deemed threatening to the State. A number of features of the State Security Court system raise questions regarding the availability of a fair trial to defendants tried within the system. For example, the participation of a military judge on every State Security Court panel undermines the independence of the courts, particularly given the nature of the court's jurisdiction and the role of the military in enforcing Turkey's strict Anti-Terror Law. In addition, the SSCs are governed by special procedures that afford fewer protections for defendants than do procedures in Turkey's ordinary criminal courts. In particular, suspects accused of political crimes within the jurisdiction of SSCs are subject to extended periods of incommunicado

detention during which they may be tortured. Though the systematic use of torture is well-documented, police responsible for such acts are rarely held accountable. Finally, lawyers representing defendants in the State Security Courts are often subject to intimidation and harassment, sometimes undermining the effectiveness of their defense.

In September 1997, Fordham Law School's Joseph R. Crowley Program in International Human Rights [\[FN4\]](#) and the Lawyers \*2132 Committee for Human Rights [\[FN5\]](#) (“Lawyers Committee”) undertook a two-year project to study Turkey's State Security Court system and to evaluate it against international fair trial standards. The project included extensive study of Turkish law and procedure, including a review of previous reports by the Lawyers Committee and other international and Turkish non-governmental organizations, and information provided by the Turkish government, among other sources. In May and June 1998, an eleven person delegation [\[FN6\]](#) spent two weeks visiting ten cities in Turkey. [\[FN7\]](#) During the mission, delegation members interviewed lawyers, prosecutors, judges, government officials, and torture victims and observed hearings in both State Security Courts and ordinary penal courts. [\[FN8\]](#) This report documents our investigation, summarizes our findings, and sets out our recommendations to the Turkish government. [\[FN9\]](#)

The report is divided into three major parts. Part I addresses the right to a fair trial in the State Security Courts. Following an overview of the State Security Court system, this Part analyzes problems with the independence of the SSCs, particularly the participation of a military judge, and then proceeds chronologically through the trial process. It addresses the role of the prosecutor in securing a fair trial, with particular focus on the prosecutor's relationship with the police and with defense \*2133 attorneys. It then describes in some detail the right to counsel and obstacles to effective representation by defense counsel in State Security Courts. Finally, this Part addresses the use of coercive interrogation procedures by the anti-terror police and the use of coerced testimony in SSC proceedings.

Part II elaborates on the problem of coercive investigation techniques by documenting the existence of a climate of impunity for police who engage in torture and other serious violations of human rights. Part II begins by noting that torture of individuals held in detention continues to be one of the most serious human rights problems in Turkey. It then reviews jurisdictional hurdles to prosecution of police for torture, the most important of which is a much-criticized law requiring bureaucratic review and approval to prosecute any civil servant accused of a crime. Part II also addresses other obstacles including reluctance on the part of prosecutors to pursue these cases, understaffing of prosecutors' offices, police interference with the collection of evidence such as forensic evidence of torture, and a reluctance on the part of the court to convict and impose appropriate sentences.

Part III addresses the separate but related problem of the harassment and intimidation of lawyers and human rights advocates. This Part begins by examining the harassment and unfair prosecution of lawyers, a problem that further compromises the fairness of proceedings in State Security Courts by undermining the effectiveness of counsel in such proceedings. It then addresses the regulation and intimidation of human rights advocates, particularly the use of the Anti-Terror Law to restrict their freedom of speech and association. Because much of the work of defense lawyers and human rights advocates is deemed threatening to the Turkish state, these individuals may become defendants themselves in the SSC system, thereby facing detention and the possibility of torture, conviction, and imprisonment. This report concludes with a list of recommendations to the Turkish government for addressing the problems and improving its human rights record.

## \*2134 I. THE RIGHT TO A FAIR TRIAL IN TURKEY'S STATE SECURITY COURTS

### A. Introduction

The right to a fair trial is fundamental to a broad set of human rights in that a properly functioning justice system protects individuals from the unlawful and arbitrary denial of basic rights and freedoms. [\[FN10\]](#) In light of its importance, international standards defining the right to a fair trial require states to safeguard the fairness of procedures beginning from the moment of arrest and detention through trial and the final stages of the judicial process. Hence, the right to a fair trial implicates a wide range of personnel and procedures connected with the criminal justice system. This Part examines the right to fair trial in Turkey's State Security Courts as measured against Turkey's obligations under international law.

SSCs are a part of a system of special courts in Turkey designed to adjudicate political and serious criminal cases deemed threatening to the security of the state. SSCs have existed since 1973, when the legislature created them in accordance with then-governing 1962 Turkish Constitution. [\[FN11\]](#) In 1976, the Constitutional Court annulled the law creating the SSCs, ending the SSC jurisdiction for a time. The SSC system was restored in the 1982 Turkish Constitution, itself the result of a military takeover of the civilian government. [\[FN12\]](#) The current Turkish Constitution specifically provides for SSCs, describing them as special courts 'established to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the State.' [\[FN13\]](#)

Currently, there are eight SSCs in Turkey, some with multiple\*2135 chambers. [\[FN14\]](#) Each SSC is comprised of a president, two full members, two substitutes, and a prosecutor. The president, one full member, and one substitute must be civilians. The other full member is a military judge. [\[FN15\]](#) SSCs differ from regular courts in a variety of ways; these differences regard the number of judges, the use of special judges, the use of special prosecutors, the use of special procedures, and reliance on a special investigative arm of the security forces.

The structure and scope of activity of the SSCs raise serious questions in light of Turkey's obligation under international law to protect a defendant's right to a fair trial. This right, however, depends not only on the conduct of the trial but also on the totality of the criminal justice system. [\[FN16\]](#) The fairness of the SSC trials therefore can only be assessed by taking into consideration every stage of the process from initial detention, through investigation, to the eventual court proceedings. [\[FN17\]](#) In assessing the right to fair trial in the SSCs, this Part considers several of the component elements of that right at each of these stages.

After reviewing Turkey's obligations under international law, this Part addresses the role of judicial independence in the SSC system, especially the structural foundation of the SSCs in the Turkish Constitution and the procedures for appointing both military and non-military judges to the SSCs. This Part next considers the prosecutor's role in collecting and presenting evidence\*2136 and in safeguarding the rights of defendants, including those detained for pre-trial interrogation. It then addresses the right to counsel in connection with the extended period of incommunicado detention and the role of defense counsel in the SSC system. Finally, this Part focuses on the period of pre-trial detention in state security cases, the role of coercive

interrogation techniques during this period, and the use of torture-induced testimony in SSC proceedings.

## B. Turkey's Obligations Under International Law

The primary international instrument ratified by Turkey and bearing on the right to fair trial is the European Convention. [\[FN18\]](#) Article 5 of the European Convention sets out standards governing the pre-trial detention phase of a proceeding. Article 6 contains standards for a fair hearing. These standards, which are binding in Turkish and international law, [\[FN19\]](#) include the following rights.

- Protection from the arbitrary deprivation of the right to liberty and security of person. [\[FN20\]](#)
- The right to be informed promptly of the reasons for arrest and any charges. [\[FN21\]](#)
- The right to be brought promptly before a judicial authority and to trial within a reasonable time. [\[FN22\]](#)
- The right to challenge the lawfulness of detention before a court (habeas corpus). [\[FN23\]](#)
- The right to compensation for wrongful imprisonment. [\[FN24\]](#)
- The right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. [\[FN25\]](#)
- Presumption of innocence. [\[FN26\]](#)
- \*2137 • Due process safeguards including defendants' rights to be informed in detail of the case against them. [\[FN27\]](#)
- The right to adequate time and facilities and to legal assistance in preparing a defense. [\[FN28\]](#)
- Defendants' right to present witnesses on their behalf and to examine prosecution witnesses. [\[FN29\]](#) Although comprehensive, this list is not fully exhaustive with respect to the requirements of fairness in criminal proceedings. For example, the right to counsel appears expressly in Article 6(3), which deals with the rights of defendants in criminal trials. [\[FN30\]](#) The European Court of Human Rights (“European Court” or ‘Court’) has also held that this right is implicit in both the Article 5(3) right of the detained person to be ‘brought promptly before a judge’ and the Article 5(4) right of detained persons to ‘take proceedings’ of habeas corpus. [\[FN31\]](#) The European Court has also found additional features implicit in the right to counsel, including the right to communicate with counsel, [\[FN32\]](#) and confidentiality in lawyer-client relations. [\[FN33\]](#) Although not without limits, [\[FN34\]](#) these features of the right to counsel are applicable to \*2138 Turkey under the European Convention and are of particular importance because domestic Turkish law does not require the state to provide lawyers for defendants in the SSCs.

The European Convention permits a state party to derogate from certain obligations ‘in time of war or other public emergency threatening the life of the nation.’ [\[FN35\]](#) Turkey has so derogated from its obligations under the European Convention, including obligations relating to fair trial, citing the threat to the nation caused by internal terrorist activity, principally aligned with Kurdish-separatist factions including the PKK. Between 1990 and 1992, Turkey derogated from Articles 5, 6, 8, 10, 11, and 13 of the European Convention. [\[FN36\]](#) Since 1992 it has reported its derogation solely from Article 5. [\[FN37\]](#) Neither the European Court nor the European Commission on Human Rights (‘European Commission’ or ‘Commission’) has questioned Turkey's stated grounds for derogation. In its 1996 decision in *Aksoy v. Turkey*, for example, the Commission simply ruled that ‘[i]n view of the grave threat posed by terrorism in

this region, the Commission can only conclude that there is indeed a state of emergency in South-East Turkey which threatens the life of the \*2139 nation.’ [\[FN38\]](#)

Despite Turkey's declared derogation, the Court has not shrunk from finding violations of Article 5 in complaints brought before it under the right of individual petition provided for in Article 25 of the European Convention. [\[FN39\]](#) The Court has repeatedly based its decisions in these cases on findings that the particular measures have not been ‘strictly required by the exigencies of the situation’ as required under Article 15(1), which deals with derogation in time of war or other public emergency. [\[FN40\]](#) The Court has dealt with complaints on a case-by-case basis rather than finding a systemic failure of pre-trial detention procedures in SSC cases. [\[FN41\]](#) The Court has also taken a very broad view of fair-trial guarantees. The Court has emphasized that in assessing fair-trial issues, it is important to look at the entire process to determine the point at which various component rights are implicated. Similarly, the Commission has stated that Article 6 rights ‘must be guaranteed throughout the process, rather than at a particular stage in them.’ [\[FN42\]](#)

Turkey has also ratified both the U.N. Convention Against Torture and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (‘European Torture Convention’). [\[FN43\]](#) Both of these treaties absolutely prohibit torture during criminal interrogation and require ‘\*2140 that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.’ [\[FN44\]](#)

Beyond the binding international treaties ratified by Turkey, other international instruments are relevant to a consideration of the right to fair trial before SSCs. The U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment [\[FN45\]](#) amplifies and reinforces the due process rights and pre-trial detention safeguards contained in the European Convention. Similarly, the U.N. Basic Principles on the Independence of the Judiciary [\[FN46\]](#) (or ‘Principles on Lawyers’) establish more detailed standards in the area of judicial independence, while the U.N. Basic Principles on the Role of Lawyers [\[FN47\]](#) elaborate the right of access to counsel provided for in the binding treaty documents. Although not treaties, these instruments represent an authoritative set of internationally-recognized standards adopted by consensus by the U.N. General Assembly. [\[FN48\]](#) In each of these instruments, states are exhorted to implement the principles therein and in so doing bring practices in every country closer to the standards envisaged in the Universal Declaration of Human Rights [\[FN49\]](#) and the treaties derived from it, including the European Convention.

\*2141 C. State Security Courts and Judicial Independence

### 1. SSCs and the 1982 Constitution: Problems of Special Jurisdiction

State Security Courts fulfill a powerful function within the Turkish State as described in the ringing rhetorical language of the Turkish Constitution. The 1982 Constitution stipulates countering threats to the integrity of the eternal Turkish Nation and motherland as the reason for its promulgation. [\[FN50\]](#) The preamble of the 1982 Constitution, which, according to Article 4, shall not be amended nor shall its amendment even be proposed, proclaims the absolute supremacy of the will of the nation. The preamble further asserts that ‘no protection shall be afforded to thoughts and opinions contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its State and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Atatürk.’ [\[FN51\]](#)

In the 1982 Constitution, the interests and integrity of the Turkish State clearly take priority over the rights and liberties of its citizens. Indeed, a recent report by rapporteurs of the Council of Europe Parliamentary Assembly called attention to the negative impact on human rights in Turkey of the language of the 1982 Constitution. The report stated:

A basic concern of the Assembly, however, is still not being addressed. The Turkish Constitution, adopted under military rule in 1982 leaves room for (although it does not necessarily entail) conceptions of the relationship of the State to the individual which are authoritarian and not compatible with the Council of Europe's Statute and the European Convention on Human Rights. [\[FN52\]](#) The rapporteurs recommended adjustment to the language of the preamble as one possible way to address concerns about the authoritarian slant of the Constitution. [\[FN53\]](#)

\*2142 In the context of constitutional language emphasizing the primacy of the state, the establishment of SSCs as special courts with jurisdiction over cases of a political nature has proven highly problematic. The removal of political cases from courts of general jurisdiction to the SSCs has led to an institutional bias within the SSCs in favor of security at the expense of individual liberty. After all, the very existence of SSCs is justified by the threat to the state posed by the crimes comprising their jurisdiction. As a result, the SSC system has lost the necessary balance between security and liberty that is found in the European Convention and in much other international human rights law. [\[FN54\]](#) In sum, the SSC has become a primary instrument for repression in Turkey. The military--enshrined in the Constitution as the guardian of the State, endowed with executive power through the National Security Council, and with judicial power through the presence of a military officer on the judicial panel in the SSC--is both the interpreter and enforcer of what are described in the Constitution as 'Turkish historical and moral values' or the 'will of the nation.' [\[FN55\]](#)

## 2. Judicial Independence and Military Judges

The international community generally disapproves of courts in which military judges exercise jurisdiction over civilians because the independence of such courts cannot be guaranteed. [\[FN56\]](#) This subsection reviews the characteristics of the State \*2143 Security Courts that bear on the question of the independence of such courts, specifically the participation of a military judge.

The military judges' presence on a SSC panel violates the requirement of an independent tribunal in two important ways. First, both the manner and term of appointment for military judges create dependence on the military establishment. Second, the participation of military judges in criminal procedures against civilians represents a conflict of interest due to the role of the military in domestic law enforcement.

The independence of a tribunal depends in part on procedures governing the manner of appointment of judges, their term of office, and limitations on their transfer and removal from office. [\[FN57\]](#) A review of the procedure for the appointment and removal of military judges in SSCs reveals that the military strongly influences each stage of the process. Pursuant to the Military Legal Service Act, [\[FN58\]](#) the Secretary of Defense and the Prime Minister appoint military judges by decree, subject to the approval of the President. Although the appointment procedure must take into account the opinion of the Court of Cassation and the Ministry of Justice, a special committee of military members effectively controls the process. [\[FN59\]](#) The committee is composed of the personnel director and legal advisor of the General Staff, the

personnel director and legal advisor of the staff of the branch of the military in which the candidate is serving, and the Director of Military Judicial Affairs at the Ministry of Defense.

SSC judges are appointed to a four-year term. [\[FN60\]](#) For military judges, reappointment depends on the committee's evaluation of the judge's performance and ability. In evaluating the aptitude\*2144 of military judges to serve on SSCs, the committee members must review assessment reports drawn up by the Minister of Justice and the Secretary of Defense. [\[FN61\]](#) The Minister of Justice and Secretary of Defense also determine the advancement of military judges in salary, rank, and seniority. [\[FN62\]](#) Military judges are therefore subject to oversight by their military superiors, even while sitting on SSCs. [\[FN63\]](#)

Whether this evaluation and appointment process actually affects the decision of a military judge in a particular case is not dispositive of the question of judicial independence. The degree to which the interests of the military influence a case may be indiscernible to an objective review. Nevertheless, judges who face reevaluation and reappointment every four years must feel the pressure of those superior officers evaluating them. Moreover, their presence creates the appearance of partiality, thereby undermining public confidence in the integrity of the system.

The military judges' continuing accountability to their superior officers after their tenure on the SSCs poses perhaps an even greater threat to their independence on the bench. The military judge's subsequent career advancement and future assignments depend upon evaluation by military superiors. Thus, the legal decisions that military members of the SSCs render may well determine their professional future whether or not they remain on the bench. For example, a ruling viewed by superiors as against the military's interest could subject a judge to reassignment in a less desirable position, a loss of status, career frustration, and even disciplinary measures. Such possibilities undermine the capacity for independent judgment of the military members of SSC tribunals.

The second important threat to the independence of the SSCs stems from the connection between the interests of the military and the nature of SSC jurisdiction. [\[FN64\]](#) The State Security Courts have jurisdiction over crimes threatening the integrity of \*2145 the Turkish State, of which the Turkish military is the ultimate guarantor under the 1982 Constitution. In fulfilling this function, the military has extended its operation to both ordinary law enforcement and politics. As to the former, the military functions in connection with, and sometimes in lieu of, ordinary police to enforce the Anti-Terror Law in certain regions of the country. As to the latter, both the coup of 1980 and the military's overt role in forcing the Islamic Refah (Welfare) Party from power in 1997 indicate an ability and willingness to override the democratic process. Under the circumstances, the presence of military judges on the SSCs seriously undermines the ability of SSCs both to adjudicate fairly cases involving violations of laws that the military helps to enforce and to protect the rights of individuals deemed by the military to be threatening to the state.

These concerns have been expressed by both the European Commission and the European Court. Both the Commission and the Court have found that the presence of a military judge on SSC panels violates a defendant's right to an independent and impartial tribunal. For example, in *Incal v. Turkey*, [\[FN65\]](#) the European Commission found that the Turkish SSCs violated Article 6(1) [\[FN66\]](#) of the European Convention.

The Commission is of the view, under the current legislation on the composition of the National Security Courts, the manner of appointment and assessment of military judges raises a number of questions and may cast doubt on the image of independence which they should project. The Commission notes in this regard that military judges are accountable to their

commanding officers in their capacity as military officers. [Moreover,] [t]he fact that a military judge participates in criminal proceedings against a civilian, in cases not in any way involving the internal order of the armed forces, highlights the unusual nature of these proceedings and can also be regarded as an intervention by the armed forces in a non-military judicial domain, that is, a domain which should remain, in a democratic country, above any suspicion of dependence\*2146 or partiality. [\[FN67\]](#)

The European Court also found that the presence of a military judge on the SSC's panels violates the European Convention's guarantee of an independent and impartial tribunal. Noting that the military judges sitting on the SSCs are still soldiers and thereby under the control of the executive, that their military superiors assess and discipline them and determine their career, and that their term of office is only four years and renewable, the Court found that an applicant 'could legitimately fear that because one of the judges . . . was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case.' [\[FN68\]](#)

### 3. Judicial Independence: The Appointment and Promotion of Non-Military Judges and Prosecutors

The Turkish Constitution guarantees judicial independence of non-military judges in a variety of ways. The Constitution states that '[j]udicial power shall be exercised by independent courts on behalf of the Turkish Nation.' [\[FN69\]](#) It insulates the judiciary from outside influence by prohibiting orders or instructions relating to the exercise of judicial power from any authority and any legislative debate concerning a pending trial, and it provides that the legislative and executive branches must implement court decisions without alteration or delay. [\[FN70\]](#) The Constitution also provides judges with security of tenure [\[FN71\]](#) and puts the burden\*2147 upon judges to discharge their duties in accordance with the principles of the independence of the courts. The provisions apply to all non-military judges, including the non-military members of the SSC.

The Constitution also creates the Supreme Council of Judges and Public Prosecutors ("Supreme Council"), a seven member body of executive and judicial personnel charged with overseeing the judiciary. The Minister of Justice serves as the President of the Supreme Council. The undersecretary to the Minister of Justice is an ex officio member. The President of the Supreme Council appoints the remaining five members, each to a four-year term, selecting three from a list of nominees presented by the High Court of Appeals from among its ranks and two from a list of nominees prepared by the Council of State. The Supreme Council in turn oversees appointment to posts, admissions into the profession, promotions, removal from office, and other administrative functions of the judiciary. Decisions of the Supreme Council are not reviewable. [\[FN72\]](#) As with non-military judges, security of tenure for public prosecutors is recognized by the Constitution [\[FN73\]](#) and all other personnel matters are within the exclusive jurisdiction of the Supreme Council. [\[FN74\]](#)

The system for appointing and overseeing non-military judges is clearly vastly superior to that for military judges. Nevertheless,\*2148 despite these efforts to secure the independence of non-military SSC judges, several features of the appointment and oversight process provide reason for concern. The membership structure of the Supreme Council creates a potential for political influence in many essential personnel decisions. For example, although the Constitution prohibits the dismissal of judges except under limited circumstances, it does not address the

transfer or reassignment of judges. Thus, a judge may be removed from a case by reassignment or effectively demoted through transfer to another, less desirable, region. The lack of an appeal mechanism from the decision of the Supreme Council, though intended to ensure independence, makes this situation worse.

Several lawyers suggested that, because of his rank, the presence of the Minister of Justice in the Supreme Council creates undue political pressure on judges and prosecutors. Moreover, the delegation was told of instances in which judges had recused themselves from cases, apparently under official pressure. Adnan Günes, an Istanbul SSC prosecutor, told the delegation that despite guarantees of judicial independence, a judge can be removed at any time by the Minister of Justice and his undersecretary acting through the Supreme Council, and because any objection to such a decision to remove a judge can only be referred to the same body, appeal is futile. Mr. Günes also criticized the current system for promoting judges as ‘opaque.’ He called for a larger judicial council with more members elected by the judiciary. [\[FN75\]](#)

#### D. The Roles of the Prosecutor and Lawyers in Securing a Fair Trial

Turkey maintains an inquisitorial criminal justice system in \*2149 which the prosecutor plays a critical role in the investigation, indictment, and prosecution of a case. Because the role and power of the defense attorney in such a system is limited relative to that of the prosecutor, prosecutorial independence is particularly important to the guarantee of a fair trial. The delegation found that this essential independence is lacking in SSC proceedings in a number of ways.

##### 1. The Relationship Between the Prosecutor and the Security Forces

Turkish law expressly authorizes public prosecutors to conduct investigations in the preparatory stages and to determine jurisdiction over a case. Nevertheless, in practice, prosecutors frequently delegate both duties to the security forces or, not uncommonly, acquiesce as security forces usurp control over these duties. This problem pervades the criminal justice process, beginning with arrest and detention.

Security forces are responsible for capturing and detaining suspects. Article 5(a)(2) of the October 1998 Regulation on Apprehension, Police Custody and Interrogation (‘October Regulation’) authorizes members of the security forces to take suspects into detention ‘where there are strong traces, indications, circumstantial evidence and proof that they have committed or have attempted to commit a crime.’ [\[FN76\]](#) Since the security forces have broad powers to detain on the basis of suspicion alone and without an arrest warrant issued by the prosecutor, the prosecutor may not be notified of an arrest and detention until after the fact.

This situation creates several problems. First, the security forces, in effect, make the jurisdictional decision by electing whether to bring the suspect before a SSC prosecutor or an ordinary criminal court prosecutor. Although certain cases fall within the exclusive jurisdiction of the SSCs, there is substantial concurrent jurisdiction between the SSCs and the regular courts. In these concurrent areas, or in cases in which the political aspect of the alleged crime is ambiguous, authorities exercise considerable discretion in deciding whether to pursue a case \*2150 through the regular courts or through the SSCs. This decision is important due to the differences in procedures in the two systems. For example, detainees and defendants have significantly fewer protections in SSCs than they do in the regular courts, and the State has no

duty under domestic law to provide a lawyer to detainees and defendants in SSCs, as it does in ordinary courts.

Second, the control of the security forces over the period of detention undermines the role of the prosecutor in overseeing interrogation and collection of evidence. Although the supervisory role of the prosecutor is critical to protect the rights of a detainee who is undergoing criminal investigation, the prosecutor's responsibilities are often delegated or usurped. For example, in the case of one defendant, Hasan Demir, the arrest warrant required the police to take the defendant directly to the prosecutor. Instead, the police took him straight to interrogation, leaving him vulnerable to mistreatment and torture. When the defendant later complained to the prosecutor, the prosecutor claimed that he had delegated the task of interrogation to the police. The defense lawyers appealed to the Minister of Justice, but the Ministry declined to take any action against either the police or the prosecutor for this apparent violation of procedural law. [\[FN77\]](#)

The Turkish government is apparently aware of the important role that prosecutors should play in protecting the rights of a detainee. In February 1998, then-Prime Minister Mesut Yilmaz issued a circular to prosecutors and police officers establishing measures for 'obtaining just, expeditious and efficient results in the judicial system, protecting human rights and preventing activities that do not conform to human rights.' [\[FN78\]](#) This circular placed responsibility on public prosecutors to inspect detention facilities where detainees were held during police interrogation. It also authorized prosecutors to supervise the police by listening in on radio conversations between police and gendarmery forces. The then-Minister of Justice, Oltan Sungurlu, authorized prosecutors to carry out their inspections at all times and without hindrance or obstruction from the security forces.

When the delegation asked prosecutors whether the new \*2151 regulation and circular had changed the way that they carried out their work, most of them responded that it had not. They explained that they lacked the resources necessary to prepare cases for trial, let alone to take on additional duties safeguarding the rights of defendants and overseeing the conduct of the security forces in this area. [\[FN79\]](#)

Despite the likely inefficacy of the new procedures, the police and gendarmery opposed the changes, perceiving them as a threat to their control over the detention centers. On October 1, 1998, the then-Minister of Justice, Hasan Denizkurdu, and then-Minister of the Interior, Kutlu Aktao, enacted the October Regulation. Article 25 of this new regulation places the responsibility for supervising detention facilities firmly in the hands of the police, limiting the prosecutors' role to visiting detention facilities 'as a prerequisite of their judicial task.' [\[FN80\]](#) The Turkish Daily News reported that 'based on the new regulation, the police and gendarmery forces will not permit prosecutors to enter the police stations . . . . With this regulation, public prosecutors are prevented from obtaining any information about the events occurring in the police stations.' [\[FN81\]](#) The capacity to listen in on confidential police and gendarmery radio wavelengths was not mentioned in the new regulation, but is reportedly not envisioned as part of the prosecutors' role. [\[FN82\]](#)

The significance of the reversal of policy regarding prosecutorial supervision of detention centers may be mostly symbolic, given the limited effectiveness of the circular issued by Prime Minister Yilmaz in February 1998. Nevertheless, the success of the police and gendarme in overturning even minor changes indicates that the security forces alone control the period of detention and that prosecutors and judges have little power in this area. This lack of prosecutorial or judicial oversight over the period of detention is extremely problematic because it is during this period that torture and ill-treatment most \*2152 often occur. SSC procedures give the

security forces every incentive to rely on custodial interrogation as their primary means of obtaining evidence, and they control the setting in which such interrogation is conducted. It is common for the defendant to confess during the incommunicado detention period, and once the confession has been put into the defendant's file, it becomes very hard to remove, despite evidence of torture.

Many members of the judiciary with whom the delegation met believe that a specialized judicial police force would help to prevent human rights violations within the judicial process. [FN83] The creation of such a force under the control of the Ministry of Justice and with responsibility for criminal interrogation would have the effect of separating the detaining authority and the interrogating authority. This proposal has long been discussed as a way to end the violations of human rights that currently plague the pre-trial detention phase in the criminal justice process. [FN84] Whatever the merits of such a plan, the fate of the far less ambitious proposals for increasing prosecutorial scrutiny over the interrogation made by Prime Minister Yilmaz in February 1998 indicates that this major structural reform would face determined opposition from the security forces and their supporters in government.

## 2. The Role of the Defense Attorney

### a. Denial of the Right to Counsel During Detention

In light of the ways in which the prosecutorial function has been compromised in the SSCs, the role of the defense attorney takes on added importance. Unfortunately, that role is undermined in practice before SSCs, where procedures safeguarding the participation of the defendant's attorney in an ordinary criminal proceeding are suspended.

\*2153 The most serious problem in this regard is the denial of the detainee's right of access to counsel during the initial phase of detention. Turkish law currently permits a detainee accused of crimes within the jurisdiction of the SSCs to be held for four days before being given access to counsel. During that period, the detainee may be interrogated and tortured and will often confess. The confession, in turn, often serves as the sole basis for prosecution notwithstanding evidence of torture. Thus, a detainee's defense may be irrevocably damaged before he ever consults with counsel.

The delegation spoke with several judges and prosecutors who recognized the desirability of shortening the detention period, a view shared by some government officials. Although a draft revision of the Criminal Procedure Code prepared by the Ministry of Justice under the Yilmaz Government proposed reform in this area, the legislation has not been enacted by the Parliament. On the contrary, the trend has been away from reform. For example, Article 20 of the October Regulation explicitly denies SSC detainees access to counsel during the critical phase of the proceeding, when the prosecutor takes a formal statement from the accused to be presented in court. After establishing the right of access to counsel in ordinary cases, the article makes clear that '[i]n crimes falling under the scope of State Security Courts, the apprehended person may meet his lawyer only upon extension of the custody period by order of the judge.' [FN85] Even family members of SSC detainees need not be informed of the detention before the scheduled appearance before a judge after four days.

When asked why Turkey imposes the four-day period of incommunicado detention, both SSC prosecutors and judges and \*2154 Ministry of Justice officials referred to Brogan and Others v. United Kingdom, a decision of the European Court regarding length of detention. They

emphasized that if the European Court were to deem four days too long, Turkey would reduce the incommunicado detention period. [\[FN86\]](#)

This argument conflates the issue of length of detention with the detainee's right of access to counsel during the period of preliminary investigation. Brogan, the case relied upon by Turkish officials, deals specifically with the 'right to be brought promptly before a judge.' [\[FN87\]](#) It does not refer to incommunicado detention. The government's reading of Brogan ignores other decisions of the Court addressing the right to counsel. For example, in *Murray v. United Kingdom*, the Court affirmed the right of access to counsel at the preliminary investigation phase, [\[FN88\]](#) which, in SSC cases in Turkey, certainly begins and often is completed within the first four days of detention. Thus, even if the European Court were to accept a four-day detention period, the denial of access to counsel during that period may constitute a separate violation of the detainee's rights.

Ministry of Justice officials defended the imposition of a period of incommunicado detention as necessary due to the serious nature of the crimes within the jurisdiction of the SSCs, particularly terrorism. According to these officials, in such crimes there is a heightened fear that the lawyer, or anyone else who may meet with the detainee, might either assist in the destruction or suppression of evidence against the detainee or leak information to others outside the legal process who may be intent on committing terror crimes or acting against the State. [\[FN89\]](#)

\*2155 Several SSC judges and prosecutors also cited terrorism as justification for special procedures in SSC cases. The Chief Prosecutor and two prosecutors in the Istanbul SSCs, however, commented that, as lawyers, they believed that the defendant should have access to his attorney during these first four days of detention. [\[FN90\]](#) Seraffettin Iste, the Chief Judge of the Istanbul SSC, conceded that 'it would be better to let defendants see their attorney and to prosecute lawyers who assist terrorists by passing information outside of detention facilities.' [\[FN91\]](#) The Chief Prosecutor of the Ankara SSC, Cevdet Volkan, disagreed and argued that the suggestion to prosecute separately the lawyers who pass information was unworkable. According to Volkan:

The claim that lawyers transmit information is our opinion; we cannot prove it. It would be difficult to prove after the fact. The four-day period is meant for the collection of evidence, not for interrogation. Think of the Akin Birdal case. His assailants would not have been captured if not for the detention and investigation period. [\[FN92\]](#)

\*2156 With respect to terrorism, the European Court has held that 'the context of terrorism . . . has the effect of prolonging the period during which the authorities may, without violating Article 5(3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.' [\[FN93\]](#) At the same time, however, the Court cautioned that any such special factors 'cannot justify . . . dispensing altogether with 'prompt' judicial control . . . . The degree of flexibility is, in fact, very limited.' Moreover, the threat of terrorism, even if credible, cannot justify a blanket four-day incommunicado detention for all SSC detainees. Rather, the exigencies of a particular situation must be measured against the requirement of Article 5 on a case-by-case basis.

#### b. Obstacles to Client Access After the Four-Day Period

After the first four days of incommunicado detention, the judge, at the request of the prosecutor, may approve an extension of the detention period for the SSC detainee. At that point, however, the detainee has the right to contact a lawyer. Nevertheless, even though access to

counsel is granted in theory, serious obstacles remain to the effective representation of defendants.

First, security forces may pressure detainees not to request legal counsel. [FN94] Through psychological and physical mistreatment, members of the security forces may easily dissuade a detainee, who may be ignorant of his rights under the law, from insisting on access to a lawyer. [FN95]

Second, attorneys may encounter obstacles to providing effective legal representation to the client. The most basic problem the attorney may encounter is simply locating the client. Members of the security forces may deny that the client has been detained or insist that he has been transferred to another detention center. Once he identifies the location of the client, the defense attorney must apply for permission to visit the detainee. \*2157 Although prosecutors usually grant such permission, attorneys often will not visit for fear of harassment by police. [FN96] When the attorney does meet with his client, the police are always present, making it difficult for the lawyer and the client to communicate effectively. Such meetings usually lasts for no longer than ten minutes. [FN97]

An experience of Sedat Cinar, an attorney with the Diyarbakir Bar Association, illustrates the problems that many defense attorneys encounter. In 1993, Cinar obtained the acquittal of his client in the SSC. As the client left the prison, the security forces detained him again, before he saw his family or his lawyer, and took him to the Mardin gendarmerie. [FN98] Attorney Cinar went to the gendarmerie and asked to see his client. Because a prosecutor's permission was necessary to see him, Cinar visited the prosecutor's office to get such approval. After waiting five hours, the prosecutor finally called the gendarmerie to authorize Cinar to see his client. The gendarme commander replied that the defendant was a terrorist, that Cinar was a terrorist lawyer, and that he therefore would not grant him access to his client. Although the prosecutor argued that Cinar was entitled by law to see his client, the gendarme commander refused access. The prosecutor then advised the lawyer not to go to the gendarmerie because the gendarme would only harass him and would not permit him to see his client. [FN99]

In addition to being denied access to their clients, attorneys representing defendants in SSCs may be unable to prepare adequately for trial because they have been denied access to their clients' files during the period of extended pre-trial detention. By the time the lawyer sees the file, hearings in the case have often already begun. [FN100]

#### \*2158 c. Limitations on the Defense Lawyer's Role in the Trial/Hearing Setting

Once in court, defense attorneys face further obstacles, beginning literally and figuratively with the defense attorney's place in the courtroom. In Turkish courtrooms, the defense lawyer is physically on a lower level than the prosecutor. This imbalance is increased in many SSC courtrooms in that the judges and prosecutor often look down on the defense lawyers and the defendant from an intimidating height. The defense attorney stands on the same level as the defendants while the prosecutor sits next to the panel of judges on a platform raised above both the defendant and the defense attorney.

The importance of this physical location of the prosecutor and defense attorney in the courtroom may be more symbolic than practical, but the imbalance of power that it reflects sometimes has more serious consequences. For example, the delegation was told of numerous occasions in which lawyers were excluded altogether from hearings. Under Turkish law, the judge may exclude the defendant and the lawyer if the peace of the courtroom will be disturbed.

The judge need not give any reason for doing so. [\[FN101\]](#) Also, the lower status of defense attorneys sometimes translates into physical vulnerability in the courtroom. Defense attorneys have been attacked by police, gendarme, and hostile bystanders in SSC courtrooms. [\[FN102\]](#) Ilknur Aksu, a member of the Istanbul Bar practicing in the SSCs, described an incident where she and her client were attacked by bystanders belonging to the right wing, ultra-nationalist MHP political party while trying to defend the case in the courtroom. The prosecutor offered no protection for the defense lawyers. Such treatment forms part of a broad pattern of harassment of defense lawyers in political cases in the SSCs [\[FN103\]](#) and obviously impedes defense lawyers' ability to provide a full defense for their clients.

Prosecutors and defense attorneys also have very different levels of participation in the hearing process. For example, unlike\*2159 trials in many countries where a court reporter generates a complete transcript of what is said by all parties during a hearing or trial, the Turkish courts employ a stenographer, using a manual typewriter, to generate an account of the trial or hearing. The typist, however, does not record verbatim what is said in the courtroom. Rather, the typist puts into the record what the judge or the prosecutor dictates. A judge summarizes the testimony of witnesses, statements of defendants, and arguments of defense counsel. The defense lawyer is not permitted to dictate his defense argument directly into the court record and instead must rely on the judge's summary. The defense lawyer can object to the judge's summary during the hearing, but it is within the judge's discretion whether to accept the objection or even to dictate it into the record. [\[FN104\]](#) By contrast, the prosecutor has the right to summarize his own case during the hearing, dictating it directly to the court reporter.

Finally, defense lawyers in SSCs must be concerned that statements that they make in the course of defending their clients may result in charges against the lawyers themselves. [\[FN105\]](#) Although under Turkish law attorneys enjoy immunity from prosecution for statements made in the course of representing their clients, this immunity may not be respected in political cases. For example, in 1997, a lawyer was defending a client in a hearing in the Istanbul SSC. After a police officer gave his testimony, the judge asked whether the defense lawyer had anything to say. The defense lawyer responded that this particular officer had made a career of torture. The lawyer was subsequently charged and tried in heavy penal court for insulting the police officer. Commenting on the prosecution of this lawyer, a member of the Human Rights Association ("HRA") suggested that 'the boundaries of the lawyer's immunity are indistinct and the judge has broad latitude. The immunity is interpreted very narrowly in State Security Courts.' [\[FN106\]](#) In another case, defense lawyers attempted to intervene when the police and gendarme began beating their clients. The defense lawyers themselves were \*2160 prosecuted for interfering with police action. [\[FN107\]](#) According to oenal Sarihan, a prominent defense attorney practicing out of Ankara, 'they are trying to make State Security Courts impossible places for lawyers to work.' [\[FN108\]](#)

### 3. Confrontational Attitudes Between Prosecutors and Defense Lawyers

The relationship between defense lawyers and the prosecutors and judges in the criminal justice system, and particularly in the State Security Courts, is characterized by a high level of antagonism. For example, Cevdet Volkan, the Chief Prosecutor of the Ankara SSC, had a particularly hostile attitude towards members of the Ankara Bar practicing in the SSCs. He stated,

In Ankara, there are approximately fifteen lawyers who take cases in State Security Courts. You always see the same lawyers. They are the lawyers of the terrorist groups. This shows the power of the terrorist groups in Turkey. These fifteen or twenty lawyers in the SSC in Turkey, all they do is make propaganda in the courts and false allegations of torture. [\[FN109\]](#)

Such attitudes, however honestly expressed, undermine the proper functioning of the legal system and frustrate the resolution of a range of important substantive and procedural problems in the system. For example, when asked why the four-day incommunicado detention period was necessary, Mr. Volkan explained, '[W]e know that the lawyers are working for the PKK, but sometimes it is hard for us to prove it. However, we do have cases in which the lawyer is convicted because he is a member of the PKK.' [\[FN110\]](#) Similarly, although not as antagonistic towards defense lawyers as his Ankara counterparts, the Chief Prosecutor in the Istanbul SSC, Mr. Gökçen, informed the delegation that 'we have strong evidence against some lawyers who pretend to be lawyers but act as liaisons between the terrorists.' [\[FN111\]](#)

Whereas those defense attorneys practicing in the SSCs lamented<sup>2161</sup> the condition of their practice, in general they refrained from direct attacks on the members of the judiciary. They appeared skeptical, however, of the interest of prosecutors in improving procedures in the SSCs, or more broadly, of prosecutors' commitment to the cause of justice. For example, when one lawyer in a group meeting at the Istanbul Bar Association suggested that prosecutors were 'ready to listen to concerns about criminal procedure,' he was shouted down by his colleagues. [\[FN112\]](#)

The above comments suggest a certain lack of respect among prosecutors for the integrity of the defense bar practicing in the SSCs, and a lack of confidence among defense lawyers in the good faith of prosecutors. This mutual antagonism makes it more difficult for lawyers, prosecutors, and judges to work together effectively on individual cases and for the profession as a whole to resolve systemic problems and to increase public confidence.

## E. Pre-Trial Detention, Torture, and the Use of Coerced Testimony in SSCs

### 1. Pre-Trial Detention

Despite recent amendments, the period of pre-trial detention without charge is far longer in SSC cases than in regular criminal prosecutions. The 1997 amendments to the Criminal Procedure Code brought the periods for pre-trial detention without charge down from ten to seven days in the security zone of southeastern Anatolia and provided for judicial review of detention after four days. [\[FN113\]](#) The new legislation also reset the limits for detention without judicial supervision, whether outside or within a State of Emergency Region, to forty-eight hours for one or two persons accused and to four days for three or more people<sup>2162</sup> accused. This four-day period may be extended with the permission of the judge to seven days and again from seven to ten days within a State of Emergency Region. [\[FN114\]](#)

The Chief Prosecutor in a city in the southeast explained that, when deciding whether to extend the period of detention beyond the initial four days, the judge will take into consideration (i) the number of defendants, (ii) the nature and number of crimes at issue, and (iii) the difficulty of gathering evidence. Applying these basic criteria, the decisions are made on a case-by-case basis. [\[FN115\]](#) In practice, an extension is routinely granted. The police and gendarme may bring a request to extend the detention period for a prisoner on the grounds that they need more time to finish the investigation. The Chief Prosecutor normally forwards the request to the judge. In

connection with the judge's consideration of the request, the detainee is rarely brought before the court. [\[FN116\]](#)

Turkish officials insist that this four-plus-three framework complies with the standards articulated by the European Court in interpreting Article 5. Article 5(3) requires that a detained person shall be brought promptly before a judge for a determination of the lawfulness of the detention. In interpreting Article 5(3), the Court has never set down an inflexible time limit with respect to the maximum permissible period of detention before the detainee must be brought before a judge. Rather, it has pronounced\*2163 on a number of specific time periods as they have arisen.

In *Brogan and Others v. United Kingdom*, [\[FN117\]](#) for example, four applicants were held under the United Kingdom's Prevention of Terrorism Act for time periods ranging from four days and six hours to six days and sixteen hours. The reason for detention was the same in each case: reasonable grounds for suspicion of involvement in acts of terrorism. Because none of the four applicants was ever brought before a judge, the question for the Court was whether the time periods before release were reasonable. After taking the impact of terrorism into consideration, the Court held that even the shortest period of time, four days six hours, violated the standard of Article 5(3). Specifically, the Court stated:

To attach such importance to the special features of this case [(i.e., to the context of terrorism)] as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly.' An interpretation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision . . . . The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3). [\[FN118\]](#)

The Turkish government appears to have deliberately misconstrued the *Brogan* judgment to interpret a four-day period as the maximum permitted duration of detention without judicial supervision. [\[FN119\]](#) Such a construction of the judgment is erroneous in that *Brogan* does not establish a maximum permitted \*2164 length for detention without judicial supervision; it merely states that four days and six hours is too long. Moreover, the fact that, under Turkish law, the four-day period applies to incommunicado detention makes it even more problematic due to the denial of access to counsel.

Of course, these legal limits, troubling as they are, might not be observed. Between 1991 and 1995, the police frequently post-dated the arrest to allow for longer detentions. Although this practice apparently occurs less frequently now, it has not been eliminated entirely. [\[FN120\]](#)

Another means of circumventing the legal limit is to subject a detainee to successive charges. One mother told the delegation the following story:

They came one night when my daughter was sleeping. They woke us up and took her only for questioning. She never came back. She was first accused of inciting members in the Gazi case. Later, she was accused of being a terrorist. When they found out that she was not guilty of such criminal activity, they made up another charge. If one charge failed, they made up another. [\[FN121\]](#)

In such a case, the technical limit on detention is observed, but its purposes are completely undermined.

Due to the often secretive nature of the arrest and detention, family members and the detainee's lawyer have no way of verifying the location or duration of detention. [\[FN122\]](#) According to the October Regulation, the police may refuse to disclose the place of detention or even the fact that the detainee is being held. [\[FN123\]](#) Lawyers or the family may request this information from the prosecutor, but unless the prosecutor ordered the detention, he may have no information. Further, families are often prevented from entering the SSC buildings when they are looking for their family members.

## \*2165 2. Torture and the Use of Coerced Testimony in SSC Prosecutions

The critical danger of this extended incommunicado detention period is that it permits, and indeed encourages, the use of torture as an investigative tool. The detainee may be coerced, through physical and psychological intimidation, to make a false confession, to sign a statement drafted by the police, or to give false statements implicating others. Defense lawyers practicing in SSCs recounted many examples involving their clients and, in some cases, themselves. For example, lawyers from the Diyarbakir Bar, who themselves had been detained and tortured, stated that each of them had been instructed by a member of the gendarme to sign a statement that the gendarme had prepared. [\[FN124\]](#) In no case was the detained attorney permitted to read the language of the statement.

The Director General of the Ministry of Justice and other Justice officials insisted to the delegation that statements coerced by torture cannot be used under any circumstances in legal proceedings. [\[FN125\]](#) They pointed to Article 138-A of the Criminal Procedure Code, which provides that a statement should be based on the free will of the defendant and that interrogators may not employ any coercive treatment, such as torture, drugging, or false promises. They stated that Turkey's Criminal Procedure Code, Article 135, specifically prohibits certain methods of interrogation. [\[FN126\]](#) Also, Article 254 of the Criminal Procedure Code requires that if the manner of an interrogation or investigation is unlawful, the evidence should not be taken into account. [\[FN127\]](#)

The position of the Ministry of Justice officials clearly reflects the state of the law on the subject of exclusion of evidence obtained through coercive measures. The delegation learned, however, that in practice evidence is rarely excluded. Several factors may account for this situation. First, comments from judges and prosecutors within the SSC system reflect a skepticism toward claims of torture. For example, the Chief Judge of \*2166 the Istanbul SSC declared, 'I do not accept evidence produced as a result of torture.' [\[FN128\]](#) He went on to note, however, that '[d]etainees who bring torture cases before the [European Court] have purposely injured each other while in detention. One forensic doctor told me that detainees used springs in beds in jail to leave marks on themselves.' [\[FN129\]](#) Judges sharing this view may be reluctant to disregard self-incriminating statements of the defendant despite evidence of torture.

Second, forensic evidence of torture is difficult to obtain due to inadequate procedures for gathering medical evidence and a lack of accountability among police during the period of interrogation. [\[FN130\]](#)

Third, when there is evidence of torture, the judge may simply direct the victim to request that a separate case against the police be opened in the heavy penal court. However, this may have no impact on the ongoing SSC case. Although in principle, the two cases should be coordinated, in reality, this rarely happens.

Finally, whether the judge actually disregards a defendant's statement when there is credible evidence of torture is impossible to determine. The allegedly coerced statement is not literally removed from the case file, and the court is not required to make a specific finding regarding the torture allegation. [\[FN131\]](#) According to Eren Keskin of the HRA, '[y]ou cannot tell how the court views the testimony because the court gives no explanation of their treatment of the evidence.' [\[FN132\]](#) Senal Sarihan, a prominent Ankara lawyer, commented that judges read the verdict and make no reference to coerced statements. [\[FN133\]](#) On appeal, the appellate\*2167 court does not see any reference to this testimony in the opinion of the lower court. Thus, the Court of Appeals has no way to enforce the rule of excluding testimony obtained by torture.

Sarihan noted, however, that there have been some encouraging judgments in the last six months in the SSC of Ankara. Even these judgments acquitting the defendants, however, made no reference to the fact that the defendants' statements were obtained under torture. 'They don't talk about the torture of the defendant,' she said, but rather refer euphemistically to a 'lack of evidence.' [\[FN134\]](#) In her view, these encouraging judgments were not faithful applications of the law on coerced testimony, but the actions of two highly qualified judges on the High Court of Appeals. These judges wished to reach a correct result, but were nevertheless reluctant to confront the issue of torture and its adverse impact on the trial process in SSCs directly. [\[FN135\]](#)

Despite these few encouraging decisions, the delegation is convinced that torture-based testimony is accepted as evidence in SSC proceedings, and, in some cases, forms the entire basis for the conviction of the defendant. This reliance upon coerced statements by the SSCs creates, in turn, an incentive for members of the security forces to continue the practice of torturing and mistreating detainees during interrogation.

## F. Conclusion

The Turkish SSC system has faced challenges to its legitimacy since its inception. In 1976, three years after the creation of the courts, Turkey's own Constitutional Court annulled SSCs because they violated principles embodied in the Turkish Constitution. The SSCs were only reinstated after the military drafters of Turkey's 1982 Constitution specifically provided for them within that instrument. While that action has prevented the Turkish Constitutional Court from revoking the jurisdiction of the SSCs a second time, these courts remain a target for internal criticism, although to mixed result. Erdal Güncer, the Chief Prosecutor of the Istanbul SSCs, viewed such criticism in political terms, stating that 'when political parties are in opposition they say they will abolish the State Security Courts, but when they are \*2168 in government they praise the system.' [\[FN136\]](#)

The SSC system has also been the target of sustained criticism from Turkish human rights organizations. For example, in a statement on October 24, 1998, the Istanbul branch of the HRA called for the elimination of SSCs. Objecting to the way in which SSCs are used to punish non-violent political dissidents, the HRA noted that to that point, 'more than 10,000 people have been tried in State Security Courts for expressing viewpoints that differ from the official line and for their political identities. There are still 6,000 dossiers containing lawsuits because of Article 312 of the Turkish Penal Code and Article 8 of the Anti-Terror Law.' [\[FN137\]](#) The HRA also criticized the presence of a serving military officer among the judges in the SSC panels.

Just one week after the HRA's public objections, the then-Minister of Justice, Hasan Denizkurdu, setting out on a visit to the European Court in Strasbourg, stated in his personal capacity that he too favored a change in the composition of the SSC panel. [\[FN138\]](#) The Chief Judge of the Ankara SSC allowed that, '[t]echnically speaking, the detention period should be

shorter than what we have right now, but we have problems dealing with terrorism. We need time.’ [FN139] He also said, ‘I do believe that the period of detention should be shorter. However, we need time to investigate because of the threat of terror, but as the threat diminishes, human rights should be restored.’ [FN140]

Officials at the Ministry of Justice recognized that conditions of detention are a general problem and pointed to the proposed new criminal procedure law as a solution. This law would allow lawyers to see their clients immediately upon detention. Under the proposed law the detention period would be forty-eight hours maximum in all circumstances, extendable only upon a judge's ruling. The defendant will have access to an attorney at all times, including the interrogation phase. [FN141] The \*2169 proposed new law would likely contribute to the reduction of torture. [FN142] The Director General warned, however, that the proposed law is a preliminary draft that is perhaps too idealistic, is subject to change, and would take time to implement even if enacted. [FN143] Leading parliamentarian Sema Piskinsut also thought it unlikely that the Yilmaz Government would be able to enact this reform in the criminal procedure code, a prediction that turned out to be correct. She was optimistic that reform may come in 1999.

Support for reform of SSC structures and procedures that fail to meet international standards is widely shared among many influential groups and individuals in Turkish society. These include the organized bar, leading human rights organizations, leading parliamentarians, some ministers, and some judges and prosecutors with extensive SSC experience. Given such support, it is remarkable and perplexing that change has not come. There can be no doubt that SSCs-- whatever their proponents may claim for their efficacy in the fight against terrorism or drug-trafficking --serve a primarily political purpose that is inimical to the protection of human rights and the rule of law. SSCs are simply too open to abuse by those in Turkish society who would ensure their continuing hold on power by resort to authoritarian repressive measures.

## II. TORTURE AND POLICE IMPUNITY IN TURKEY

### A. Introduction

Torture of individuals held in detention by police continues to be one of the most serious human rights problems in Turkey. Despite the prevalence of torture, especially in cases involving enforcement of the Anti-Terror Law, [FN144] investigation, prosecution,\*2170 and punishment of members of the security forces are rare. [FN145] The failure of the Turkish government to enforce domestic and international proscriptions on torture has led, in turn, to a climate of official impunity that encourages systematic abuse of detainees during the detention period. This Part documents the lack of accountability among members of the security forces and explores obstacles to the investigation, prosecution, and punishment of those who engage in torture and other gross violations of human rights.

#### 1. Forms and Uses of Torture in Turkey

Although the delegation did not undertake a systematic investigation of the use and prevalence of torture under police detention, interviews with attorneys, victims, prosecutors, and government officials confirmed that torture continues to be a serious problem in Turkey. [FN146] The Human Rights Foundation of Turkey (“HRFT”), a domestic non-governmental

organization committed to the documentation and prevention of torture and to the treatment of torture victims, reported that 537 people applied to their treatment and rehabilitation centers for treatment during 1997. [\[FN147\]](#) According to the HRFT, coercive techniques \*2171 commonly used by Turkish security forces include beating, insults, threats, blindfolding, stripping, deprivation of food and water, forcing victims to sleep on a cold floor, solitary confinement, spraying with pressurized or cold water, threats to relatives, electrical shocks, suspension by hands, sexual harassment, squeezing of testicles, and sleep deprivation. [\[FN148\]](#)

Defense lawyers practicing in the State Security Courts reported to the delegation that torture is routinely used to elicit confessions from their clients. [\[FN149\]](#) According to Erin Keskin, one such lawyer, “Although torture is illegal in Turkey, in practice it is systematic and, indeed, government policy.” [\[FN150\]](#) Lawyers described cases in which multiple detainees confessed to having committed the same crime or to having committed crimes that had never taken place. Despite the allegations of torture, their clients were then prosecuted based on the illegally obtained confessions. [\[FN151\]](#) Other lawyers had themselves been detained and tortured and gave firsthand reports to the delegation of the conditions of detention. [\[FN152\]](#)

Many prosecutors acknowledged that torture remains a problem during the period of detention; [\[FN153\]](#) however, most were generally unwilling to concede that it was used systematically as a tool for investigation. Most prosecutors who were willing to discuss the issue of torture with the delegation characterized it as a product of inadequate discipline or lack of direct control of the \*2172 anti-terror police by the prosecutor's office. [\[FN154\]](#) Others were considerably more skeptical of torture claims. For example, Cevdet Voltan, the Chief Prosecutor in Ankara, insisted that claims of torture were exaggerated by members of illegal organizations in order to discredit the security forces or escape punishment. [\[FN155\]](#) The same prosecutor explained that the high rate of confession in State Security Courts was a result not of torture, but of the control exercised by illegal organizations over individual defendants. [\[FN156\]](#) Mehmet Turgut Oksay, the Chief Judge of the Ankara State Security Court, stated that there was “a standard defense imposed on defendants by terrorist groups,” which included “invariably claiming torture during interrogation.” [\[FN157\]](#)

Other government officials interviewed also acknowledged that torture continues to be a problem, though most denied that it was systematic or routine. For example, the delegation met with Dr. Hikmet Sami Turk, then Minister for Human Rights. He noted that “although there is no legal system in the world that permits torture, from time to time there are reports of torture, even in Turkey.” [\[FN158\]](#) Sema Piskinsut, Chair of the Parliamentary Commission on Human Rights, was more direct in her acknowledgment of the problem and the government's responsibility to address it. She noted that her commission had found implements of torture in police detention rooms and that, although complaints of torture were common, few cases were prosecuted. Ms. Piskinsut is preparing a report of her findings that will include specific recommendations to reduce the incidence of torture and increase police accountability. [\[FN159\]](#)

Notwithstanding the efforts of officials to downplay the scope of the problem, the delegation is convinced that torture of \*2173 detainees and police abuse more generally remain serious problems in Turkey. Credible accounts offered by victims and their representatives as well as reports of domestic and international non-governmental organizations indicate that the use of torture by security forces is systematic and widespread. [\[FN160\]](#)

## 2. Torture, Impunity, and Turkey's Obligations Under International Law

Under international law, Turkey has an obligation not only to eliminate the use of torture, but also to provide an effective means of redress for victims of torture and police abuse. Thus, when a victim reports torture or abuse and the state fails to investigate and prosecute the claim adequately, the violation of international law is not limited to the act of torture itself but extends to the failure of process.

Although not a party to the International Covenant on Civil and Political Rights (“ICCPR”), Turkey has signed the European Convention, Article 3 of which specifically addresses torture. Article 3 provides that “[n]o one shall be subjected to torture or to inhumane or degrading treatment or punishment.” [\[FN161\]](#) Article 5 encompasses police abuse more generally and provides that “[e]veryone is entitled to liberty and security of person.” [\[FN162\]](#) Article 13 of the European Convention addresses the issue of remedy: “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” [\[FN163\]](#)

The U.N. Convention Against Torture, which Turkey ratified in 1988, provides for more specific measures to eliminate torture. Article 2 calls on “[e]ach State Party . . . [to] take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction[s].” [\[FN164\]](#) Article 4 requires that acts of torture be defined as criminal under domestic law and punishable by appropriate penalties. [\[FN165\]](#) \*2174 Article 13 provides that “[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture . . . has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” [\[FN166\]](#) Article 14 adds an obligation to provide redress and adequate compensation to torture victims. [\[FN167\]](#)

In a formal sense, the domestic law of Turkey meets some of these international obligations by criminalizing torture and police abuse. Article 17 of the Turkish Constitution provides that “[n]o one shall be subjected to torture or ill-treatment incompatible with human dignity.” [\[FN168\]](#)

Moreover, the Turkish Penal Code prohibits the use of torture by police. Article 243 establishes that an official who “tortures an accused person or resorts to cruel, inhumane or degrading treatment in order to make him confess his offense, shall be punished by heavy imprisonment for up to five years and shall be disqualified from the civil service either temporarily or for life.” [\[FN169\]](#) Article 245 applies to police abuse generally and provides that

[t]hose persons authorized to use force and all police officers who, while performing their duty or executing their superiors' orders, threaten or treat badly or cause bodily injury to a person or who actually beat or wound a person in circumstances other than prescribed by laws and regulations, shall be punished by imprisonment from three months to three years and shall be temporarily disqualified from the civil service. [\[FN170\]](#)

Notwithstanding these proscriptions of torture in its domestic law, to the extent that Turkey fails to investigate and, where appropriate, prosecute claims of torture, it is in violation of international\*2175 law. [\[FN171\]](#) Since Turkey ratified Article 25 of the European Convention in 1987, permitting individual petition to the European Commission, both the Commission and the European Court have repeatedly held that Turkey has violated Article 3's ban on torture, Article 5's guarantee of liberty and security of person, and Article 13's guarantee of an effective remedy, among other articles.

For example, in *Aksoy v. Turkey*, the Court found that the applicant had been stripped naked, suspended by the arms, and subjected to electrocution of his genitals, during a fourteen-day period of detention. [\[FN172\]](#) The Court held that the applicant had been tortured in violation of

Article 3 of the European Convention and denied an effective remedy for his complaint of torture in violation of Article 13. [FN173] With respect to the requirement of an effective remedy, the Court noted that it “entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.” [FN174] In *Aksoy*, the Court found Turkey's procedures so inadequate that not only did they constitute a violation of Article 13, but also the applicant was relieved of the obligation to exhaust domestic remedies under Article 26. [FN175] The Court noted that “[t]here is no obligation to have recourse to remedies which are inadequate or ineffective.” [FN176]

Similarly, in *Aydin v. Turkey*, the Court held that the detention, torture, and rape of the applicant by members of the security\*2176 forces violated Article 3. [FN177] Moreover, the Court noted that “Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.” [FN178] In *Aydin*, the Court held that the public prosecutor's failure to visit the scene of the alleged rape, to question the accused in the early stages of the investigation, or to ascertain whether the victim or her family members had been detained, all contributed to a violation of Turkey's obligation to provide an effective remedy. The Court noted especially that the prosecutor's “failure to look for corroborating evidence at the [gendarmierie] headquarters and his deferential attitude to the members of the security forces must be considered to be a particularly serious short-coming in the investigation.” [FN179]

Based on Turkey's clearly established obligations under international law, the remainder of Part I examines in greater detail domestic procedures in law and in practice for the investigation, prosecution, and punishment of individuals who commit acts of torture and other grave violations of human rights. For the most part, it documents the failure of such procedures and describes the resulting climate of impunity for human rights violations. Finally, it makes specific recommendations for improving official accountability and thereby reducing the incidence of torture and abuse.

## B. Why Impunity? Pretrial Stage

Prosecution of members of the security forces for serious violations of human rights seems to have increased in recent years, [FN180] perhaps signaling a somewhat greater commitment on the part of the government to eliminating the practice of torture. Indeed, the delegation was able to observe hearings in several cases involving the prosecution of police and confirmed that \*2177 others were pending during the two weeks of the mission. [FN181] Nevertheless, the scope of the government's commitment must be measured not merely by the frequency but by the success of such prosecutions. As the remainder of this Part demonstrates, serious obstacles must be overcome before the climate of impunity can be eliminated. At the pre-trial stage, these obstacles include a combination of jurisdictional hurdles and prosecutorial reluctance. This section explores the way that these problems frustrate the prosecution of complaints of torture such that cases rarely progress beyond the investigatory phase.

### 1. Jurisdictional Hurdles

Under Turkish law, civil servants, including police, cannot be prosecuted without the permission of administrative authorities. [FN182] This procedural protection has the effect of removing certain police misconduct cases from the judicial process entirely. In other cases,

investigation and prosecution may be seriously delayed while the cases are channeled through the administrative procedure. [\[FN183\]](#)

The Law on the Procedure for the Investigation of Civil Servants [\[FN184\]](#) (“Civil Servants Law”) provides that administrative bodies,\*2178 not prosecutors, shall determine in the first instance whether civil servants shall be prosecuted for a crime. [\[FN185\]](#) Three conditions must be met for the administrative protections to apply. First, the person must be a civil servant, meaning that he or she is employed in the public sector with responsibility for public administration. Second, the civil servant must be charged with a crime that is not excluded from the scope of the law. Excluded crimes generally involve public corruption, for example, crimes under the election laws, corruption, bribery, embezzlement, and treason. [\[FN186\]](#) Third, the crime charged must have been committed in the course of the civil servant's duties. [\[FN187\]](#)

In cases that fall within the scope of the law, the prosecutor does not make the initial determination as to whether the defendant will be charged. Rather, an administrative board, [\[FN188\]](#) made up of bureaucrats mostly lacking in legal training, [\[FN189\]](#) determines whether the civil servant should be prosecuted or simply disciplined by his or her superiors. [\[FN190\]](#) If the board determines \*2179 that prosecution is warranted, then it refers the case to the appropriate criminal court, along with a statement specifying the crime of which the civil servant is accused and perhaps a report of its investigation. The prosecutor then proceeds with his investigation and prosecution of the case. [\[FN191\]](#)

The purpose of the law is to afford some degree of immunity for civil servants acting in their official capacities. In theory, the administrative process shields civil servants from the harassment of unfounded prosecution by permitting bureaucratic review of the charges before the case proceeds. Where appropriate, problems may be addressed within the civil service hierarchy rather than through criminal prosecution. Under the current system of arbitrary prosecution and police abuse of detainees, the harassment of civil servants through unwarranted prosecution may be a legitimate concern. [\[FN192\]](#) Though often critical of the current system, those protected by it seem to argue for reform rather than elimination. Moreover, lawyers interviewed by the delegation defended a similar protection from prosecution for attorneys as essential to their professional independence and cited credible examples of prosecutorial harassment. [\[FN193\]](#)

Even assuming that the threat of prosecutorial harassment is significant, addressing this threat through the creation of bureaucratic review rather than reform of the prosecutorial function contributes to the climate of impunity by further frustrating and delaying the prosecution of official misconduct. Indeed, in the view of many of the lawyers, prosecutors, and judges interviewed by the delegation, the administrative review process rarely serves its intended function and instead frustrates efforts to hold police accountable for violations of human rights. According to Sema Piskinsut, the critical problem is that “the judicial organ does not have full authority over the process.” [\[FN194\]](#)

Several aspects of the administrative procedure operate to undermine the prosecution of a civil servant, particularly if the \*2180 defendant is a member of the security forces. First, simple confusion over the jurisdictional boundaries of the administrative process may create delay even if those involved are acting in good faith. This is particularly problematic in cases involving members of the security forces because their civil servant status depends upon the context in which the act in question is taken. Although classified as civil servants, members of the security forces are covered by the law only when acting within the scope of their ordinary law enforcement duties, that is, in their administrative capacity. [\[FN195\]](#) For example, if members of the gendarme take into custody and torture a person suspected of avoiding military service, any

complaint of torture would be referred to the administrative board. [\[FN196\]](#) Alternatively, when police act under the direction of the prosecutor, they are acting in a judicial rather than an administrative capacity and, arguably, should not be covered by the administrative protections of the law. [\[FN197\]](#) Thus, if police arrest and detain a suspect in a criminal investigation, any complaint of torture, in theory, would be handled directly by the prosecutor. [\[FN198\]](#)

A second way in which the Civil Servants Law contributes to the climate of impunity is that it permits officials to ignore or treat as disciplinary issues crimes committed by their colleagues or subordinates. Because other civil servants comprise the membership of the boards, the boards cannot be assumed to function independently. A judge of the heavy penal court in a city in the southeast told the delegation that “in most cases, the councils do not make the right decision regarding prosecution because they know the accused and are themselves civil servants.” [\[FN199\]](#) In such cases, the administrative boards may simply act to protect the accused from prosecution. In the emergency zones, administrative approval for prosecution is virtually never given; outside emergency zones, such approval is merely unusual.

Furthermore, the effectiveness of judicial review of such a \*2181 decision is questionable. In *Aksoy v. Turkey*, the Turkish government defended the administrative process in part by noting that decisions of an administrative board not to prosecute were always reviewed by the Supreme Administrative Court and sometimes reversed. [\[FN200\]](#) A number of lawyers and judges interviewed by the delegation, however, indicated that the lack of effective appeal when prosecution was denied is an important failure of the current system. [\[FN201\]](#) At a minimum, considerable confusion exists as to the availability of an appeal. Whatever the status of judicial review for administrative decisions, in *Aksoy*, the European Court found that the overall procedure was so inadequate that it not only violated Article 13 of the European Torture Convention but relieved the applicant of his obligation to exhaust domestic remedies before applying to the Commission. [\[FN202\]](#)

The case of Ibrahim Tekbudak illustrates this problem. The HRFT reported that police officers broke Tekbudak's arm while beating him at a public demonstration in May, 1996. [\[FN203\]](#) Although the Izmir prosecutor initially launched an investigation of the incident, the prosecutor determined that jurisdiction was lacking because the defendants were civil servants and the act took place in the context of their administrative duties. The prosecutor then sent the file to the Izmir Provincial Administrative Board. Upon conducting its own review, the board found insufficient evidence and the matter was dropped. [\[FN204\]](#) In such a case, even if review of the board's decision is available, the record\*2182 compiled by the board may not be adequate to permit effective evaluation by the Supreme Administrative Court.

Another factor is the delay that the administrative process often entails. Currently, the law imposes no clear time limit on the investigation by the administrative board. [\[FN205\]](#) Thus, even if the board ultimately deems prosecution appropriate, the delay can be legally or practically fatal to the case. Because the statute of limitations continues to run during this period at least for certain crimes, even if the case is eventually transferred to the judicial system, prosecution may no longer be possible. [\[FN206\]](#) In other cases, though the statute of limitations may not legally bar prosecution, as a practical matter prosecution may be difficult or impossible due to loss or destruction of evidence or the unavailability of witnesses.

Finally, the problem of delay may not end once the board sends the case to the prosecutor. The court is not bound by the factual findings of the board and indeed may even disagree with the board's conclusion that the case falls within the jurisdiction of the judiciary. In such a situation, the court may return the case to the administrative board for additional review and

appeal. Such back and forth can lead to substantial delay in the investigation of the case by a reluctant prosecutor and may make it virtually impossible to prosecute the defendant effectively once the jurisdictional issue is settled. [\[FN207\]](#)

One additional jurisdictional factor creates problems for those torture victims accused of political crimes and tried in SSCs. In such cases, the investigation of torture is conducted by a prosecutor in a completely separate court system, the heavy penal court. As a result, the victim is less able to monitor the investigation of the allegations, and any evidence of torture is less likely to affect the proceedings in the SSCs. Although the \*2183 Criminal Procedure Code provides that confessions obtained through torture should not be considered as evidence, [\[FN208\]](#) the findings of fact regarding torture may be inconsistent. Indeed, the trial of a detainee may proceed in the SSC system based on an allegedly coerced confession before the investigation of the torture allegations has been concluded or even begun. For example, the Izmir State Security Court relied on the Manisa students' allegedly torture-induced confessions to convict them well before the trial of their accused torturers was completed in heavy penal court. [\[FN209\]](#)

## 2. Unwillingness to Prosecute

Perhaps an even more serious hurdle to police accountability for torture is reluctance on the part of prosecutors to investigate and initiate proceedings against members of the security forces. International standards guarantee detainees the right to complain about torture and oblige authorities to investigate any complaint or evidence of torture. Under Article 13 of the U.N. Convention Against Torture, each signatory undertakes to “ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” [\[FN210\]](#)

The Turkish Criminal Procedure Code requires a prosecutor who has received a complaint of torture or other information indicating that a crime may have occurred to initiate an investigation to determine whether there are grounds for prosecution. [\[FN211\]](#) The police are obligated to cooperate with the prosecutor's investigation. If the investigation supports the allegations of torture, then the prosecutor is supposed to charge those responsible. [\[FN212\]](#) If prosecution is not warranted, the prosecutor must inform the detainee, who then has the opportunity to appeal\*2184 the decision to the chief justice of the criminal court. [\[FN213\]](#) The chief justice may then order a prosecution if he or she deems that appropriate in a given case. [\[FN214\]](#)

Notwithstanding the requirements of Turkish and international law, prosecutors themselves professed reluctance to investigate claims of torture for several reasons. First, some prosecutors were simply skeptical of the claims of alleged torture victims. [\[FN215\]](#) For example, Cevdet Volkan explained that “defendants will accuse police of torture as a defense. We often face false accusations of torture.” [\[FN216\]](#) The willingness of prosecutors to credit the accounts offered by the security forces has been criticized repeatedly by the European Court. In *Kaya v. Turkey*, [\[FN217\]](#) the Court explained that it was struck in particular by the fact that the public prosecutor would appear to have assumed without question that the deceased was a terrorist who had died in a clash with the security forces. [\[FN218\]](#) In *Aydin v. Turkey*, the Court cited the deferential attitude of the prosecutor toward members of the security forces as “a particularly serious shortcoming in the investigation.” [\[FN219\]](#)

Second, although the Criminal Procedure Code authorizes the prosecutor to investigate directly, in practice prosecutors rely heavily on the police to conduct the preliminary

investigation of crimes. [FN220] A potential conflict of interest exists when police investigate allegations of torture against other police officers. At the same time, the prosecutors' dependence on the police means that they may be reluctant themselves to investigate allegations of torture for fear of alienating the police. [FN221] Also, they may lack the staff that is necessary to conduct independent investigations\*2185 of the police. [FN222] Several prosecutors suggested that the creation of an independent, judicial police force was necessary to control police abuse. [FN223] Although others thought this suggestion unrealistic, most agreed that the lack of resources exacerbated the problem.

Finally, the prosecutors themselves may be intimidated by the police. The prosecutors interviewed by the delegation were understandably reluctant to address this question; however, one noted that “although the prosecutor is free to bring charges against police officers, the security force administration will create problems. These will not be deliberate threats, but they will be of a more subtle nature. Some prosecutors decide not to bring such cases.” [FN224]

### 3. A Case Study: The Diyarbakir Prison Killings

The ongoing prosecution of sixty-five members of the security forces for killing ten prisoners in Diyarbakir E-type Prison illustrates the pre-trial obstacles to successful prosecution in cases of torture or police abuse. [FN225] On September 24, 1996, members of the security forces beat to death ten Kurdish prisoners who had been accused of political crimes and were awaiting trial. According to one witness, the bound prisoners were forced to lie on their faces and then were severely beaten by police and gendarme. Wounds on the bodies indicate that they died because of massive, repeated blows to the head. Photographs of the deceased reveal the absence of wounds to the hands, supporting \*2186 the claim that their hands were bound at the time of the beating. In addition to the ten who were killed, twenty-four others were injured and had to be hospitalized.

Lawyers representing the victims in the case suggested that the prison massacre was, at a minimum, a grossly inappropriate response to a disturbance at the prison and possibly a premeditated assault. According to these lawyers, on the morning of the massacre guards escorted thirty prisoners from their cells to meet visiting relatives. On the way, one of the prisoners opened a small window of another cell to ask for a plastic container to store the food that he expected his visiting relatives to bring. The chief guard berated the prisoner and swore at him for having done this. According to the guards, a fight erupted between the guards and the prisoners, and the guards then closed the iron gates at either end of the corridor, confining the prisoners to the corridor.

The prison administrator called the prison prosecutor and the chief prosecutor to the prison for direction on handling the situation. At noon, prison administrators sent a fax to the Ministry of Justice to ask permission to transfer the prisoners to Gaziantep prison. [FN226] At 2:00 p.m., the Ministry gave permission for the transfer. Prison administrators requested that units of gendarmes and special police be sent to reinforce the prison guards already on the scene. At 3:00 p.m., the chief prosecutor called a doctor at the Diyarbakir hospital to warn him to prepare for a large number of patients. [FN227] At about 3:30 p.m., after reinforcements had arrived, the corridor gates were opened. Prison guards entered from the northern end of the corridor, and the gendarmes and special police unit entered from the south. Together they beat and subdued the prisoners. According to one \*2187 witness, after the prisoners were bound and pacified, members of the security forces took some of the prisoners out of the corridor, one by one, into a

nearby room where nine of them were beaten to death. According to guards interviewed by the Diyarbakir Bar Association shortly after the incident, ‘whoever died, died in that room.’ [\[FN228\]](#)

The dead and some of the twenty-four injured were taken to the hospital in Diyarbakir. The nine were pronounced dead on arrival. The prison doctor, Dr. Serdar Gök, examined the injured and approved sixteen, including Kadir Demir, for transfer to Gaziantep. When the car arrived at Gaziantep Prison, Kadir Demir was dead, the tenth victim of the massacre. [\[FN229\]](#)

Initially, the prosecutor opened two separate investigations: one of the conduct of the prisoners and the other of the beatings and deaths. The first case, for damaging state property and causing harm to civil servants, is pending against the prisoners. The second was subsequently divided into two cases: one naming a prosecutor, the chief prosecutor, and the Minister of Justice for having authorized the action, [\[FN230\]](#) and a second naming \*2188 gendarmes, police, and guards for excessive use of force and manslaughter. This latter case was again divided into two, separating prison guards in one case from gendarmes and police in another.

In the case against the prison guards, the prosecutor quickly dismissed the counts against thirty or so defendants based on limited questioning of the injured prisoners. Each prisoner was asked only who had injured him, and not whether he had seen others harmed. By indicting on the basis of this questioning, the prosecutor reduced the case from approximately forty to seven defendants, all of whom the injured witnesses had identified by name as having harmed them. The limited questioning also precluded indictments for any killings since, as attorney Sezgin Tanrikulu observed, “the dead could not be asked who had killed them.” [\[FN231\]](#)

The most visible case to arise out of the prison melee is the case now pending in Diyarbakir Heavy Penal Court III against twenty-nine gendarmes and thirty-six police officers for the use of excessive force and manslaughter (‘Diyarbakir Prison Case’). [\[FN232\]](#) Before proceeding in heavy penal court, this case had to work its way through the jurisdictional maze created by the Civil Servants Law. [\[FN233\]](#) Its progression through the system illustrates the problems created by the administrative procedure even in cases that are eventually prosecuted.

After the initial investigatory phase, the prosecutor had in his purview a case against the sixty-five police and gendarmes. Because the defendants had acted on the authority of the prosecutor and allegedly had committed the crimes in a detention center, they were functioning in their judicial role and should \*2189 not have been permitted to invoke the protections of the Civil Servant Law. Nevertheless, evidently hoping to avoid responsibility for this politically controversial case, the prosecutor referred the matter to the city administrative council. [\[FN234\]](#) After reviewing the case, the council found that ‘since the forces were called in by the prosecutor, and therefore they were [performing a] judicial function, the council is not authorized to decide [[[the case].’ [\[FN235\]](#) This finding obliged the prosecutor to proceed with the case in the heavy penal court in Diyarbakir. The court, however, declined to hear the case, claiming that it was within the jurisdiction of the administrative board. This conflict of jurisdictional claims between the council and the heavy penal court had to be resolved by Turkey's Court of Cassation. [\[FN236\]](#) The judges of the penal chambers of the Court of Cassation, sitting en banc, heard the appeal and determined that the case was not administrative. It therefore sent the case to Heavy Penal Court III in Diyarbakir where it is now proceeding. [\[FN237\]](#)

The first hearing in the case was held in June 1997, nine months after the killings took place. This lengthy delay illustrates the way in which prosecutorial reluctance and jurisdictional confusion can combine to undermine the accountability of members of the security forces for abuse of individuals in their custody.

### C. Why Impunity? The Trial and Sentencing Stages

Once pre-trial obstacles have been overcome and the case proceeds to the fact-finding stages, problems frequently emerge that undermine the integrity of the trial process, including barriers to the participation of the victim's representatives, inadequate investigation and presentation of evidence, and, in cases where the crime is proven, a reluctance on the part of the court to convict and sentence members of the security forces appropriately. This section describes the factors in the trial and sentencing stages that contribute to the climate of impunity.

#### \*2190 1. Difficulty of Developing a Case Against Members of the Security Forces

##### a. Conflicts of Interest and Intimidation

Many of the problems in holding the police accountable for torture arise directly from the conflict of interest inherent in police conducting investigations of their own colleagues. This conflict is exacerbated by the fact that members of the security forces are not only tried without detention, but also frequently remain on duty while under investigation and prosecution. [\[FN238\]](#) This practice permits the defendants in a case to tamper with evidence, to intimidate witnesses, and to continue the abuse for which they are being prosecuted.

Again, the Diyarbakir Prison Case offers an illustration of the problem. In that case, the defense has argued that the forces were called in to quell an armed riot by the prisoners. Yet, no weapons were found on the prisoners. [\[FN239\]](#) When interviewed by a member of the delegation, lawyers for the defendants insisted that various weapons were found in subsequent searches of the prison and that the lawyers had submitted this evidence to the court. [\[FN240\]](#) Although the delegation was unable independently to confirm this assertion, the fact that police, gendarmes, and prison guards accused in the Diyarbakir case have remained on duty, a number of them in the E-type prison, raises the possibility that any weapons found were planted and therefore undermines the integrity of searches of the prison. Moreover, members of one or more of the three branches of the security forces implicated in the killings conducted the investigation in its early stages without the direct supervision of the prosecutor. [\[FN241\]](#) Given the importance of this early stage and the critical role of the prosecutor in ensuring the integrity of the \*2191 investigation, this failure to supervise may have undermined the ultimate success of the prosecution as well as the availability of other remedies.

The practice of permitting members of the security forces to remain on duty while on trial permits them access not only to evidence but also to potential witnesses. This creates an opportunity for the defendant to coach sympathetic witnesses such as other police officers and to intimidate adverse witnesses such as other detainees. For example, in the Diyarbakir Prison Case, an accused gendarme accompanied a prisoner-witness to one of the hearings as a part of his duty. [\[FN242\]](#) The gendarme was in court armed, contrary to court rules. [\[FN243\]](#) The defendant's direct control over the immediate fate of one of the witnesses may undermine the willingness of the witness to testify against the defendant, whether or not any express threat is made.

##### b. Physical Evidence

The belief widely shared among prosecutors and judges that defendants routinely allege torture in order to undermine the reputation of the police means that, as a practical matter, the testimony of the victim is not sufficient evidence to support a conviction. [FN244] Successful prosecution, therefore, depends upon physical proof. Because torture techniques are designed to inflict pain and suffering without leaving physical signs that could incriminate the interrogators, physical evidence of torture depends, in turn, upon timely and thorough medical examinations and reports. Indeed, such reports are required under Turkish law. [FN245] For a number of reasons, however, comprehensive and \*2192 reliable medical reports are rarely available in torture cases. [FN246]

First and most obviously, the required physical examination may not be conducted at all or may not take place in a timely manner. In some cases, the torture report may be missing from a detainee's file. In other cases, a report may be included in the file even though the victim maintains that no physical examination ever took place. Attorneys interviewed by the delegation indicated that they believe that in such cases the medical report is simply forged by the police. [FN247] In other cases, the medical examination may be deliberately delayed. In such cases, many of the physical signs of torture may have faded or disappeared, making it difficult or impossible for the physician to confirm the victim's allegations of abuse. [FN248]

Second, even if the examination takes place in a timely way, it may not be sufficiently thorough to yield the necessary information. In some cases, the quality of the examination may be compromised by the inexperience of the examining physician.\*2193 [FN249] Only thirty-two court houses in Turkey have a forensic council that can provide a high level of expertise in torture cases. [FN250] In other locations, ordinary doctors conduct the examinations. [FN251] These doctors may not have had any specialized training in forensic medicine and are therefore often unable to detect more subtle evidence of torture. [FN252]

In other cases, the quality of the examination may be undermined by intimidation of the doctors rather than their lack of training. The intimidation may be quite direct. For example, often the police remain in the examining room with the doctor and the detainee. The delegation observed a hearing in a trial in State Security Court in which two brothers claimed that they had been tortured. Their lawyer, Oguz Demir, explained that one of the alleged torturers brought them to the doctor for a physical examination. The doctor recorded merely that they complained of pain but not the physical indications of torture. Because the prosecutor ordered no physical examination after the complaint of torture was made, the record contained no medical evidence of torture. [FN253] Thus, there was no basis either for the exclusion of coerced testimony in the trial of the victim or for the prosecution of the accused torturers. In cases such as this, the presence of police reduces the likelihood that the doctor will make a thorough investigation even if he suspects torture. It also greatly reduces the likelihood that the victim will report the abuse in the first place for fear that he or she will be tortured again.

Doctors may also be intimidated by threats of professional or legal repercussions for reporting torture. In 1995, Physicians for Human Rights, an international non-governmental organization, conducted a very thorough study of the role of physicians \*2194 in the systematic torture of detainees in Turkey. [FN254] Their report indicates that, as state employees, physicians conducting official medical examinations of prisoners feared loss of their jobs if they reported torture. [FN255] Others feared that they would themselves be prosecuted or detained and tortured if they reported torture consistently. [FN256] They also indicated that reporting torture at substantial risks to themselves was probably futile because such reports would simply be altered by the police or ignored by the prosecutor. [FN257]

Third, requests for independent, private medical examinations arranged by the victim's lawyer or family are often denied or the reports themselves are ruled inadmissible. For example, the report of the Izmir State Hospital and Izmir Medical Association as well as much of the medical evidence gathered by the lawyers for a group of students tortured in Manisa was apparently disregarded by the lower court when it acquitted the defendants for lack of evidence of torture. In a potentially important decision, the court of appeals reversed the verdict of acquittal of the police and specifically criticized the lower court for disregarding this evidence of torture. [FN258] The precedential significance of the decision was undermined, however, by the refusal of the heavy penal court to follow the decision of the court of appeals. On January 27, 1999, the heavy penal court reinstated its verdict of acquittal. [FN259]

In some cases, medical evidence of torture may be clear, but prosecution may fail because the perpetrators cannot be identified. In theory, those responsible for torture might be identified either directly by their victims or other witnesses or by inference through records of police custody. Often neither of these methods is available. Direct identification by victims or witnesses is often impossible because detainees are routinely blindfolded throughout the detention period. [FN260] Identification numbers on \*2195 the officers' clothing or license plates on cars used by police are frequently changed in order to mask their identity. Although this practice is justified by the Turkish government as a means of protecting the security of the police who risk their lives in the fight against terrorism, it has the effect of undermining the investigation of torture. [FN261] In addition, the practice of permitting personnel to remain on duty reduces the willingness of witnesses to testify. [FN262]

Circumstantial evidence of the perpetrator's identity is also often unavailable. For example, although the investigating officer is required to sign statements taken from detainees, the signature is virtually always illegible and unaccompanied by a printed or typewritten name. In many cases, no accurate record is kept as to the identity of detainees or the period of detention. For example, in *Aydin v. Turkey*, the log produced by gendarme officials for the year in which members of the Aydin family were allegedly detained revealed no record of their detention. Despite the fact that the log contained only six entries for all of 1993, the prosecutor accepted it as credible evidence in support of the officials' contention that the Aydin family had not been detained.

### c. General Problems in the Collection and Presentation of Evidence

Legal protections afforded anti-terror forces combined with prosecutorial reluctance to pursue claims against members of those forces can frustrate the collection and accurate presentation of evidence in a variety of ways. For example, since hearings began in the Diyarbakir Prison Case, the proceedings have been prolonged and delayed because of the inability to gain access to and present important evidence. Defendants are not required \*2196 to be present in court, even for the purpose of identification. [FN263] Victims' lawyers' requests that the court detain the defendants and compel their attendance in court have been denied. On the contrary, some of those defendants have been transferred to other towns, and some continue to serve in the Diyarbakir E-Type prison. [FN264] This dispersal of the defendants has necessitated the taking of their testimony in the remote locations. [FN265] Prosecutors in those locations, who may be completely unfamiliar with the case, ask questions without the benefit of the case file. [FN266] The victims' lawyers argue that this practice allows the defendants to invoke their right to freedom from self-incrimination selectively in that their cursory statements

given in remote locations are accepted as evidence of a prisoners' riot, but the defendants are not required to give their full testimony at trial where they would be subject to close questioning. [\[FN267\]](#) In the Diyarbakir Prison Case, the court has extended this practice to witnesses and victims as well. Rejecting the victims' lawyers' requests that the court allow witnesses to be brought to Diyarbakir to testify, the court, stating that there is no legal obligation to bring the defendants before the court and to take their testimony in the courtroom, refused the attorneys' request to bring before the court all defendants, intervening victims, and witnesses who were not in Diyarbakir. [\[FN268\]](#)

Similarly, the victims' lawyers have been stymied in their attempts to obtain a medical determination of the causes of the deaths. When the dead and injured were brought to Diyarbakir State Hospital, the prosecutor was apparently unable to persuade the forensic specialist to work overtime. [\[FN269\]](#) Thus, only non-forensic medical personnel viewed the bodies, and these physicians made no determination as to the causes of the death. A fifteen-minute videotape of the bodies was taken, however, \*2197 which is now in the court's exclusive possession. [\[FN270\]](#) On the court's refusal to allow the victims' attorneys to copy the videotape, the attorneys requested on April 24, 1998, that the court submit the tape to forensic doctors for a determination. [\[FN271\]](#) Although this request was granted, the report of the forensic specialists did not arrive until an hour before the June 5, 1998 hearing, a delay that, according to the court, was caused by problems in getting the tape to the doctors. The one-page forensic report did not distinguish among the bodies and gave a general description of heads covered with blood and stitched. It give no determination of a cause of death. [\[FN272\]](#)

Since the delegation's initial visit in June 1998, the delay and confusion in the gathering and presentation of evidence in the Diyarbakir Prison Case has continued. In January 1999, a three-person follow-up mission attended a hearing in the case in which guards who had witnessed the beatings testified. During the proceeding, the chief judge summarized the testimony of two witnesses who had been questioned in another location and questioned five other witnesses in court. The most striking aspect of the proceeding was the fact that the court was hearing detailed testimony from these important witnesses for the first time two and one half years after the killings took place. The lawyers for the victims in the case expect that the slow pace of the proceedings will continue and that, ultimately, no one will be held accountable for the deaths. [\[FN273\]](#)

Thus, the Diyarbakir Prison Case continues to illustrate the myriad ways in which a prosecution may be prolonged, forestalling punishment of those responsible and frustrating the participation of attorneys representing the victims. These problems are due in part to specific legal protections built into the procedures in the State Security Courts and afforded to members of security forces engaged in the fight against terrorism. Reluctance on the part of the court or prosecutor to pursue investigation of security force members exacerbates the problems in a system that is inquisitorial rather than adversarial. In such a system, the prosecutor and the court exercise much greater control \*2198 over the marshaling and presentation of evidence than in an adversarial system. This can mean that justice is delayed and, ultimately, denied.

## 2. Failure to Convict/Reversal on Appeal

According to lawyers representing torture victims, most torture prosecutions of members of the security forces end in acquittal. Accurate and up-to-date statistics are difficult to obtain as the Turkish government has declined to follow the 1996 recommendation of the U.N. Committee to

Prevent Torture to track and review the conviction rate and sentences of police accused of torture or abuse of prisoners. [\[FN274\]](#) Nevertheless, available information suggests that the conviction rate is quite low whether measured against cases reported or even cases prosecuted. For example, the HRFT has reported that of seventy cases from 1980 to 1995 in which the government acknowledges that the victims died of torture, fewer than one-third of those cases had resulted in convictions as of the end of 1996. [\[FN275\]](#)

This pattern probably reflects, in part, the view shared by many judges that torture allegations by political prisoners are fabricated to undermine the police. [\[FN276\]](#) It also reflects the difficulties that prosecutors and advocates for victims face in collecting evidence to support allegations of torture and ascertaining the identity of the victims. In the view of many lawyers working in the State Security Courts, however, the low conviction rate in these cases also reflects a general lack of commitment on the part of the Turkish government to hold police accountable for their conduct. These lawyers told the delegation that convictions were rare even in cases such as the Manisa case described below, in which there is compelling evidence of torture and clear identification of the perpetrators.

In the unusual event that members of the security forces are convicted at the trial level, their sentences are often overturned on appeal on either substantive or procedural grounds. For example, in a highly publicized investigation and trial lasting over two years, five police officers were convicted of beating to death \*2199 journalist Metin Goktepe and were sentenced to seven and one half years in prison. Seven others were acquitted. On July 17, 1998, the High Court of Appeals in Ankara overturned both the convictions and the acquittals and remanded the case to the trial court with instructions to correct for certain irregularities in the original proceeding. Similarly, on December 24, 1998, the convictions of five police officers the beating death of Baki Erdogan were overturned on appeal, again for procedural reasons. In both cases, hearings before the original courts have resumed, and the convictions may or may not be reinstated. Lawyers involved with these cases note that, even if the convictions are ultimately reinstated by the trial court, the process may take months or even years and may again be subject to appeal. [\[FN277\]](#)

#### D. A Case Study: Detention and Torture in Manisa

The investigation and prosecution of police accused of torturing of a group of teenagers in Manisa, a town in western Turkey, illustrates many of the obstacles to holding police accountable, particularly the reluctance to prosecute and ultimately to convict those responsible for torture.

In December 1995, sixteen people were arrested and detained by the Anti-Terror Department of the Manisa Security Directorate. Most of those detained were high school students, seven under the age of eighteen. The students were detained until January 5, 1996, when they were arraigned on charges of having been members of an illegal organization and having acted on behalf of that organization. At that point, four were released to stand trial without arrest and the remaining twelve were held pending trial. [\[FN278\]](#) Two cases were brought against the students, each consisting of two charges (writing political slogans on a wall and throwing Molotov cocktails). The property crimes fell within the jurisdiction of the ordinary penal court, where the students were tried and acquitted. The political crimes were tried in State Security Court, where the students were initially convicted. After their conviction was reversed on appeal, the case was remanded to the State Security Court where it is still pending.

\*2200 The students claim that they were severely tortured while in detention. The families were permitted to visit the students twice while they were in detention, once on December 31, 1995 and once on January 2, 1996. Although the visits lasted only a minute or two each time, relatives were able to learn of the students' claims that they had been tortured. The families immediately filed a torture complaint with the prosecutor. On December 31 and January 2, the students were sent for a medical examination at the request of the families. The students report that, during these medical examinations, the police stood either next to them or near enough to hear the conversations during the examinations. No one asked the police to leave. The examining physicians did not ask the students to undress. Instead, the physicians simply looked at them from a distance, fully-clothed. They did not ask them any questions about their physical complaints or trauma that they might have suffered. None of the students had a urogenital examination or a psychological examination. Not surprisingly, these official reports included no confirmation of torture having taken place.

The families continued their efforts to obtain medical evidence of torture. The Izmir Medical Chamber (Izmir Tabip Odasi, ("ITO")) attempted to arrange for independent medical examinations of the students but were denied access to them. The ITO then arranged to survey the youths about the medical examinations that they had undergone and to record their accounts of torture and their physical complaints as precisely and comprehensively as possible. Based on the official medical reports, these surveys, and hospital records, the ITO concluded that the students had been subjected to a range of torture techniques including beating, hosing with cold water, deprivation of clothing, electrical shocks to the genitals, anal rape with a truncheon, squeezing of the testicles, and psychological harassment and humiliation.

Despite this evidence, the prosecutor refused to open a case against the police. Subsequent medical examination revealed that the students suffered from deformation in their ears from cold water spray, chronic pain from electrical shocks to their genitals, injuries from the squeezing of the boys' testicles, and tuberculosis. This medical report was also sent to the prosecutor who again refused to open a case. Media attention increased, and an eyewitness came forward who had been detained at \*2201 the same time. Sabri Ergul, a Member of Parliament from the region, who had witnessed a part of the torture, went directly to the President about the case. Finally, on June 4, 1996, six months after the alleged incidents of torture, the prosecutor opened a case against the police.

The trial of the police proceeded in heavy penal court simultaneously with the trials of the students both in the SSC and in heavy penal court. The lawyers for the students attempted to introduce evidence of torture from the police trial at the students' trials in SSC and in heavy penal court in order to call into question the statements that were taken under detention. After much public controversy about the case, the heavy penal court acquitted the students, noting that there was no conclusive evidence, other than their police statements, that the defendants committed the offenses. The SSC, however, apparently relied upon the allegedly coerced statements and reached a conviction well before the trial of the police for torture was concluded.

The defendant police officers, who were never arrested, did not attend the hearings in their trial. Moreover, their lawyers argued that they should be identified by the students through photographs rather than in person, a procedure designed to protect the identity of police officers engaged in anti-terror work. The court agreed to the use of the procedure because the officers remained on duty throughout the trial. On March 11, 1998, the police officers were acquitted by the heavy penal court due to insufficient medical evidence of torture. Both the conviction of the students and the acquittal of the police were appealed.

Throughout the three-year period since the students were detained, this case has received an unusual amount of attention. The acquittal of the police was strongly criticized by human rights advocates and others, both within and outside of Turkey. In October 1998, the verdict of acquittal of the police was overturned by the court of appeals. [\[FN279\]](#) Explaining its decision, the court of appeals stated that “[t]hese youths have been subjected to physical and psychological violence. Torture is a crime. There will inevitably be sanctions.” [\[FN280\]](#) The case was returned to \*2202 the Manisa Heavy Penal Court for further proceedings.

In a communication with members of the delegation, the Turkish government's Minister for Human Rights cited this decision as an important development, noting that the officers would be retried. Given the importance of the case, a trial observation team attended the hearing on January 27, 1999, in which the Manisa Heavy Penal Court's decision was expected to be announced. After the initial discussion regarding the presence of cameras and recording devices and a ten minute break, the substantive part of the hearing lasted less than five minutes. Without any further investigation or argument, the Manisa Heavy Penal Court simply announced that, notwithstanding the decision of the court of appeals, it had decided to reinstate its earlier decision of acquittal. [\[FN281\]](#)

The Turkish government, Turkish citizens, and domestic and international human rights organizations have come to see the Manisa case as a test of the government's resolve to end impunity for human rights violations. Unfortunately, the outcome in this case suggests that, even if the current government would like to punish those guilty of torture, it lacks the power to do so. Although the Minister for Human Rights might have welcomed a different outcome in Manisa, certain prosecutors and members of the judiciary seem committed to protecting the impunity of the security forces. Consequently, there is currently no credible threat that a member of the security forces who commits acts of torture will be held accountable. Until those responsible for the investigation, prosecution, and trial of members of the security forces begin to take serious allegations and evidence of torture, the climate of impunity will persist and serious human rights abuses will continue in Turkey.

#### E. Impunity and Women Victims of Torture: Special Concerns

Women all over the world face special risks when they are held in detention. [\[FN282\]](#) In addition to the forms of torture suffered by men, women more often suffer gender-specific harassment \*2203 and humiliation and may become pregnant as a result of rape. [\[FN283\]](#) In Turkey, cultural and political conditions contribute to the climate of impunity when the victims of torture and abuse are women. [\[FN284\]](#) Eren Keskin, a lawyer working on a project to assist women abused under detention, has documented fifty-four cases of women who were raped or sexually abused while in detention. [\[FN285\]](#) She believes that virtually all women who are detained are sexually abused. [\[FN286\]](#) She estimates that ninety-five percent are naked while they are being questioned by the police and that they are often touched sexually and verbally abused in the process. [\[FN287\]](#)

Women who are raped or sexually abused in prison or by police continue to feel the effects long after the assault. Given the obstacles described above to the successful prosecution of their assailants, women know that they have little to gain by reporting the incident to the prosecutor. Alternatively, they have much to lose by making a such a report. If they disclose their abuse, then they risk suffering the social stigma of having been raped. [\[FN288\]](#) They may be ostracized by their communities and even their families. [\[FN289\]](#) Women are sometimes forced into arranged marriages to eliminate the family's shame of sexual assault. [\[FN290\]](#) Thus, social

attitudes are an additional obstacle to reporting \*2204 rape and, therefore, to treatment and rehabilitation as well as prosecution.

As with other forms of torture, physical evidence of rape is critical to the prosecution of police. Here again, women face additional problems in the collection of physical evidence beyond those already discussed. According to Eren Keskin, if the woman had not had sexual intercourse prior to the rape, then the incident must be reported within seven to ten days in order for a medical examination to reveal evidence of violation. If the woman had had sexual intercourse prior to the rape, then the evidence must be taken within forty-eight hours in order to prove that intercourse took place. This amount of time often passes while the woman is still in detention. [FN291] Thus, physical evidence of rape is very difficult to obtain. Psychological testing is possible at trauma centers, but prosecutors generally do not seek this type of evidence in torture cases. The woman's testimony alone is not enough. [FN292]

The following descriptions of three rape cases demonstrate the particular difficulties that rape victims and their families face when they decide to pursue charges against the assailant. Taken together, they explain both the reluctance of victims to report rape and to pursue prosecution and the climate of impunity that surrounds the security forces in such cases.

The Case of Sukran Aydin. [FN293] Sukran Aydin was born in Derik village of Mardin in 1976. Because the men in her family had refused to become Village Guards, they were unpopular with the security forces. [FN294] On June 29, 1993, members of the security \*2205 forces came to the village dressed in civilian clothes and began to harass the villagers. Accusing them of "helping the terrorists," they beat some of the men and took Ms. Aydin, her father, and two of her relatives to the Derik Gendarmerie. They put them in separate rooms and blindfolded them. Two men beat Ms. Aydin, attempted to force her to admit to helping the terrorists, stripped her, and then raped her. Four days later, she and her family members were released without any explanation. Ms. Aydin told her mother what had happened to her. Her mother then took her to the Derik hospital where a medical examination confirmed that she had had forced intercourse and had multiple lesions on her thighs. She was then sent to Mardin State Hospital where a second medical report confirmed these findings. As a result of the medical evidence, the prosecutor started an investigation of Derik Gendarmerie commander Musa Citil. Meanwhile, convinced that the prosecution would prove futile, her lawyers applied to the European Commission. The European Court eventually ruled against Turkey, finding that the rape had taken place and that Ms. Aydin's rights under Articles 3 and 13 of the European Convention had been violated. Nevertheless, more than five years after the initial report was made, the Mardin Heavy Penal Court is still considering the case against Citil for the rape of Ms. Aydin and the abuse of her relatives. Notwithstanding the ruling of the European Court and the medical evidence, the heavy penal court has yet to determine whether a rape was committed. The defendant has never attended the hearings. The Aydin family, including Sukran Aydin and her new husband, is still experiencing harassment. Her home is under surveillance. Recently, her husband was detained in Diyarbakir without any apparent reason.

The case of X. [FN295] X is from Eryol village of Diyarbakir. In November 1996, her parents went to Diyarbakir, leaving ten-year-old X at home alone. She alleges that Suleyman Askan, a Village Guard from the same village came to her house and raped her, putting a gun to her head. He then threatened to kill her if she mentioned the attack to anyone. Eventually, X told her aunt what had happened to her, and her aunt told her parents,\*2206 who filed a complaint with the prosecutor. X's father was later threatened by an officer in the Mermer Gendarmerie, who told him not to pursue the matter. After the father filed a second complaint in Diyarbakir on

February 21, 1997, the prosecutor eventually opened a case against Askan. Askan was charged with “raping and consequently causing serious psychological trauma to a person younger than fifteen years of age” and trespassing private property. Notwithstanding the report from the Forensic Medicine Association establishing that X had been raped, the prosecutor urged acquittal due to lack of evidence. Although X's lawyers requested additional time to collect evidence to support the forensic report, including an examination of X in a state mental hospital, the court denied these requests and acquitted the defendant. The case is currently on appeal.

The Case of Remziye Dinç. [\[FN296\]](#) Günluce is a remote village in Kozluk township in Batman province. It is a small village and therefore under the protection of Village Guards. In early 1995, Remziye Dinç, then seventeen years old, was raped four times by three brothers, Nevzat, Ceyhan, and Ekrem Altuner, who were all Village Guards. According to Ms. Dinç, Nevzat Altuner had been the first to rape her in February. The rapes occurred in Günluce where Ms. Dinç lived with her sister and grandparents. Ms. Dinç told no one about the rapes for a few months, as Nevzat had threatened to kill her family unless she remained silent. In the summer, however, she discovered that she was pregnant. No longer able to conceal her situation, she began to tell her story and filed a complaint with a prosecutor in August 1995.

The prosecutor interrogated the three brothers, all of whom denied the charges. After Ms. Dinç gave birth in October 1997, the prosecutor ordered a paternity test, which revealed to a 99.8% certainty that Nevzat Altuner was the father of Ms. Dinç's child. The Batman prosecutor then opened a case against Nevzat on October 16, 1996. Despite the fact that the paternity test corroborated Ms. Dinç's account, the prosecutor refused to open a case against the other two brothers. On the strength of additional medical reports that corroborated her \*2207 claims, Dinç's lawyers were eventually able to have the other two brothers joined as defendants.

The case began in Batman Heavy Penal Court, under the former chief judge of that court. According to Ms. Dinç's attorneys, this judge was particularly diligent in his efforts to insulate the three Village Guards from liability. For example, one of her lawyers received a phone call in his office on the day before the hearing on which Nevzat Altuner was due to appear in court to testify. He was told that the three judges were taking Nevzat's testimony immediately and in chambers rather than at the next day's scheduled public hearing. Ms. Dinç was scheduled to arrive in Batman the next day for the hearing, where she would have the opportunity to identify Nevzat Altuner. Having had no advance notice, the lawyer arrived at the court only in time to register an objection to the testimony that he had just missed. Ms. Dinç arrived the next day, but was denied the opportunity to identify Altuner in court.

Throughout the trial, the accused remained at large, the other two brothers continuing their service in the Village Guards. Ms. Dinç surrendered her baby for adoption and moved to Istanbul for her safety, where she received counseling and support from women's and human rights groups. In the meantime, the case dragged on. The former head judge was relocated, and another judge took over the chairmanship of the Batman Heavy Penal Court and began to preside over the case. In February 1998, the judge issued a warrant for the arrest of the three. [\[FN297\]](#) The same gendarmerie that supervises the Altuners' Village Guard unit was charged with arresting them. When the delegation visited Batman on May 26, 1998, the three Altuner brothers were still at large. Lawyers interviewed by the delegation were unable to determine whether the three Village Guards were in hiding or whether the gendarmerie were simply refusing to act on the warrant.

On June 16, 1998, Nevzat Altuner was convicted of “consented rape” and his brothers were acquitted. The crime of consented rape is a form of statutory rape in which the defendant is

\*2208 charged with having sexual intercourse with a woman who was a virgin. Despite the fact that the brothers had initially denied ever having intercourse with Ms. Dinç, after the paternity test confirmed that he was the father of the child, Nevzat Altuner was permitted to introduce evidence of consent. The court apparently rejected Ms. Dinç's claim that she was forcibly raped and convicted the defendant of the least serious crime possible in the face of the evidence of paternity. The case has been appealed.

All three of these cases reflect the reality that women and girls who are raped by members of the security forces have much to lose and little to gain from even reporting the rape, much less pursuing its prosecution. Even Ms. Aydin, who prevailed in her claim against Turkey in the European Court, continues to live with official harassment and has yet to see a resolution of the criminal prosecution. In the case of sexual assault by police, the general skepticism toward rape claims combined with the tendency of prosecutors to credit the accounts of officials over that of victims exacerbated the overall climate of impunity.

## F. Conclusion

Torture continues to be one of the most serious human rights problems in Turkey. Notwithstanding the Turkish government's assertions that it is committed to ending the practice, the systematic use of torture as an interrogation technique persists, in part due to the climate of impunity surrounding the police. Under the current system, police accused of torture face no credible threat of prosecution and conviction. They are protected by corrupt bureaucratic procedures, reluctant prosecutors, poorly designed and rarely observed protocols for the collection of evidence, and a court system in which many judges are highly skeptical of claims of torture, particularly when raised by political prisoners. This failure of the Turkish government to investigate torture claims and to hold police accountable for their acts of torture not only encourages the continuing use of torture by police, but also constitutes an independent violation of the human rights of torture victims.

## \*2209 III. INTIMIDATION OF HUMAN RIGHTS LAWYERS AND MONITORS

### A. Introduction

The guarantee of a fair trial discussed in Part I of this report and the elimination of the climate of impunity advocated in Part II depend in part on the ability of lawyers and human rights advocates to function effectively in Turkey. This Part documents a pattern of intimidation and abuse of lawyers and human rights advocates that constitutes both a violation of the rights of those individuals and seriously impairs their ability to perform their work.

Section B of this Part begins with a review of Turkey's legal obligations to protect lawyers set forth in the U.N. Basic Principles on the Role of Lawyers and implicit in the European Convention's guarantee of the right to a fair trial. This section then documents examples of abuses ranging from detention and torture to state-sponsored or state-tolerated harassment. Section C focuses on the situation of human rights advocates. Again, the section begins with a review of Turkey's legal obligations with particular attention to the rights of free speech and association under the European Convention. The section then documents examples of abuses of human rights advocates and closures of human rights organizations.

## B. Treatment of Lawyers

### 1. Turkey's Legal Obligations to Lawyers as Citizens and Professionals

The right of every citizen of Turkey to speech, to free association, to personal security, and to be free from torture are recognized in domestic and international law. [\[FN298\]](#) Whenever any Turkish citizen is denied these rights, the State's obligations are implicated, regardless of that citizen's profession or status in society. But when lawyers are targeted for harassment, intimidation, and violence for performing their legitimate legal work, \*2210 not only are the lawyers' individual rights as citizens threatened, but also other protected rights are compromised, including the right to counsel and the right to fair trial. [\[FN299\]](#) This threat is compounded in legally-declared emergency situations and other contexts in which the due process rights of defendants are abrogated. In such situations, the role of defense counsel is even more critical, and adherence to basic international standards protecting the legal profession is therefore more, not less, important. At the same time, this added importance of defense counsel during emergency situations often places defense lawyers in commensurately greater danger. [\[FN300\]](#)

The role of the legal profession in safeguarding fundamental rights is recognized in the U.N. Basic Principles on the Role of Lawyers. [\[FN301\]](#) Approved by the General Assembly in September 1990, the Principles on Lawyers are the international community's authoritative statement of acceptable practices with regard to the role of lawyers. As such, they form an important part of the growing body of customary international law protecting fundamental human rights. The Principles on Lawyers begin with a declaration of the importance of effective legal representation in the protection of fundamental rights of all persons. The Preamble states, “adequate protection of human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.” [\[FN302\]](#) The Principles on Lawyers then set forward twenty-nine core standards, addressing issues ranging from access to lawyers to the protection of lawyers to special safeguards in criminal justice matters.

Several of the standards set forth in the Principles on Lawyers are particularly relevant to the situation in Turkey. For example, Article 16 of the Principles on Lawyers states that “[g]overnments shall ensure that lawyers . . . are able to perform all of their professional functions without intimidation, hindrance,\*2211 harassment or improper interference.” [\[FN303\]](#) Article 17 further provides: “[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.” [\[FN304\]](#) The delegation observed, however, that defense attorneys working in SSCs face a vast array of intimidation and harassment, sometimes sponsored by the state and at other times simply tolerated by it.

Article 18 states that “[l]awyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.” [\[FN305\]](#) This principle is critical to ensuring proper representation of politically unpopular defendants such as those appearing before State Security Courts. The delegation observed, however, that many members of the Turkish government and legal profession--including judges, prosecutors, and other lawyers--share the view that defense lawyers are “terrorist lawyers” because they defend clients accused of crimes against the Turkish state. [\[FN306\]](#)

To the extent that defense lawyers facilitate their clients' alleged criminal activity, these lawyers should be both disciplined professionally and prosecuted to the fullest extent of the law, consistent with international human rights standards. [\[FN307\]](#) The Principles on Lawyers do not sanction impunity for lawyers. Indeed, the Principles on Lawyers recognize that the legal profession has distinctive responsibilities, including a duty to ‘maintain the honour and dignity of their profession as essential agents of the administration of justice.’ [\[FN308\]](#) The Principles on Lawyers also recognize that bar associations ‘have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering \*2212 the ends of justice and public interest.’ [\[FN309\]](#) Nevertheless, the recognition of these responsibilities in the Principles on Lawyers does not justify either attitudes or policies that undermine lawyers as a profession on the ground that some lawyers may act inappropriately. Not only do such policies directly violate the Principles on Lawyers and undermine the rights guaranteed by the European Convention, but also they have the further effect of exposing lawyers to non-governmental threats, assault, and other forms of intimidation, simply for doing their jobs.

## 2. Problems Faced by Lawyers in Turkey

Lawyers in Turkey, particularly defense lawyers practicing in the SSC system, face a variety of forms of intimidation and harassment in the course of providing legitimate legal services to their clients. The most immediately threatening forms include arrest and detention, sometimes for prolonged periods and sometimes involving physical and emotional abuse and torture. The case described in this subsection of twenty-five lawyers detained and tortured in Diyarbakir exemplifies these methods of intimidation. Less immediate, but no less threatening, are criminal prosecutions of lawyers. Such prosecutions threaten not only the lawyer's liberty, but also the lawyer's license, reputation, and professional and personal relationships, often for periods of years as allegations are raised, investigated, tried, and appealed. In addition to the pending prosecutions of the twenty-five Diyarbakir lawyers, the case of defense lawyer oenal Sarihan, discussed below, illustrates this problem. Finally, less threatening but nevertheless objectionable forms of harassment--such as disrespectful or threatening treatment of lawyers by members of the security forces, including unnecessary searches and verbal abuse--reflect both the open hostility that defense counsel face in Turkey and the willingness of the government to ignore the problem.

### a. Arrest, Detention, and Abuse of Defense Lawyers: The Twenty-Five Lawyers Case

In one of the worst instances of abuse of lawyers, twenty-five defense lawyers practicing in the Diyarbakir SSC were arrested in November and December 1993, detained, tortured, and ultimately\*2213 prosecuted for their professional legal activities (‘Twenty-Five Lawyers Case’). This case alone involves almost ten percent of Diyarbakir Bar Association and close to half of the lawyers practicing before the SSC at the time. [\[FN310\]](#) This report focuses on sixteen of the lawyers in this case, [\[FN311\]](#) all of whom were detained in November and December 1993 without access to counsel for up to twenty-six days. [\[FN312\]](#)

The lawyers were charged with membership in the PKK--a violation of Turkish Penal Law, Article 168--and various ancillary provisions. The Article 168 charge carries a possible prison

term of between twelve and one half to twenty-two years. The charges against most of the defendants have since been reduced to a sole charge of aiding and abetting the PKK, in violation of Article 169. This charge carries a prison term of four and one half to seven years. Any conviction would also result in lifetime disbarment.

All sixteen lawyers claim that they were tortured and mistreated under detention and presented their allegations to Turkish authorities, both in and out of court. All sixteen also filed applications for review with the European Commission, [FN313] alleging\*2214 that Turkey had violated Article 3 of the European Convention, which prohibits torture and inhumane or degrading treatment or punishment. [FN314] In addition, at various opportunities the defendants have repeated their claims of abuse to representatives of numerous human rights organizations. Nevertheless, the Turkish officials have never initiated an investigation or criminal proceedings against any of the alleged abusers.

The lawyers' claims of torture and mistreatment under detention include being continuously blindfolded in cold and damp cells or corridors for up to twenty-six days, deprived of food other than a meager supply of bread and water, and permitted access to toilet facilities only twice every twenty-four hours. Most report having been physically beaten and made to listen to the cries of other detainees, who were being tortured. Many report having been threatened with death. Some report having been forced to endure mock executions. Others were stripped naked in frigid conditions and buffeted with pressurized cold water for sustained periods, in some cases up to an hour at a time. Detailed reports of the lawyers' accounts are included in the European Commission's determination of admissibility of the application on their behalf; [FN315] two of their accounts are illustrative.

\*2215 One lawyer, Meral Danis Bestas ('Bestas'), told the delegation that three plainclothes policemen detained her and her husband, Mesut Bestas, also a defense lawyer, as they left Diyarbakir SSC on November 16, 1993. [FN316] They were blindfolded, put in an unmarked police car, and driven to a detention center. During the drive, the police joked about taking a notorious route--one through a nearby town named Silvan where the bodies of a number of victims of 'unknown perpetrator killings' had been discovered.

After arriving at the detention center, Bestas was separated from her husband, searched, and placed in a moderately sized single cell. Instead of a bed, the cell had two wooden slats and a blanket that was "so dirty that [she] did not dare use it." She was told that she would be permitted to use the bathroom facilities only twice per day, that she would receive only one piece of bread per day, and that she would have to "drink from the toilet." The cell was very cold and dark, with a small opening that allowed her to see into the corridor where other defendants were being held. Continuous loud military music played in the cellblock throughout the period of detention.

Bestas was repeatedly interrogated. Early on, the interrogators told her that, as a lawyer, she must be familiar with their methods, including electric shocks and a technique known as the "Palestinian hanger." During the first brief interrogation session, she was blindfolded, thrown to the floor, and told to "kneel before" her captors. They threatened her in various ways, saying such things as "you know what we can do to you," "electric shocks are better with a wet blanket," and "you will get a whole hour because we are thinking of you." She told them that she had nothing to hide and would answer their questions, but that \*2216 she had done nothing illegal. Ultimately, she was returned to her cell.

Two days later, Bestas was told that her answers were "not sufficient." She was then asked about her activities as a defense lawyer and as a member of the HRA. For example, she was

questioned as to why she “represented terrorists,” why she had helped to prepare press releases that denounced human rights abuses, and why she had filed applications with Strasbourg (referring to the European Commission). She responded that she was not connected to any illegal organization and that her activities had been in the proper pursuit of her professional duties. At one point, someone slapped her hard on the face. She was then accused of acting as a courier for imprisoned PKK members, a charge that she denied.

On December 8, 1993, Bestas was again interrogated and told to sign a prepared statement. She asked to read the statement, but the interrogators laughed and told her, “You can't read, there is no reading here.” She refused, stating, “I am a lawyer, I am not going to sign anything I have not read.” The gendarmes took her to a room where the floor was wet and told to remove her clothes. She initially resisted, but relented when resistance proved futile. She was then targeted with high-pressure jets of cold water. After approximately fifteen minutes of this treatment, she fainted. The next day, after she again refused to sign a confession, she was twice more subjected to the same type of torture. Freezing and exhausted, she was convinced that she was going to die.

On December 10, 1993, she was taken to a forensic doctor, who refused to examine her but issued a report stating that she had no physical injuries. She was then brought to court, along with the other defendants, where she complained to both the prosecutor and the examining judge about the abuse that she had suffered during detention. Although she told the authorities that she could identify her torturers, no investigation was initiated. The judge ordered Bestas' release, but instead she was again blindfolded and, along with the other defendants, brought back to detention center. There, one of the senior officers lectured them that they had been “treated better” than normal villagers because they were lawyers. They were also told that they could not get away and that, even if the court did not convict them, they would be killed. After an appeal from the Bar Association,\*2217 they were finally released in the early hours of the morning. Three days later, Bestas obtained a physical examination by a private physician, who diagnosed her as suffering from tuberculosis.

On November 15, 1993, Sabahattin Acer, another Kurdish lawyer from Diyarbakir, “was arrested and taken to the Regiment Headquarters Interrogation Center, where he was put in a small, dark, cold and damp cell.” [\[FN317\]](#) Although the night-time temperature fell below freezing, he had no bed and instead was forced to sleep on a wooden slat with a single blanket. He was allowed access to the toilet twice per day. His food ration was one piece of bread per day, sometimes less.

After a while, Acer was blindfolded and brought to an interrogation room for the first time. There, he was asked a number of questions, such as why he attended hearings in the SSCs on behalf of suspected terrorists and whether he had prepared reports of human rights abuses to be submitted to international human rights organizations. At one point, he was asked about the activities specified in the indictment. When Acer refused to admit to the charges against him, he was taken back to his cell.

During a second interrogation, Acer was beaten. At one point, the interrogators took him outside, loaded their weapons, made him remove his clothes, and informed that if he did not admit his crimes, he would be taken to the hills and executed.

During the third interrogation, in which Acer was again blindfolded and beaten, he agreed to sign a confession. He did so because he knew that he could not withstand further torture, such as the pressurized water treatment experienced by some of his colleagues. He was not allowed to read his statement before signing it.

Like Meral Bestas, Acer was brought to a doctor before he was taken before a judge. Afraid for his life, he did not tell the doctor of the abuse that he had suffered during his detention. On December 10, 1993, at the prosecutor's urging, the examining judge refused to release Acer from custody. He was not released on bail until February 17, 1994.

A number of factors support the credibility of these and \*2218 other accounts of torture and mistreatment of the defendants in the Twenty-Five Lawyers Case. First, the defendants not only lodged their complaints as soon as possible, i.e., the first time they were brought before the examining judge on December 10, 1993, but also have repeated these allegations, both in court and out of court, to Turkish authorities, inter-governmental organizations, and members of non-governmental organizations. In addition, their allegations are remarkably detailed, specifying time, place, and method of torture. Further, the defendants' claims are consistent with abusive practices that have been documented by various international monitoring groups, including in previous reports by the Lawyers Committee, as well as findings and public statements by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. [\[FN318\]](#)

If these accounts are true, then the torture and mistreatment of the lawyers under detention constitute violations of Articles 5, 6, 7 and 12 of the Convention Against Torture, and Article 3 of the European Convention. Moreover, irrespective of the veracity of the defendants' claims, Turkey's failure to investigate these charges constitutes an independent violation by Turkey under these instruments. Finally, the detention and torture of these defense lawyers based on their legitimate professional actions violates the U.N. Basic Principles on the Role of Lawyers and undermines the ability of these lawyers to fulfill their important function within the criminal justice system. [\[FN319\]](#)

#### b. Prosecution of Defense Lawyers for Legitimate Legal Work

Compounding the abuse and torture sometimes suffered by defense lawyers in detention in Turkey is the more common harassment inflicted by baseless, prolonged, and often repeated criminal prosecutions for conduct arising out of the lawyers' legitimate representation of their clients. This harassment includes not only the ultimate threat of conviction and loss of liberty, but also the threat of disbarment and the resulting deprivation of livelihood, injury to personal and professional reputation, and severe disruption of professional and personal relationships. This disruption often lasts for years while specious allegations are raised, investigated, tried, and appealed.

The Twenty-Five Lawyers Case, for example, is now entering its sixth year and has been fully submitted without a decision since January 1997. This alone may constitute a violation of Article 6(1) of the European Convention, which upholds the right to trial "within a reasonable time." A number of the defendants have reported that the disruptive influence that this delay has had on their lives has been one of the worst aspects of their ordeal. For example, Meral Bestas stated during her interview,

This case is still going on, and we don't know what is going to happen to us. We cannot make any long-term decisions. We are trying to carry on a normal life with extraordinary effort. Sometimes I look at my son and say 'What is going to happen to us? Will I be able to see him again?'

The fact that the case is now in its sixth year despite the lack of credible evidence against the defendants by itself strongly suggests that this prosecution is designed to punish the defendants

for their legitimate activities as lawyers and human rights advocates. But other factors buttress this conclusion. For example, the allegations in the indictment explicitly condemn permissible human rights activity such as communicating with the HRA in Europe regarding activities of the security forces in the region. The chief prosecutor in Diyarbakir, Bekir Selcuk, has admitted \*2220 that these and other similar allegations in the indictment refer to petitions filed with the European Commission. [\[FN320\]](#) The prosecutor's willingness to include these allegations in the indictment is an obvious attempt to criminalize conduct protected under international law [\[FN321\]](#) and is strong evidence that this prosecution was initiated to punish the defendants and to deter them from engaging in human rights advocacy.

Although the Twenty-Five Lawyers Case is one of the most notorious examples of the prosecutions of lawyers for their legitimate activities, it is not unique. Moreover, this problem is not limited to the southeast of Turkey. For example, oenal Sarihan, a nationally prominent human rights lawyer in Ankara, has been subjected to numerous threats, acts of intimidation, and abusive prosecutions during her legal career. She is currently being prosecuted for statements that she made while representing a group of university students in Ankara who were prosecuted for peacefully protesting university fees and apparently tortured while in detention. [\[FN322\]](#)

Sarihan's legal troubles began at a press conference outside the courthouse after the students were convicted. Commenting on the harsh sentences handed down by the court, she stated that "in Turkey, murderers receive more lenient sentences than those imposed on these students." [\[FN323\]](#) Her comments along with portions of her defense statement were reported in various newspapers. Thereafter, two judges sitting in the case filed a complaint in the SSC claiming that she had "insulted the court" and \*2221 "intervened in an ongoing case." Sarihan refused to be interviewed by the prosecutor on the ground that he had failed to obtain the requisite permission to interrogate her from the Ministry of Justice. Since then, the case has been transferred from the SSC to the regular criminal court, where it is still pending. If convicted, she faces a maximum of six years' imprisonment and disbarment for life.

Despite this intimidation, Sarihan continued to represent the students. After a favorable intermediate appellate ruling in the students' case, Sarihan made another statement to the press that produced yet another complaint from one of the SSC judges. Another investigation was opened against her and, again, she refused to speak to the prosecutor without proper authorization from the Ministry of Justice. This second case, like the first, is still pending.

The process repeated itself a third time when Sarihan responded to press questions about the basis for her second prosecution. The charges in this third case--that she exposed the judges to the risk of terrorist attacks by making disparaging remarks about the judiciary--is the most serious of the three cases against her and is currently pending before the SSC in Istanbul.

Sarihan and her colleagues are entitled to the same rights of freedom of expression as everyone else. Moreover, as legal advocates, they have an obligation to promote justice and the rule of law. The statements for which Sarihan is being prosecuted fall well within her right to free expression, as protected by Article 10 of the European Convention and Principle 23 of the U.N. Basic Principles on the Role of Lawyers. In addition, each of her statements relates to her duties as a lawyer for the university students and, therefore, is protected independently under Principle 16.

As with the Twenty-Five Lawyers Case, the weak basis for the charges against Sarihan, and the failure of the prosecutor to follow proper procedures in bringing them, suggest that these prosecutions are intended to punish for, and deter the defendants from their legitimate activities as lawyers and human rights advocates. These prosecutions therefore violate Article 25 of the

European Convention and Principles 14, 16(a), and 16(c) of the Principles on Lawyers. Furthermore, the Twenty-Five Lawyers Case is an especially clear example of identifying lawyers with \*2222 their clients and the clients' causes, in violation of Principle 17 of the Principles on Lawyers. Finally, the protracted delay in resolution of these proceedings creates an additional burden and coercive restraint on the defendants for their legitimate activities as lawyers and human rights advocates and, as such, is an independent violation of Article 6(1) of the European Convention on Human Rights and Principles 16(a) and 16(c) of the Principles on Lawyers.

### c. Other Harassment of Defense Lawyers

Less threatening but more common forms of harassment, including physical and verbal abuse of lawyers in the performance of their duties, contribute to, and help to maintain, the climate of intimidation created by these patterns of arrest, detention, and prolonged prosecution of lawyers. Statements and actions of officials in the Turkish government often aggravate rather than ameliorate the problem. Further, the Turkish government's failure to protect lawyers adequately even in the courtroom, leaves counsel vulnerable to harassment and sometimes to violence by third persons, including right-wing organizations and off-duty members of the security forces. [\[FN324\]](#)

For example, the delegation heard credible accounts of physical intimidation especially of lawyers representing torture victims in actions against the police. Lawyers have allegedly been punched, kicked, slapped, and otherwise physically abused upon entering or leaving the courts. Although the assailants frequently have been identified, the Turkish government has, for the most part, failed to initiate any legal action in such cases.

In the so-called Aydin case, for example, police officers were on trial for torturing and killing Baki Erdogan during a ten-day period of detention. [\[FN325\]](#) Throughout the case, the victims' lawyers reported overt and constant harassment by police officers and others, sympathetic to the defendants. On the day of the final verdict, April 21, 1998, the courtroom filled with police officers, both in plain clothes and in uniform. After the verdict was announced, these officers attacked the lawyers, the plaintiffs, the journalists, and even the prosecutor. For a time, the lawyers \*2223 could not leave the Palace of Justice. They were eventually were able to leave with the prosecutor on the case, protected by police officers on duty.

According to the president of the Ankara Bar Association, incidents such as in the Aydin case are "single, isolated events." [\[FN326\]](#) A significant number of defense lawyers practicing in politically sensitive cases maintain, however, that these incidents are part of a widespread, systematic pattern of intimidation against lawyers who represent torture victims or defend clients accused of crimes against the state in SSCs. Moreover, they believe that the attack after the verdict was carefully premeditated. [\[FN327\]](#)

In the "Gazi Massacre" case, another case in which police are on trial, lawyers representing the victims have reported that hostile groups in the city of Trabazon have thrown stones at them when they enter the city to work on the case. They also claim that the police there routinely stop them, confiscate their identification cards, and generally treat them as suspects themselves. The lawyers complained to the Trabazon court, which allegedly sent a letter to the Ministry of Justice and on to the Supreme Court. The lawyers also complained directly to the Ministry of Justice, the Ministry of the Interior, and the Governor of Trabazon about the attacks, to no avail. When the

lawyers filed a complaint, the prosecutor refused to pursue the case because the lawyers could not identify specific perpetrators.

The failure of the Turkish authorities to control threats against lawyers from right-wing groups sympathetic to the security forces has become an increasingly serious problem for lawyers representing unpopular clients and victims of police abuse. Defense lawyer Savim Akat met with members of the delegation who attended a hearing in a case that Akat was defending in \*2224 SSC. [FN328] She reported that during the first two hearings in the case, the defense lawyers had endured physical and verbal abuse from members of a right-wing organization. She repeated that the lawyers had requested protection from the prosecutor and the Istanbul Bar Association, to no avail. In response to the lawyers' petition to the court, the court stated that it could provide security inside, but not outside the courtroom. Akat planned to continue her work on the case, but reported that she and her family continued to fear for her safety.

Indeed, the delegation observed first hand a small indication of the physical intimidation that defense lawyers in Turkey suffer. On June 2, 1998, two members of the delegation observed a hearing at the Istanbul SSC in which a member of a leftist organization was on trial for killing a police officer and a member of a right-wing organization. Defense lawyers told the delegation that during every previous hearing in the case, they had experienced serious physical and verbal harassment by members of a right-wing group. In the hearing attended by the delegation, police presence had been increased significantly and, although the atmosphere in the hearing was tense, no violence occurred. After the hearing ended, members of the delegation left the building with the defense lawyers. As they were leaving, members of the right-wing group lingering outside the court house shouted and shook their fists as the delegation members and defense lawyers drove away. The lawyers attributed the relative calm during the hearing and afterward to the presence of a foreign delegation and the resulting increased police presence.

In addition to physical intimidation, lawyers report a pattern of verbal intimidation consisting of statements from key Turkish officials, [FN329] prosecutors [FN330] and other members of the \*2225 legal profession, [FN331] including representatives of prominent bar associations [FN332] and members of the security forces. Often these statements reflect the assumption that lawyers who appear in court on behalf of clients suspected of terrorist activities not only endorse the activities of their clients, but also actively promote those activities as well. Lawyers report being openly referred to as "terrorist lawyers." In an extreme example of improperly associating a defense lawyer with the motives or acts of a client, one lawyer, Keles Ozturk, reported to the delegation that when one of his clients, Hatijuh Edejar, filed a complaint against the police for harassment, the police not only raided the client's home, but also raided Ozturk's home as well. [FN333]

Such attitudes deepen the climate of intimidation discussed above and render attorneys more vulnerable to threats and attacks by extremist groups. In light of such threats, a number of lawyers reported that they fear for their safety in certain locations and settings. One defense attorney, Sezgin Tanrikulu, stated: "I don't go the gendarme center outside of Diyarbakir because I am not sure how I'll be treated." [FN334] Another lawyer, Tahir Elçi, echoed these remarks, stating that in Central Anatolia, "attorneys fear being in the same part of town as the police \*2226 and gendarmes." [FN335] In part for this reason, of the eighty-three attorneys officially involved in the Diyarbakir Prison Case, only ten regularly appear at the hearings. [FN336] Such threats not only violate the rights of the attorney, but also undermine his or her ability to represent his or her client.

Dr. Hikmet Sami Turk, former Minister for Human Rights, has himself acknowledged the failure of the Turkish government to counter the assumption that defense lawyers are associated with their clients' causes. During a meeting with the delegation, Dr. Sami Turk admitted that Turkish lawyers are assumed to be associated with their clients' causes, stating simply, “[i]t is regrettable, but true.” To explain this unfortunate situation, he added, “Evidence exists to show that sometimes, certain lawyers are indeed connected with terrorist organizations.” Even assuming such evidence exists, such statements should be made and interpreted with extreme care. To the extent that lawyers facilitate terrorist activity, they should be prosecuted in accordance with the law. Any such illegal activity, however, does not justify either blanket policies or remarks about lawyers in general. Moreover, official statements about illegal activity conducted by lawyers--unless carefully qualified--too often leave all lawyers open to official and unofficial persecution based on facile assumptions that lawyers who defend unpopular clients are no different from the clients themselves.

Although it should be noted that not all defense lawyers interviewed claimed to have faced intimidation, [\[FN337\]](#) the problem is significant and is not isolated to the emergency regions. The incidents described in this report reflect a larger pattern of physical intimidation against lawyers defending unpopular clients and representing victims of abuse by members of the security \*2227 forces. This delegation's experiences are consistent with those of earlier Lawyers Committee representatives, who heard many similar accounts from lawyers in Turkey. The number of and consistency among these reports suggests that a significant problem exists. Moreover, whether or not the lawyers' claims of physical intimidation are true, the failure of the domestic legal system to investigate these charges and to secure an environment in which lawyers may perform their functions without fear of reprisal represents a violation of Turkey's international obligations.

### C. Treatment of Human Rights Advocates

Like defense lawyers, human rights advocates and human rights organizations in Turkey suffer official and officially-tolerated harassment, intimidation, and obstruction in the performance of their legitimate works. The most obvious form of intimidation consists of direct official actions undertaken through vague and overbroad security laws. These actions include prolonged, repetitive prosecutions of human rights activists and the repeated closure of human rights organizations. Although the delegation found that the worst excesses appear to be past, systematic intimidation persists--often with remarkable insensitivity to international opinion. [\[FN338\]](#)

#### 1. Turkey's Obligations to Human Rights Advocates

The U.N. General Assembly recently approved the Declaration on the Right and Responsibility of Human Rights Defenders (‘Defenders Declaration ‘). [\[FN339\]](#) In addition to reiterating the responsibility of states to safeguard human rights under international law, the Defenders Declaration emphasizes the right, in Article 9, ‘to complain about the policies and actions of individual officials and government bodies with regard to violation of human rights and fundamental freedoms‘ through both domestic and international channels, [\[FN340\]](#) and, in Article 10, to ‘participate\*2228 in peaceful activities against violations of human rights and fundamental freedoms.’ [\[FN341\]](#) Moreover, the Defenders Declaration further obliges states to

take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of their legitimate exercise of the rights referred to in this Declaration. [\[FN342\]](#) In other words, the state has an obligation not only to permit human rights advocacy, but also to ensure a climate in which human rights advocates are protected from harassment and violence as a result of their work.

Like the U.N. Basic Principles on the Role of Lawyers, the Defenders Declaration represents a recognition by the international community of the important role of human rights advocates in securing protection of international human rights and fundamental freedoms. One need not accept the Defenders Declaration as binding international law to conclude that the intimidation and harassment of human rights advocates in Turkey is a violation of fundamental rights. In an important sense, the Defenders Declaration merely elaborates upon rights already legally protected in the form of rights to speech, to assembly, and to participate in one's government and translates them into the specific context of human rights advocacy. Under Articles 10 and 11 of the European Convention, Turkey has an obligation to protect the rights of free speech and freedom of assembly of all persons. The Defenders Declaration emphasizes the added importance of safeguarding the rights of speech and assembly when those rights are exercised to promote human rights.

Turkey's practice of prosecuting intellectuals and human rights activists for nonviolent speech and advocacy clearly violates both the principles elaborated in the Defenders Declaration and the right to free speech guaranteed by Article 10 of the European Convention. Article 10 of the European Convention is written in two parts. The first part sets out a broad right to freedom of expression, to hold opinions and to receive and impart information and ideas without interference by public authority.\*229 The second part of the article sets conditions on the exercise of these freedoms 'as are prescribed by law and are necessary in a democratic society.'[\[FN343\]](#) Specifically, Article 10(2) sets out six purposes according to which speech may be limited: national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, the rights and reputation of others, privacy, and maintaining the authority and integrity of the judiciary. The European Court has held, however, that it is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.[\[FN344\]](#)

The Turkish government has argued before the European Court that, in as much as Turkish law establishes as a criminal offense separatist propaganda [\[FN345\]](#) or incitement of 'hatred . . . thereby creating discrimination based on membership of a social class, race, religion sect or region,' [\[FN346\]](#) prosecutions brought under these provisions do not violate Article 10 because the interference with the right to freedom of expression is prescribed by law. [\[FN347\]](#) The European Court has made clear, however, that

freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society. [\[FN348\]](#)

In short, qualifications of the freedom of expression must be both prescribed by law and necessary in a democratic society. Far from being necessary to a democratic society, the application of Turkish law to restrict nonviolent political speech and human \*2230 rights advocacy is inconsistent with democracy and therefore in violation of international law.

Applying this standard, the European Court has found that criminal prosecution of peaceful human rights advocacy violates Article 10. This principle holds even in the face of government concern about national security or territorial integrity so long as the advocacy is neither intended nor likely to incite imminent violence or lawless action. [\[FN349\]](#) The Court recently reaffirmed this position in a case from Turkey. In *Incal v. Turkey*, the Court ruled that the conviction of Ibrahim Incal, a lawyer and official in a Kurdish political party, for preparing materials protesting the treatment of the Kurds, was inconsistent with Article 10 despite domestic apprehension about violent separatism. [\[FN350\]](#)

This is not to say that Article 10 prohibits any and all restrictions on speech. Recently, the European Court, in another Turkish case, upheld the conviction of a former mayor of Diyarbakir for making a statement that could have been interpreted as supporting armed resistance by Kurdish separatists. [\[FN351\]](#) The Court emphasized, however, that the applicant had uttered his remarks among a series of armed PKK attacks against civilians in southeastern Turkey, circumstances that made the statement “likely to exacerbate an already explosive situation in that region.” [\[FN352\]](#) Together, these cases suggest that any limitation on the Article 10 right to free speech will be justified only in narrow circumstances and will depend on the situation in which the limitation is applied.

\*2231 The European Convention also guarantees the right of freedom of association. Article 11 plainly states: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others.” [\[FN353\]](#) The European Commission and European Court have repeatedly determined that this freedom applies to individuals seeking to join political parties, trade unions, and non-governmental organizations.

Like the right to free speech under Article 10, the right of association is subject to certain narrow limitations. The language of paragraph two of Article 11 closely tracks that of Article 10(2). It permits restrictions on the right to association only when they (i) are prescribed by law; (ii) serve certain compelling state purposes; and (iii) are necessary in a democratic society. As with Article 10, the European Commission and European Court have strictly construed the last requirement in connection with freedom of association claims. [\[FN354\]](#)

It should be noted that Article 15 permits states to derogate from Articles 10 and 11 during a publicly declared emergency that threatens the life of the nation. Even assuming the conditions of Article 15 can be met, however, Turkey had not so derogated at the time of any of the prosecutions or closures described in this report and has not since.

Finally, closures of human rights organizations not only violate the rights of individual members, but also of the organizations themselves. International jurisprudence and legal scholarship increasingly support the conclusion that the right of association can only have meaning if the associations themselves enjoy certain rights. [\[FN355\]](#) This trend includes case law under the European Convention, where both the Commission and the Court have assumed without deciding that organizations have standing to assert freedom of association claims. [\[FN356\]](#) The Defenders Declaration\*2232 reinforces this conclusion by recognizing in Article 16 that “[i]ndividuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms . . . .” [\[FN357\]](#) It follows that just as Turkey's actions

are inconsistent with the associational rights of individuals, they likewise violate the rights of the organizations that have been shut down or otherwise impeded in their work as human rights monitors.

## 2. Problems Faced by Human Rights Advocates

Human rights advocates in Turkey face many of the same problems as lawyers, including illegitimate detention and prosecution. [\[FN358\]](#) In addition, human rights organizations are frequent targets of intimidation and harassment, including formal closure orders from the government. This subsection reviews a number of examples of problems of the latter type and evaluates them according to Turkey's international obligations described in the preceding subsection.

The case of Akin Birdal is an extreme, though not unique, example of the harassment of human rights advocates through illegitimate prosecution. Birdal is the Chair of the HRA in Ankara, Turkey's largest human rights organization. As such, he has been a target for prosecution both individually and on behalf of the organization. From 1995 to the present, Birdal has been charged in not less than twenty-one actions. [\[FN359\]](#) He has been convicted in three, for which he has been fined a total of TL870,000 and sentenced to a year in prison, although appeal of the conviction carrying the prison sentence is pending. [\[FN360\]](#) He \*2233 has been acquitted seven times [\[FN361\]](#) and currently has eleven actions pending against him, some carrying possible sentences up to six years in prison. Most of the actions pending against him are for speaking publicly in favor of a peaceful resolution to the Kurdish problem. [\[FN362\]](#) The government justifies these prosecutions\*2234 and others like them on the grounds that they are directed against statements or activities that promote terrorist activity, question the territorial integrity of the State, or question the republic's secular foundations. It is clear, however, that this application of the Anti-Terror Law to a wide range of nonviolent political speech cannot be sustained under Article 10(2) of the European Convention.

Taken together, the prosecutions against Birdal illustrate how readily the Turkish government employs its legal mechanisms to silence individual human rights advocates. But Birdal is not unique. Other human rights advocates in Turkey have also suffered from multiple and prolonged prosecutions, many for their shared association with the Human Rights Association. [\[FN363\]](#) Birdal's case is particularly apt, however, in that it illustrates the connection between state-sponsored vilification of human rights advocates and their vulnerability to violence from hostile, non-state factions. In May 1998, just days before the delegation arrived in Turkey, Birdal was in his office in central Ankara when two men with whom he had been meeting suddenly pulled out guns and fired fourteen shots, hitting him six times. [\[FN364\]](#) He was hospitalized in critical condition and nearly died. Although he has substantially recovered from the shooting, Birdal continues to suffer threats of future violence.

The violent targeting of Birdal provided no reprieve from \*2235 further prosecution by the State. Only one week after the shooting, while he was recovering from his wounds in an Ankara hospital, the government initiated yet another prosecution against Birdal, this time accusing him of undermining the State by giving a speech in Ankara. Approximately two months later, the Ankara SSC sentenced Birdal to one year in prison for "inciting hatred" in remarks again calling for a peaceful end to the Kurdish conflict. Birdal, still suffering from the shooting, was forced to attend the session in a wheelchair. [\[FN365\]](#)

### 3. Problems Faced by Human Rights Organizations

This pattern of prosecution of individuals is only a part of the Turkish government's attack on human rights advocacy. Turkish law also enables the government to pursue human rights organizations. Relying principally upon Article 54 of the Law on Associations, local executives may shut down such groups indefinitely, citing security grounds. Closures of this sort remain an ongoing and pressing problem, especially in Diyarbakir and other cities in the southeast. Indeed, no example better illustrates the authorities ability to subvert human rights organizations than the closing of the HRA's Diyarbakir branch.

On May 22, 1997, members of the Diyarbakir branch found the doors to their office tied shut with an official wax lock accompanied by a threatening note warning against attempting to reopen. The same day several leaders of the organization were arrested and detained for thirty-six hours. During that time they were asked whether they were planning a protest against Turkish army operations in northern Iraq, which they denied. [\[FN366\]](#) On May 23, the governor of the state of emergency zone for the region ordered the indefinite closure of the Diyarbakir branch office\*2236 on the ground that it had violated Article 54 of the Law on Associations. The order specified that the group's activities undermined the integrity of the state, threatened the rights of others, and obstructed the course of justice.

Lawyers acting on behalf of the branch challenged the closure in the Diyarbakir Administrative Court, seeking both a reversal of the closure as well as a stay pending a final decision. The Administrative Court upheld the closure, and the lawyers for the Diyarbakir branch have since appealed to the Court of Cassation, where the matter is pending. The office has been closed for two years.

The ongoing closure of the Diyarbakir branch not only undermines the speech and association rights of its members, but also compromises legitimate human rights advocacy in the region, including providing assistance to individuals filing applications with the European Commission. Yet two years after the closure, no court has determined that the branch violated any law, nor have any criminal charges been filed.

In a meeting with the delegation, Dr. Hikmet Sami Turk, Turkey's then-Minister of Human Rights, drew a distinction between administrative closure on suspicion of illegal activity and the initiation of criminal prosecution for that activity. He stated that a local executive could order an administrative closure notwithstanding the state's failure to mount a criminal prosecution. [\[FN367\]](#) Yet this formal distinction proves too much. Closing an organization on the ground that it either harbored illegal publications or planned illegal activity without pursuing prosecutions for these activities permits the curtailment of speech and free association based on a much lower standard of proof than would be required in a criminal prosecution. Vague, unproved suspicions of illegal activity cannot justify the indefinite suspension of the rights of free speech and association guaranteed by Articles 10 and 11 of the Convention.

The closure of the Diyarbakir branch is not an isolated example. On the contrary, the government has not hesitated to employ its closure powers broadly, as it did in 1997 when as many as seven branches of the HRA were shut down in the space \*2237 of four months. [\[FN368\]](#) Though these closures proved temporary, they raise significant concerns nonetheless. Even a limited shutdown materially disrupts--and chills--the human rights work undertaken by the HRA and similar groups.

The sheer number and scope of the closings underscores just how vulnerable human rights advocacy in Turkey remains. [\[FN369\]](#) Besides that HRA, a number of other organizations have

been targeted for harassment or closure, among them some of the most highly-regarded human rights organizations in Turkey. For example, the government has taken a number of steps against Mazlum Der, a leading Turkish human rights group emphasizing religious freedom. It has repeatedly searched the group's offices in Istanbul and Ankara, [\[FN370\]](#) seized its property, [\[FN371\]](#) and otherwise interfered with its work. [\[FN372\]](#)

\*2238 On June 17, 1998, shortly after the delegation concluded its mission, government authorities closed the Diyarbakir branch office of the HRFT after less than a week of operation. This branch would not be allowed to reopen for more than a month. As grounds for that closure, the government cited the HRFT's alleged failure to submit a notice of permission to establish a branch office from the General Directorate of Foundations in its application to the Diyarbakir Regional Directorate of Foundations. Yavuz Onen, the President of the HRFT maintains, however, that the HRFT adhered to all relevant requirements and took every precaution in applying to open the Diyarbakir office precisely because the group anticipated possible obstruction by the authorities. The HRFT has earned widespread respect inside and outside of Turkey for providing medical and psychological aid to torture survivors and their relatives and documenting the incidence of torture and other human rights violations. [\[FN373\]](#) The \*2239 circumstances of the closure suggest that it may have been an attempt by the government to avoid--or at the least postpone--any embarrassment from the dissemination of HRFT's work. [\[FN374\]](#)

#### D. Conclusion

Turkish human rights lawyers and advocates continue to face harassment and intimidation as a result of their work. Some of the threats, such as detention, prosecution, and administrative closures of organizations, come directly from the Turkish government. Others, including death threats and physical assaults from hostile groups, are a result of the failure of the Turkish government to create a secure environment in which human rights advocacy can take place. Many of these problems constitute violations of the human rights of lawyers and advocates themselves. More broadly, the harassment and intimidation of the human rights community undermines the pace of progress towards the goal of eliminating all forms of human rights violations within Turkey.

### RECOMMENDATIONS

Given the forgoing, the delegation offers the following recommendations for improvements within the areas examined above.

#### A. Ensuring the Right to a Fair Trial

Turkey has a well-developed system of criminal justice staffed by able lawyers, judges, and prosecutors that is nevertheless severely compromised by the existence of the SSC system. The right to fair trial, and the rule of law generally, would be better served by the abolition of the SSCs and by the integration of their functions into the regular penal court system. Few, if any, changes to existing courts and penal procedure would be necessary in order to carry out this reform. Therefore, the delegation\*2240 recommends the following measures to ensure the right to a fair trial.

(i) The State Security Courts should be abolished and their functions transferred to the existing penal courts, operating under the existing Criminal Procedure Code.

Recognizing that this root and branch reform may be unrealistic in the present uncertain political circumstances, the delegation offers the following recommendations addressing different aspects of the work of the SSCs.

(ii) No one should be prosecuted for the nonviolent expression of political beliefs. The delegation endorses the recommendation of the Council of Europe Parliamentary Assembly report that the language of the Turkish Constitution should be reviewed by the European Commission for Democracy Through Law (“Venice Commission”) and that domestic reform of the Constitution aimed at purging it of anti-democratic, authoritarian language should be undertaken, with a view to removing the SSCs from the political arena.

(iii) Military judges should be removed from the judicial panel in all cases in which civilians are defendants. As the European Court has noted, the presence of a military officer among the judges violates the European Convention's guarantee of an independent, impartial tribunal.

(iv) Executive influence over the Supreme Council of Judges and Prosecutors should be eliminated in order to ensure the separation of powers and the independence of the judiciary, as required in the Constitution. The role of the Minister of Justice as a member of the Supreme Council should be reviewed with a view to decreasing his influence over the process of appointing, promoting, transferring, and disciplining judges and prosecutors.

(v) Prosecutors should be empowered to take independent action to carry out their full function as envisaged in Turkish law, including fulfilling their obligation to safeguard the well-being of suspects during pre-arraignment detention. Additional resources should be provided to prosecutors to enable them to carry out their duties in full.

(vi) The security forces' power of detention should be strictly controlled. They should have no power to detain on their own authority except where the detainee presents an immediate\*2241 danger to others or where a detainee is discovered in the act of committing a crime.

(vii) All detainees, regardless of the gravity of the offense of which they are accused, should be granted access to legal counsel within a maximum limit of forty-eight hours. Defendants must be given adequate access to legal advice during the vital statement phase of the prosecution process, which often occurs within the first few days of detention.

(viii) Lawyers representing defendants in SSC cases should be permitted unfettered access to their clients and should not be subjected to any form of intimidation or harassment because of their work as defense lawyers.

(ix) In all cases, relatives should be informed within twenty-four hours that an immediate family member has been taken into detention.

(x) Enhanced measures to safeguard detainees against torture during pre-trial detention must be enacted. Evidence shown to be extracted by coercive, illegal measures must be excluded from the file. Records of all members of the security forces coming into contact with detainees should be scrupulously maintained and be available to detainees and their legal representatives.

## B. Promoting Accountability for Torture and Police Misconduct

The delegation recommends the following measures to promote the accountability of police, gendarme, and security for members responsible for torture and other forms of misconduct.

(i) Amend Decree 285 such that public prosecutors rather than provincial administrative boards in the State of Emergency regions have the sole authority to initiate prosecution of security forces alleged to have violated the law.

(ii) Amend the Temporary Law on the Procedure for Investigation of Civil Servants (“Civil Servants Law”) such that public prosecutors rather than provincial administrative boards have direct authority and responsibility to investigate and prosecute crimes by security force members, whether they are acting in their administrative or their judicial capacities.

(iii) Initiate efforts to educate prosecutors regarding the prevalence of torture and Turkey's obligations under international law to provide effective redress of such claims.

\*2242 (iv) Create independent procedures for recording every torture claim that is made to a prosecutor and the eventual disposition of the claim.

(v) Increase prosecutorial resources either through the creation of a judicial police force directly under the control of prosecutors or by other appropriate means designed to ensure effective, timely, and independent investigation and prosecution of torture claims.

(vi) Where credible evidence exists implicating members of the security forces in human rights violations, those officers should be immediately removed from duty pending trial. Care should be taken to avoid conflicts of interest in the investigation of fellow officers by members of the security forces.

(vii) Require that physicians involved in the examination of detainees receive adequate forensic training to identify the sometimes subtle signs of torture; strengthen measures to protect physicians who report torture from harassment and intimidation; permit detainees to obtain medical examinations from independent physicians and require that such reports be admissible as evidence of torture or coercion.

(viii) Require systematic record-keeping in places of detention, indicating the name of the detainee, location and duration of detention, and identity of all examining officers. Adoption of the recommendations concerning access to counsel can be expected to improve the accuracy of such record-keeping.

(ix) Implement all recommendations in the Council of Europe's Committee for the Prevention of Torture's “Public Statement on Turkey” of December 6, 1996, including reviewing past sentences of officers convicted under Articles 243 and 245 of the Penal Code to determine whether these articles should be amended and strengthened.

### C. Protecting and Promoting Respect for the Work of Lawyers and Human Rights Advocates

The delegation recommends the following measures to ensure a safe working environment for defense lawyers and human rights advocates and to promote respect for their work.

(i) Expeditiously resolve pending prosecutions against attorneys and human rights advocates and immediately dismiss those cases in which no illegal activity has been proven.

\*2243 (ii) Curtail prosecution of attorneys and human rights advocates for their legitimate professional and political activities as protected under Article 10 of the European Convention and elaborated by the Defenders Declaration and the U.N. Basic Principles on the Role of Lawyers.

(iii) Curtail the practice of administrative closure of organizations based on their legitimate political and professional activities as protected under Article 11 of the European Convention and elaborated by the Defenders Declaration; reopen those organizations that have been closed based on such activities.

(iv) Promote a climate of respect and cooperation among judges, prosecutors, and defense attorneys by educating all three groups concerning their respective roles and responsibilities within the criminal justice system. Particular attention must be paid to eliminating the widespread identification of defense lawyers with the causes of their clients.

(v) Take all necessary steps to protect the safety of lawyers both inside and outside the courtroom from those who threaten them based on their representation of unpopular clients, whether or not such threats are directly state-sponsored.

(vi) Take all necessary steps to protect the safety of human rights advocates from those who would threaten them based on their work, whether or not such threats are directly state-sponsored.

[\[FNa1\]](#). The Lawyers Committee for Human Rights/Crowley Program Joint Delegation to Turkey benefitted from the contributions, support, and advice of many individuals and organizations. First, we are indebted to the scores of lawyers, prosecutors, judges, and other informed individuals who have met and consulted with the delegation during our visit and the drafting of this report. Second, several Turkish human rights organizations and professional associations have been helpful to us in our work. These include the Human Rights Foundation, the Human Rights Association, the Organization of Human Rights and Solidarity for Oppressed People (Mazlum Der), and the Contemporary Lawyers Association. The bar associations of Istanbul and Diyarbakir have been particularly helpful to our work, serving as co-hosts of the joint delegation and providing much advice and hospitality at other times. The bar associations of Adana, Ankara, Adiyaman, Batman, Izmir, and Malatya, and the Union of Turkish Bar Associations have also assisted us. The wisdom and counsel of lawyers Senal Sarihan and Sezgin Tanrikulu have been particularly valuable to the joint delegation and to the Lawyers Committee in its work over the past few years. We are grateful to all of the above. None of the above individuals or organizations bears any responsibility for the views and opinions expressed here.

The Turkish government has been unfailingly cooperative and helpful in facilitating our access to officials and in providing comments on our work, some of which are reflected in this report. We have particularly appreciated the comments of Prof. Dr. Hikmet Sami Turk, now Minister of Justice, and the helpfulness of Dr. Serif Unal, Director General for International Cooperation at the Ministry of Justice and Namik Tan, Counsellor at the Embassy of Turkey to the United States in Washington, D.C.

The Directors of the Crowley program would like especially to thank Dean John Feerick and the Fordham Law School alumni for supporting the work of the Crowley program; Robert Quinn, the 1998-1999 Crowley fellow, who invested countless hours preparing this report for publication; and Michael Posner, Executive Director of the Lawyers Committee for Human Rights, for his willingness to collaborate on this project.

[\[FN1\]](#). See, e.g., Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, Turkey Country Report on Human Rights Practices for 1998, (1999) [[[hereinafter 1998 State Dep't Report] (see also reports for earlier years); Human Rights Foundation of Turkey, Treatment and Rehabilitation Centers Report (1996) [hereinafter 1996 HRFT Report] (see also reports for earlier years); Committee on International Human Rights of the Association of the Bar of the City of New York, Torture in Turkey: The Legal System's Response, 45 Record 6 (1990); Committee on International Human Rights of the Association of the Bar of the City of New York, An Update of the 1990 Report of the City Bar Association on the Turkish Legal System's Response to the Problem of Torture in Turkey, 51 Record 468 (1996); Human Rights Watch/Helsinki, Broken Promises: Torture and Killings Continue in Turkey 16-47 (1992) [hereinafter Human Rights Watch/Helsinki, Broken Promises]; Physicians for Human Rights, Torture in Turkey and Its Unwilling Accomplices: The Scope of State Persecution and the Coercion of Physicians (1996) [hereinafter Physicians for Human Rights, Torture in Turkey];

Human Rights Watch/Helsinki, *Torture and Mistreatment During Pre-Trial Detention by Anti-Terror Police* vol. 9, no. 4 (1997) [hereinafter Human Rights Watch/Helsinki, *Torture and Mistreatment*]; United Nations, Report of the Committee Against Torture, G.A. Res. 44, U.N. GAOR, 48th Sess., Supp. No. 44A, U.N. Doc. A/48/44/Add.1 (1994) [hereinafter U.N. *Torture Report*]; Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1996 Public Statement on Turkey, Dec. 6, 1996, Ref.: CPT/Inf (96) 34 [EN] (visited Apr. 14, 1999) <<http://www.cpt.coe.fr/en/other/stat9612.htm>> (on file with the Fordham International Law Journal) [hereinafter 1996 Council of Europe Statement].

[FN2]. This region has been the scene of armed conflict since 1984. The conflict has been characterized by serious human rights violations, including attacks on civilians, by both security forces and members of the Kurdish Workers Party ('PKK').

[FN3]. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d plen. mtg., U.N. Doc. A/RES/39/46 (1995) [hereinafter Convention Against Torture].

[FN4]. The Joseph R. Crowley Program in International Human Rights ("Program" or "Crowley Program") at Fordham University School of Law promotes teaching, scholarship, and advocacy in international human rights law. Principal elements of the Program include an annual fact-finding mission to an area of the world with significant human rights concerns, a student outreach project involving students in course work, research and human rights internships, both domestically and abroad, and a speaker series, bringing many of the world's foremost experts in the field onto campus, stimulating dialogue and promoting scholarship. The Crowley Program approaches its work in these areas in light of Fordham Law School's commitment to public service, its widely recognized strength in the field of international law, and its close proximity to the world's leading centers for human rights advocacy. For more information about the Crowley Program, visit its website at <<http://www.fordham.edu/law/centers/crowley/home.htm>>.

[FN5]. Since 1978, the Lawyers Committee for Human Rights ("Lawyers Committee") has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the standards affirmed in the International Bill of Human Rights. Its programs focus on building the legal institutions and structures that will guarantee human rights in the long term. Strengthening independent human rights advocacy at the local level is a key feature of the Lawyers Committee's work. For more information about the Lawyers Committee, visit their website at <<http://www.lchr.org>>.

[FN6]. The members of the delegation from the Crowley Program were Professors Tracy Higgins and Martin Flaherty (Co-Directors, Crowley Program), Michael Sweeney (Crowley Program Fellow), Marko Maglich, Ayako Nagano, Kyseline Jean-Mary, Joan Xia, Nnennaya Okezie, and Dyanna Pepitone (Crowley Program Scholars). The representatives of the Lawyers Committee were Neil Hicks and Tigran Eldred. The delegation benefitted from the help of seven very able interpreters: Muge Kinacioglu, Ayliz Baskin, Aykut Kazanci, Tolga Ozalun, Dilek

Kurban, Ayse Artun, and Pinar Erdogdu.

[FN7]. The cities were Adana, Ankara, Adiyaman, Batman, Diyarbakir, Istanbul, Izmir, Manisa, Mardin, and Urfa.

[FN8]. A detailed itinerary listing the mission interviews is attached in Appendix One.

[FN9]. A version of this report entitled Obstacles to Reform: Exceptional Courts, Police Impunity and Persecution of Human Rights Defenders in Turkey is available from the Crowley Program in International Human Rights and the Lawyers Committee for Human Rights.

[FN10]. For a full discussion of the right to fair trial in international law, focusing in particular on the provisions of the International Covenant on Civil and Political Rights ('ICCPR'), see Lawyers Committee for Human Rights, What Is a Fair Trial?: A Basic Guide to Legal Standards and Practice (Oct. 1995).

[FN11]. See Law No. 1773 (1973) (Turk.) passed in accordance with Article 136 of the 1962 Turkish Constitution.

[FN12]. The State Security Courts (or "SSCs") have been controversial in Turkey throughout their existence. The Turkish National Bar Association opposed their establishment and continues to support their abolition.

[FN13]. Turk. Const. art. 143 (1982).

[FN14]. SSCs are located in Ankara, Istanbul, Izmir, Diyarbakir, Adana, Konya, Trabzon, and Van.

[FN15]. Turk. Const. art. 143; Law No. 2845 on the Creation and Rules of Procedure of the State Security Courts §§ 3, 5 (Turk.) (translated in *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547, 1558, P 28 (1998-IV)).

[FN16]. For example, in the ICCPR, to which Turkey is not a state party, but which may be regarded as the primary international instrument in this area, General Comment No. 13 identifies issues regarding the appointment of judges and the independence of the judiciary as falling within the coverage of Article 14 of the covenant. See International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171, 176-77, 6 I.L.M. 368, 372-73 (1967) [hereinafter ICCPR]; Compilation of General Comments & Recommendations Adopted by the Humans Rights Treaty Bodies, Hum. Rts. Committee, 21st Session, 1984, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) [hereinafter General Comment 13] (dealing principally with fair trial questions).

[FN17]. As will be discussed below, such an approach has been followed by the European Court of Human Rights ("European Court" or "Court") in its jurisprudence pertinent to this area, under Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention' or 'Convention'). See European Convention,

supra note 3, arts. 5-6, 213 U.N.T.S. at 226-28.

[FN18]. See *id.* Turkey has not ratified the ICCPR, the leading globally applicable standard that sets out the right to a fair trial.

[FN19]. Under Article 90 of the Turkish Constitution, international treaties ratified by the government and approved by the Turkish Grand National Assembly have the force of law. See Turk. Const. art. 90.

[FN20]. European Convention, supra note 3, art. 5(1), at 226.

[FN21]. *Id.* art. 5(2), at 226.

[FN22]. *Id.* art. 5(3), at 226.

[FN23]. *Id.* art. 5(4), at 226.

[FN24]. *Id.* art. 5(5), at 228.

[FN25]. *Id.* art. 6(1), at 228.

[FN26]. *Id.* art. 6(2), at 228.

[FN27]. *Id.* art. 6(3)(a), at 228.

[FN28]. *Id.* art. 6(3)(b), (c), at 228.

[FN29]. *Id.* art. 6(4), at 228.

[FN30]. *Id.* art. 6(3), at 228; see *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 15-16, P 33 (1980).

[FN31]. See European Convention, supra note 3, art. 5(3), (4), at 226; see *Artico*, at 15-16, P 33.

[FN32]. See *Campbell & Fell v. United Kingdom*, 65 Eur. Ct. H.R. (ser. B) at 41, P 99 (1982).

[FN33]. See *S v. Switzerland*, 220 Eur. Ct. H.R. (ser. A) (1992). It may be noted that the Court, in the case of *S v. Switzerland*, cited the United Nations' Standard Minimum Rules for the Treatment of Prisoners (1955) in support of its conclusion that the right of confidential communication with lawyers is a basic requirement of a fair trial and hence is implicit in Article 6. Article 93 of the Standard Minimum Rules states that a prisoner is entitled

to receive visits from his legal adviser ... and to prepare and hand to him [ [ [ , and to receive,] confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.

Standard Minimum Rules for the Treatment of Prisoners, First U.N. Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No.

1, at 11, U.N. Doc. E/3408 (1957), amended by E.S.C. Res. 2076, U.N. ESCOR 62d Sess., Supp. No. 1, at 35, U.N. Doc. E/5988 (1977).

[\[FN34\]](#). The European Convention permits restrictions on the right of counsel for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. See *Murray v. United Kingdom*, Eur. Ct. H.R. judgment of Feb. 8, 1996, 1 Reports of Judgments and Decisions 30, 54-55, P 63 (1996-I). The issue of the lawfulness of a restriction, therefore, is determined by the effect on the particular individual's trial, not by the legality or the illegality of the measures in the domestic law. The Court has observed that 'even a lawfully exercised power of restriction is capable of depriving an accused, in certain circumstances, of a fair procedure.' *Murray*, at 55, P 65.

The Court has found several restrictions permissible. For example, in a case in which the defendants were accused of terrorist offenses, the Court found permissible a three or four-week initial ban on visits by lawyers to arrested persons; a requirement of prior notice to the authorities for visits; the separation of lawyer and client by glass paneling; and a ban on defense lawyers tape recording visits with detained clients. The Court has required, however, that paper correspondence between defense lawyers and detained clients be permitted without delay or interruption, although judicial supervision is permissible. See *Kröcher & Möller v. Switzerland*, App. No. 8463/78, 26 Eur. Comm'n H.R. Dec. & Rep. 24, 53-54, P 15 (1981).

In *Campbell & Fell v. United Kingdom*, the Court stated that 'there may be security considerations which would justify some restriction on the conditions for visits by a lawyer to a prisoner.' *Campbell & Fell v. United Kingdom*, 65 Eur. Ct. H.R. (ser. B) at 45-46, P 113 (1982). In one case, for example, there was a question of risk that evidence might be suppressed. See *Can v. Austria*, 95 Eur. Ct. H.R. (ser. A) (1985). The point was not discussed in depth because a settlement was reached in the case.

[\[FN35\]](#). European Convention, *supra* note 3, art. 15(1), at 233.

[\[FN36\]](#). See 33 Y.B. Eur. Conv. on H.R. 14 (1990).

[\[FN37\]](#). See 35 Y.B. Eur. Conv. on H.R. 16 (1992).

[\[FN38\]](#). *Aksoy v. Turkey*, Eur. Ct. H.R. judgment of Dec. 18, 1996, 26 Reports of Judgments and Decisions 2260, 2304, P 179 (1996-VI) (Commission report).

[\[FN39\]](#). Since 1995, the European Court has found violations of Article 5 of the European Convention against Turkey in the following cases: *Mitap and Müftüoğlu v. Turkey*, Eur. Ct. H.R. judgment of Mar. 25, 1996, 6 Reports of Judgments and Decisions 402 (1996-II); *Yagci & Sargi v. Turkey*, 319 Eur. Ct. H.R. (ser. A) (1995); *Mansur v. Turkey*, 319 Eur. Ct. H.R. (ser. A) (1995); *Aksoy*, at 2264, P 3; *Sakik and Others v. Turkey*, Eur. Ct. H.R. judgment of Nov. 26, 1997, 58 Reports of Judgments and Decisions 2609, 2628, Holding PP 2, 5, 7 (1997-VII); *Kurt v. Turkey*, Eur. Ct. H.R. judgment of Apr. 25, 1998, 74 Reports of Judgments and Decisions 1152, 1197, Holding P 5 (1998-III).

[\[FN40\]](#). *Aisling Reidy et al., Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 Neth. Q. Hum. Rts. 161, 162 (1991).

[FN41]. For a full discussion of the challenges facing the mechanisms illustrated by Turkey's and other nations' near-permanent state of emergency, see Oren Gross, "Once More Unto the Breach": The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies, 23 *Yale J. Int'l L.* 436 (1998).

[FN42]. *W v. Switzerland*, App. No. 9022/80, 33 *Eur. Comm'n H.R. Dec. & Rep.* 21, 37, P 6 (1983) (emphasis added).

[FN43]. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, *Europ. T.S. No.* 126 [[[hereinafter European Torture Convention]].

[FN44]. *Id.*; Convention Against Torture, *supra* note 3, art. 15.

[FN45]. G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988).

[FN46]. The U.N. Basic Principles on the Independence of the Judiciary was adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985, and was endorsed by General Assembly Resolution 40/32 of November 29, 1985 and Resolution 40/146 of December 13, 1985. See G.A. Res. 40/32, U.N. GAOR, 40th Sess., Supp. No. 53, at 204, U.N. Doc. A/40/53 (1985); G.A. Res. 40/146, U.N. GAOR, 40th Sess., Supp. No. 53, at 254, U.N. Doc. A/40/53 (1985) [hereinafter Principles on Judiciary].

[FN47]. The U.N. Basic Principles on the Role of Lawyers was adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, and welcomed by the General Assembly in Resolution 45/121 of December 14, 1990. See G.A. Res. 45/121, U.N. GAOR, 45th Sess., U.N. Doc. No. A/CONF. 144/28 (1990) [hereinafter Principles on Lawyers].

[FN48]. See Christopher L. Avery & Amnesty Int'l, *A Guide to the United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* (London 1989).

[FN49]. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 135, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

[FN50]. See Turk. Const. pmb1.

[FN51]. *Id.*

[FN52]. Andras Barsony & Walter Schwimmer, *Honouring of Obligations and Commitments by Turkey: Report to the Committee on the Honoring of Obligations and Commitments by Member States of the Council of Europe*, Doc. No. 8300 P 28 (Jan. 15, 1999) (visited June 26, 1999) <[http:// stars.coe.fr/doc/doc99/edoc8300.htm](http://stars.coe.fr/doc/doc99/edoc8300.htm)> (on file with the Fordham International Law

Journal).

[\[FN53\]](#). See *id.* P 31.

[\[FN54\]](#). For example, in *Brogan and Others v. United Kingdom*, the European Court remarked on the need, inherent in the European Convention system, for a proper balance between the defense of the institutions of democracy in the common interest and the protection of individual rights. *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) at 27, P 48 (1989).

[\[FN55\]](#). Turk. Const. pmb1. Indeed, just as in a theocracy where priestly rulers interpret the requirements of the deity and thus determine law and its application, in Turkey the military guardians interpret what the sacred state requires in terms of obedience from its citizens. The objection on human rights grounds to theocracy is not, after all, that such a system of political authority derives from God. Rather, it is that in such a system power falls into the hands of an unaccountable group of rulers who claim special authority to derive law from sacred texts. In Turkey, the military establishment, which includes military judges, has a constitutionally established special prerogative to interpret the commands of the secular deity of the Turkish nation.

[\[FN56\]](#). See, e.g., *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report of the Special Rapporteur*, U.N. ESCOR, 51st Sess., Provisional Agenda Item 10, P 34, U.N. Doc. E/CN. 4/1995/39 (1995) (report of Mr. Dato Param Cumaraswamy of Malaysia, Special Rapporteur of the United Nations Commission on Human Rights, submitted on February 6, 1995).

[\[FN57\]](#). See *id.*; *Findlay v. United Kingdom*, Eur. Ct. H.R. judgment of Feb. 25, 1997, 30 Reports of Judgments and Decisions 263, 281-82, P 73 (1997-I); General Comment 13, *supra* note 16, § 3.

[\[FN58\]](#). See *Military Legal Service Act*, Law No. 357, Section 16, §§ 1, 3 (Turk.) (translated in *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547, 1560, P 29 (1998-IV)).

[\[FN59\]](#). *Id.*

[\[FN60\]](#). See *id.* Additional Section 8 (translated in *Incal*, at 1560, P 29) (‘Members of the National Security Courts belonging to the Military Legal Service, shall be appointed by a committee composed of the personnel director and legal advisor of the General Staff, the personnel director and legal advisor attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defense.’).

[\[FN61\]](#). See *id.* Additional Section 7 (translated in *Incal*, at 1559, P 29).

[\[FN62\]](#). See *id.*

[\[FN63\]](#). See, e.g., *id.* §§ 18(1), 29, 38 (translated in *Incal*, at 1560, P 29).

[FN64]. In extraordinary situations such exceptional measures may be necessary, but they must be temporary and courts must scrupulously provide all the fair trial guarantees of international law. See General Comment 13, *supra* note 16. The Turkish SSC system does not satisfy these conditions. For example, the Turkish SSC system is not temporary. The SSCs have operated for over a decade and a half.

[FN65]. *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547 (1998-IV).

[FN66]. Article 6(1) states, ‘In the determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal.’ European Convention, *supra* note 3, art. 6(1), at 228.

[FN67]. *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547, 1587, PP 74-75 (1998-IV) (Commission report).

[FN68]. *Id.* at 1573, P 72.

[FN69]. Turk. Const. art. 9.

[FN70]. *Id.* art. 138. Article 138 states that:

Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their personal conviction conforming with the law. No organ, authority, office, or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, or send them circulars, make recommendations or suggestions. No question shall be asked, debate held, or statement made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial. Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

*Id.*

[FN71]. *Id.* art. 139. Article 139 states that:

Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of court or post. Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties on account of ill health, and those determined unsuitable to remain in the profession, are reserved.

*Id.*

[FN72]. See *id.* art. 138.

[FN73]. See *id.* art. 139.

[FN74]. See *id.* art. 140. Article 140 states:

The qualifications, appointment, rights and duties, salaries and allowances of judges and public prosecutors, their promotion, temporary or permanent change of their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offences committed in connection with, or in the course of, their duties; the conviction for offences or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of judges.

Id.

[FN75]. Interview with Adnan Günes, Istanbul SCC Prosecutor, in Istanbul, Turk. (May 27, 1998). All of the interviews cited in this report were conducted by one or more members of the Crowley Program/Lawyers Committee joint mission to Turkey. Hereinafter the interviews are cited by date and location. The vast majority of the interviews were conducted in person during the two week mission in May/June 1998. Others were conducted in New York prior to the mission or in various Turkish cities during a one week follow-up mission in January 1999. A few follow-up interviews were conducted via telephone from New York. Complete notes of all interviews are on file with the Crowley Program at Fordham University School of Law. Most of the interviews were conducted through the use of an interpreter. The quotations contained in this report appear as translated and recorded in the notes of team members. Although we have made every effort to represent the words and meaning of the speakers as accurately as possible, we regret any misrepresentation that might have occurred in the process of translation.

[FN76]. October 1998 Regulation on Apprehension, Police Custody and Interrogation art. 5(a)(2) (1998) (Turk.) [hereinafter October Regulation] (official translation provided by Turkish embassy in Washington, D.C.).

[FN77]. Interview with Oguz Demir & Several Demir in Istanbul, Turk. (June 1, 1998).

[FN78]. Justice, Interior Ministers Supersede PM Circular Permitting Inspections of Police Stations by Public Prosecutors, Turkish Daily News, Oct. 3, 1998 [hereinafter PM Circular].

[FN79]. For example, the Adiyaman Chief Prosecutor told the delegation that prosecutors have both economic and technological difficulties. They have limited human resources, a heavy case load, an inefficient administrative system, and inadequate forensic medical resources in cities and towns. He also noted that the judiciary, of which prosecutors are considered a part, is the least funded branch in Turkey. Interview with Adiyaman Chief Prosecutor, in Adiyaman, Turk. (May 31, 1998).

[FN80]. October Regulation, *supra* note 76, art. 25.

[FN81]. PM Circular, *supra* note 78.

[FN82]. See *id.*

[FN83]. Not all prosecutors favor the idea of a separate judicial police force. For example, the Chief Prosecutor in the Ankara SSCs, Cevdet Volkan, did not support the idea. ‘It would take us about 20 years to get such a force up and running,’ he said. ‘Our country lacks the resources to do this.’ He preferred, rather, to educate the security forces about issues of human rights and fair trial standards. Interview with Cevdet Volkan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

[FN84]. See, e.g., Nazim Tural, *Judicial Police: A Long-Delayed Measure to Protect Human Rights*, Turkish Daily News, July 30, 1997 (reporting that proposal to establish judicial police force has been around for over 50 years). The Ministry of Justice drafted a law for its formation in 1992, which was updated in 1997.

[FN85]. October Regulation, *supra* note 76, art. 20 (emphasis added). Members of the judiciary also clarified for the delegation the basis for this incommunicado detention period under Turkish Law. The Chief Prosecutor of the Istanbul SSC, Erdal Gocken, noted that the text of the law does not explicitly deny access to counsel during the first four days of detention. He explained that ‘the four-day rule comes from our interpretation of an amendment to the Criminal Procedure Code.’ That amendment gives a judge the discretion to extend the initial four-day detention by three days and states explicitly that the detainee has the right to counsel during those additional three days. ‘We interpret this to mean that there is no right to access to a lawyer during the initial four days.’ See Interview with Erdal Gocken, Istanbul SSC Chief Prosecutor, in Istanbul, Turk. (May 26, 1998). The October Regulation has now erased any ambiguity that may have existed about the domestic law on the question of access to counsel for state security detainees.

[FN86]. An official at the Ministry of Justice stated, ‘If the [European Court] sees any conflict between the rules applied in Turkey and the European Convention, Turkey will see to it that it conforms to the [European Court].’ Interview with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

[FN87]. *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) at 30, P 55 (1989).

[FN88]. See *Murray v. United Kingdom*, Eur. Ct. H.R. judgment of Feb. 8, 1996, 1 Reports of Judgments and Decisions 30 (1996-I).

[FN89]. The Director General of the Ministry of Justice pointed out that in terror-related crimes and crimes against the State, a defendant cannot see his lawyer until four days after his arrest so that the investigation can continue and the authorities can gather evidence. The concern is that the lawyer may facilitate the destruction of evidence and communicate with an illegal organization. Interview with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

The Chief Prosecutor of the Ankara SSCs, Cevdet Volkan, states that the reason for the four-day incommunicado detention period is that “we need time to collect evidence, particularly in multinational, multi-defendant cases. We limit the detainee's right to access a lawyer in order to prevent the lawyer from leaking the material evidence out. We have problems dealing with our lawyers.” Interview with Cevdet Volkan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

One Istanbul SSC prosecutor, Muzaffer Yalzin, explained that during the first four days of detention, a detainee, theoretically, should be able to see his lawyer. But, this is not allowed in order to stop the lawyer from passing messages out of the detention center. Interview with Muzaffer Yalzin & Adnan Günes, Istanbul SSC prosecutors, in Istanbul, Turk. (May 27, 1998).

Officials in the Ministry of Justice reasoned that terrorist crimes are a very complex issue in Turkey, and sometimes the lawyer makes connections with terrorist groups. The detainee is not allowed to see a lawyer because material evidence may be destroyed or hidden by the detainee with the help of a lawyer. Interview with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

[\[FN90\]](#). Istanbul SSC prosecutor Muzaffer Yalzin conveyed his belief that during the first four days of detention, a detainee should be able to see his lawyer. Interview of Muzaffer Yalzin and Adnan Günes, Istanbul SSC prosecutors, in Istanbul, Turk. (May 27, 1998). The Chief Prosecutor separately echoed the same sentiment, ‘In general, the detainee is kept for the first four days .... If the detainee could see the lawyer, the lawyer could warn the others. As a lawyer, I am against this procedure. If there is a principle that defense is an integral part of the judicial system, then we shouldn't worry about secondary concerns like warning others.’ Interview with Erdal Gokcen, Istanbul SSC Chief Prosecutor, in Istanbul, Turk. (May 26, 1998).

[\[FN91\]](#). Interview with Seraffettin Iste, Chief Judge of the Istanbul SSC, in Istanbul, Turk. (May 27, 1998).

[\[FN92\]](#). Interview with Cevdet Volkan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998) (referring to pending prosecution of individuals charged with May 1998 attempt to murder Akin Birdal, President of Turkey's largest human rights organization).

[\[FN93\]](#). *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) at 33, P 61 (1989).

[\[FN94\]](#). *Id.* at 33, P 62.

[\[FN95\]](#). Meeting with those members of the Istanbul Bar Association practicing in the State Security Courts, in Istanbul, Turk. (May 25, 1998).

[\[FN96\]](#). Interview with Sedat Cinar, Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998).

[\[FN97\]](#). Interview with defense lawyer, who prefers to remain anonymous, practicing in the Istanbul SSC, in Istanbul, Turk. (May/June, 1998).

[\[FN98\]](#). A gendarmerie is the physical building where the gendarme, a security force within the military command structure, is headquartered.

[\[FN99\]](#). Meeting with Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998).

[\[FN100\]](#). More generally, intimidation and harassment of defense attorneys, a serious problem discussed more fully in Part III, may contribute to an effective denial of access to counsel in that

many lawyers are deterred altogether from defending cases in the SSCs. See *infra* Part III.

[FN101]. Meeting with Istanbul office of the Human Rights Association (“HRA”), in Istanbul, Turk. (May 30, 1998). The judge may also decide to close the proceedings to the public and need not give a reason.

[FN102]. *Id.*

[FN103]. See *infra* Part III.

[FN104]. Meeting with members of the Urfa Bar Association, in Urfa, Turk. (May 30, 1998).

[FN105]. Except where indicated, the following discussion reflects the delegation's meeting with the Istanbul office of the HRA, in Istanbul, Turk. (May 30, 1998).

[FN106]. Interview with Eren Keskin, in Istanbul, Turk. (May 30, 1998).

[FN107]. *Id.* These lawyers were eventually acquitted based on the testimony of the original judge.

[FN108]. Interview with oenal Serihan, in Ankara, Turk. (June 3, 1998).

[FN109]. Interview with Cevdet Volkan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

[FN110]. *Id.*

[FN111]. Interview with Erdal Gokcen, Istanbul SSC Chief Prosecutor, in Istanbul, Turk. (May 26, 1998).

[FN112]. Meeting with those members of the Istanbul Bar Association who practice in SSCs (May 25, 1998) (reflecting comments of Mehmet Günsel, Istanbul Bar Association).

[FN113]. Before the 1997 amendments, the period of detention was seven days for one or two persons accused of crimes falling within SSC jurisdiction outside a State of Emergency Region, and fourteen days if three or more persons were accused. Within a State of Emergency Region, the same pre-trial detention without charge lasted fifteen days if one or two persons were accused, and 30 days if three or more persons were accused. See Law No. 2845 on the Creation and Rules of Procedure of the State Security Courts art. 16, § 2845.5.4 (Turk.) (translated in *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547, 1558, P 28 (1998-IV)).

[FN114]. The October Regulation clarified the 1997 amendments regarding the terms of extension. Article 14 of the October Regulation states:

Extension of the Custody Period: For reasons such as difficulty in gathering evidence or the presence of a large number of defendants and similar reasons, the Public Prosecutor may prolong

this period by a written order up to four days in cases of collective crimes, including for crimes falling under the scope of the State Security Courts. In spite of the four day extension, if the investigation is still not completed, upon the request of the Prosecutor and the decision of the Judge, the arraignment of suspects before the Judge may be extended to 7 days. For crimes committed in emergency regions and falling under the scope of State Security Courts, the 7-day period may be extended to 10 days upon request of the Prosecutor of the republic and the decision of the Judge.

October Regulation, *supra* note 76, art. 14.

[FN115]. Interview with (name withheld), Chief Prosecutor in (city withheld), Turk. (May/June, 1998). Extension is permitted only for multiple defendant crimes; crimes committed by an individual alone are not eligible for extension of the detention period.

[FN116]. Interview with Hayri Demir, Batman Heavy Penal Court judge, in Batman, Turk. (May 26, 1998).

[FN117]. *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) (1989).

[FN118]. *Id.* at 33-34, P 62.

[FN119]. This interpretation is reflected in the fact that judicial approval of prolonged detention is required after four days in the 1997 amendments to the Criminal Procedure Code. In addition, Erdal Gokcen, the Istanbul SSC Chief Prosecutor, claimed that the European Court had established four days and six hours as the limit for incommunicado detention and that therefore Turkish law was in compliance with the standard. See Interview with Erdal Gokcen, Istanbul SSC Chief Prosecutor, in Istanbul, Turk. (May 26, 1998).

[FN120]. Meeting with those members of the Istanbul Bar Association who practice in the SSCs, in Istanbul, Turk. (May 25, 1998).

[FN121]. Interview with Gulsah Togac, mother of a defendant in the Istanbul SSC, in Istanbul, Turk. (June 2, 1998).

[FN122]. Except where indicated, the following discussion reflects the delegation's meeting with the Diyarbakir Bar Association, in Diyarbakir, Turk. (May 29, 1998).

[FN123]. Article 9 of the October Regulation states, in relevant part, "For crimes falling under the jurisdiction of the State Security Courts, the relatives will be informed through the same way if there is no harm to the outcome of the investigation." October Regulation, *supra* note 76, art. 9.

[FN124]. See *infra* notes 310-19 & accompanying text (discussing Twenty-Five Lawyers Case).

[FN125]. Meeting with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

[FN126]. *Id.*; Crim. Proc. C. art. 135 (Turk.).

[\[FN127\]](#). Crim. Proc. C. art. 254 (Turk.).

[\[FN128\]](#). Interview with Seraffettin Iste, Istanbul SSC Chief Judge, in Istanbul, Turk. (May 27, 1998).

[\[FN129\]](#). Id.

[\[FN130\]](#). For a more complete discussion of the problems in establishing torture claims, see *infra* Part II.

[\[FN131\]](#). A member of the Ankara Bar Association explained that the judge does not give his verdict on the grounds of the one statement alone. Rather, the judge takes into consideration all of the evidence. “The law doesn't say that the statement should be taken out of the file, but that the coerced evidence should not be the main evidence on which the case is considered.” Meeting with the Ankara Bar Association, in Ankara, Turk. (June 3, 1998). Notably, the statements of the Ankara Bar Association were exceptionally similar in tone to those of government representatives.

[\[FN132\]](#). Interview with Eren Keskin, member of HRA, in Istanbul, Turk. (June 1, 1998).

[\[FN133\]](#). Interview with oenal Serihan, in Ankara, Turk. (June 3, 1998).

[\[FN134\]](#). Id.

[\[FN135\]](#). Id.

[\[FN136\]](#). Interview with Erdal Güncer, Istanbul SSC Chief Prosecutor, in Istanbul, Turk. (May 26, 1998).

[\[FN137\]](#). IHD Istanbul Calls for Removal of State Security Courts, Turkish Daily News, Oct. 24, 1998.

[\[FN138\]](#). Minister Advocates Change to Security Courts, Reuters World Report, Nov. 1, 1998.

[\[FN139\]](#). Meeting with Mehmet Turgut Oksay, Ankara SSC Chief Judge, in Ankara, Turk. (June 4, 1998).

[\[FN140\]](#). Id.

[\[FN141\]](#). Meeting with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

[\[FN142\]](#). Meeting with Ankara Bar Association, in Ankara, Turk. (June 3, 1998).

[\[FN143\]](#). Meeting with Ministry of Justice officials, in Ankara, Turk. (June 5, 1998).

[\[FN144\]](#). The 1991 Anti-Terror Law, Law No. 3713 (“Anti-Terror Law”) was adopted April 12,

1991. Anti-Terror Law, Law No. 3713 (1991) (Turk.). Offenses defined by the Anti-Terror Law comprise the majority of cases in the State Security Courts. See Turk. Const. art. 143 (establishing State Security Courts and defining their jurisdiction). Some attorneys interviewed by the delegation suggested that torture is more pervasive in cases involving anti-terror investigations by the police. This is consistent with recent U.S. Department of State Country Report on Human Rights Practices for Turkey and a recent report by Human Rights Watch on the anti-terror police. See 1998 State Dep't Report; Human Rights Watch/Helsinki, Turkey: Torture and Mistreatment, *supra* note 1, at 1.

[FN145]. Despite conducting scores of interviews with defense attorneys, victims, prosecutors, judges, and government officials over the course of two weeks in Turkey, the delegation was unable to confirm a single case in which a member of the security forces had been prosecuted, convicted, sentenced, and imprisoned for the torture or abuse of a detainee accused of a political crime. Though we cannot say with certainty that such cases are nonexistent, they are certainly extremely rare. An oft-cited recent example of the conviction and sentencing of police for torture was the case in which five police officers were convicted of the killing Baki Erdogan and sentenced to five years imprisonment. One sign that this result was at least unusual was the reaction of shock and outrage of the supporters of the accused police. When the verdict and sentence were announced, supporters assaulted the victim's attorneys, the prosecutor, and members of the press. On December 24, 1998, the convictions were reversed on appeal, and the case was remanded to the heavy penal court for further proceedings. See Interview with Hulya Ucpinar, Director of the Human Rights Center, Izmir Bar Association, in Izmir, Turk. (Jan. 26, 1999). As this report went to press, six police officers were convicted of beating to death journalist Metin Göktepe and were sentenced to seven years in prison. The conviction will be appealed. See Reuters, Turkey: Police Jailed in Journalist's Death, N.Y. Times, May 7, 1999, at A2.

[FN146]. This observation is also confirmed by the reports of many other investigations by Turkish and international non-governmental organizations ("NGOs"), as well as official international bodies over the last decade. See *supra* note 1 (citing reports of various organizations on use of torture in Turkey).

[FN147]. Human Rights Foundation of Turkey, State of Human Rights in Turkey 8 (1997) [hereinafter 1997 HRFT Report]. This figure does not reflect the full scope of the problem. Many torture victims are unaware of the availability of the services of the Human Rights Foundation of Turkey ("HRFT") or are discouraged from seeking its services. *Id.*

[FN148]. According to the HRFT's report for 1996, each of these methods was used on 30% or more of the 576 applicants for assistance in 1996. 1996 HRFT Report, *supra* note 1, at 30. Over half of those seeking assistance had been subjected to eleven or more torture techniques while in detention. *Id.* at 29.

[FN149]. For a discussion of the use of torture and the accountability of police and prosecutors, see Part II.

[FN150]. Interview with Eren Keskin, Istanbul SSC, in Istanbul, Turk. (June 1, 1998).

[\[FN151\]](#). According to the Turkish Criminal Procedure Code, evidence gathered through illegal interrogation cannot be considered. Turk. Crim. Proc. C. art. 135/a.

[\[FN152\]](#). For a discussion of the harassment and intimidation of attorneys, including the use of torture against them, see *infra* Part III.

[\[FN153\]](#). Rarely did government officials at any level deny the existence of torture altogether. One prosecutor did insist simply that “[t]orture is illegal in Turkey” and indicated that he was unwilling to assume that public servants, including members of the security forces, engaged in torture knowing that it is forbidden under Turkish law. See Interview with Cevdet Voltan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

[\[FN154\]](#). See Interview with the Adiyaman Chief Prosecutor, in Adiyaman, Turk. (May 31, 1998).

[\[FN155\]](#). Interview with Cevdet Voltan, Chief Prosecutor, Ankara SSC, in Ankara, Turk. (June 4, 1998). Chief Judge Seraffettin Iste of the Istanbul SSC told the delegation that he believed that detainees who bring torture cases before the European Court have purposely tortured one another while in detention. Interview with Seraffettin Iste, Istanbul SSC Chief Judge, in Istanbul, Turk. (May 27, 1998.)

[\[FN156\]](#). See Interview with Cevdet Voltan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

[\[FN157\]](#). Interview with Mehmet Turgut Oksay, Ankara SSC Chief Judge, in Ankara, Turk. (June 4, 1998).

[\[FN158\]](#). Interview with Dr. Hikmet Sami Turk, in Ankara, Turk. (June 5, 1998.)

[\[FN159\]](#). Interview with Dr. Sema Piskinsut, Chair, Parliamentary Commission on Human Rights, in Ankara, Turk. (June 4, 1998.)

[\[FN160\]](#). For an account of the torture of lawyers detained in Diyarbakir, see *infra* notes accompanying 310-19 & accompanying test.

[\[FN161\]](#). European Convention, *supra* note 3, art. 3, at 224.

[\[FN162\]](#). *Id.* art. 5, at 226-28.

[\[FN163\]](#). *Id.* art. 13, at 232.

[\[FN164\]](#). Convention Against Torture, *supra* note 3, art. 2.

[\[FN165\]](#). *Id.* art. 4.

[\[FN166\]](#). Id. art. 13.

[\[FN167\]](#). Id. art. 14. Under the Turkish Constitution, “International Agreements duly put into effect carry the force of law. No appeal to the Constitution can be made with regard to these agreements on the ground that they are unconstitutional.” Turk. Const. art. 14.

[\[FN168\]](#). Turk. Const. art. 17. Article 38 states that “[n]o one shall be compelled to make a statement that would incriminate himself or his legal next of kin, or to present such incriminating evidence.” Id. art. 38.

[\[FN169\]](#). Penal Code art. 243 (Turk.).

[\[FN170\]](#). Id. art. 245. Note that Articles 243 and 245 define two separate offenses, torture, where there is an intent to elicit a confession of guilt, and the lesser offense of abuse, where no such intent is shown. The delegation learned that the lesser charge of abuse is often invoked whereas the more serious crime of torture is rarely charged, perhaps due to the difficulty of establishing intent.

[\[FN171\]](#). Turkey has signed the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“European Torture Convention”), which established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”). By doing so, Turkey submitted to the jurisdiction of the CPT, which has since criticized the Turkish government on two separate occasions for its failure to address the problem of torture. See Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Public Statement on Turkey, Dec. 15, 1992, Ref.: CPT/Inf (93) 1 [EN] [hereinafter 1992 Council of Europe Statement]; 1996 Council of Europe Statement, *supra* note 1.

[\[FN172\]](#). *Aksoy v. Turkey*, Eur. Ct. H.R. judgment of Dec. 18, 1996, 26 Reports of Judgments and Decisions 2260, 2266, P 14 (1996-VI).

[\[FN173\]](#). Id.

[\[FN174\]](#). Id. at 2287, P 98.

[\[FN175\]](#). For a discussion of these procedures, see *infra* Part II.B.1.

[\[FN176\]](#). *Aksoy*, at 2276, P 52.

[\[FN177\]](#). See *Aydin v. Turkey*, Eur. Ct. H.R. judgment of Sept. 25, 1997, 50 Reports of Judgments and Decisions 1866, 1904, Holding P 3 (1997-VI). For a discussion of the facts of *Aydin v. Turkey*, see *infra* note 293 and accompanying text.

[\[FN178\]](#). *Aydin*, at 1895, P 103.

[\[FN179\]](#). Id. at 1896-97, P 106.

[FN180]. This perception was shared by a number of the lawyers that we interviewed. See 1998 State Dep't Report, *supra* note 1, at 5 (noting that “although prosecution of reported perpetrators has increased, punishment remained poor”).

[FN181]. In Adana, one such trial involved the prosecution of police for the killing of a man who had been detained on suspicion of theft. He died while in police custody. Autopsies revealed that he had lesions all over his body and that he had died from serious internal bleeding caused by blows to the abdomen. See Interview with Mustafa Cinkilic & Filiz Feyhan Aksoy, in Adana, Turk. (May 28, 1998.). Another case in which a member of the delegation attended a hearing was the Diyarbakir Prison case, discussed at some length later in this section. See *infra* Part II.B.3. The delegation interviewed a number of other attorneys involved in cases of this type, including the Manisa case, also discussed herein. See *infra* Part II.D.

[FN182]. See Tugrul Ansay & Don Wallace, Introduction to Turkish Law 71 (1996) (describing Law on Procedure for Investigation of Civil Servants (“Civil Servants Law”). This protection of civil servants is included, in a general way, in the Constitution, which provides that “[p]rosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law.” Turk. Const. art. 129.

[FN183]. In *Kaya v. Turkey*, this administrative procedure was challenged as inadequately protecting the right to life guaranteed by Article 2 of the European Convention. The European Court found that it was unnecessary to decide this question given its finding that the investigation in the case was so inadequate as to violate Article 2. See *Kaya v. Turkey*, Eur. Ct. H.R. judgment of Feb. 19, 1998, 65 Reports of Judgments and Decisions 297, 324, P 86 (1998-I).

[FN184]. The name of the law is often translated as the Draft or Temporary Law on the Procedure for the Investigation of Civil Servants, though it has existed in some form since 1913.

[FN185]. See Law on the Procedures for Investigation of Civil Servants art. 4 (Turk.) (noting that following preliminary investigation, “the relevant boards will decide if there is a need to prosecute the civil servant or not”).

[FN186]. See Briefing by Yasar Alturk, Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998) [hereinafter Alturk Briefing].

[FN187]. See Law on the Procedures for Investigation of Civil Servants art. 1 (Turk.) (procedures cover “crimes committed in the course of the civil servant's duties or for crimes stemming from his responsibilities as a civil servant”).

[FN188]. The administrative board may be constituted at the municipal or the provincial level, or, in the case of a high official, the High Court of Appeals for the Administrative Court may make the determination whether to prosecute. See *id.* art. 4; Alturk Briefing, *supra* note 186. Municipal and regional boards are made up of local representatives of the national bureaucracy, such as the city health manager or regional agricultural administrator. They are not standing

councils, but are convened on an ad hoc basis when cases arise. See Interview with Kamil T. Sürek & Semih Mutlu, in Istanbul, Turk. (June 1, 1998); Interview with Sedat Ozevin, head of Batman HRA, in Batman, Turk. (May 26, 1998).

[\[FN189\]](#). See Interview with Kamil T. Sürek & Semih Mutlu, in Istanbul, Turk. (June 1, 1998); Interview with Sedat Ozevin, head of Batman HRA, in Batman, Turk. (May 26, 1998).

[\[FN190\]](#). The prosecutor has no involvement in the administrative council's investigation; if the prosecutor is the first to receive information on an alleged transgression by civil servants, then he or she is required to turn that information over to the administrative board. See Interview with Sedat Ozevin, head of Batman HRA, in Batman, Turk. (May 26, 1998); Human Rights Watch/Helsinki, Turkey: Torture and Mistreatment, *supra* note 1, at 24 (noting that 'under Article 13 of the [Civil Servants Law], 'Unless the order for prosecution is given for crimes committed according to Article 1, the state prosecutors themselves cannot conduct an investigation'') (quoting Civil Servants Law).

[\[FN191\]](#). See Law on the Procedures for Investigation of Civil Servants art. 5 (Turk.)

[\[FN192\]](#). Of course, ordinary Turkish citizens enjoy no such protections.

[\[FN193\]](#). The Law of Advocates, regulating the practice of law in Turkey, provides similar protections for lawyers facing prosecution for crimes allegedly committed in the course of their duties. See Law of Advocates arts. 58-61 (Turk.); Alturk Briefing, *supra* note 186.

[\[FN194\]](#). Interview with Dr. Sema Piskinsut, Chair, Parliamentary Commission on Human Rights, in Ankara, Turk. (June 4, 1998).

[\[FN195\]](#). See Alturk Briefing, *supra* note 186.

[\[FN196\]](#). Unless, of course, the crime itself is exempted from the scope of the law. See Law on the Procedures for Investigation of Civil Servants (Turk.); see also *supra* note 185 and accompanying text.

[\[FN197\]](#). *Id.*

[\[FN198\]](#). See *id.* But see *infra* Part II.B.3 (discussing Diyarbakir Prison Case).

[\[FN199\]](#). Interview with Judge (name withheld), heavy penal court, (location withheld), Turk. (May/June 1998).

[\[FN200\]](#). *Aksoy v. Turkey*, Eur. Ct. H.R. judgment of Dec. 18, 1996, 26 Reports of Judgments and Decisions 2260, 2268, P 26 (1996-VI).

[\[FN201\]](#). The heavy penal court judge and others criticized this lack of a right of appeal and stated that proposals had been made to change this aspect of the law. See Interview with Judge

(name withheld), heavy penal court, (location withheld) Turk. (May/June 1998); see also Alturk Briefing, *supra* note 186.

Article 5 of the Civil Servants Law provides that

[i]f the board decides not to prosecute the civil servant, it prepares a report that includes an explanation for not prosecuting and sends it to the civil servant's head of administration and to the claimant, if any. The head administrator and the claimant have the right to object to this decision within five days. In any case, the decision not to prosecute is automatically sent to the higher investigatory board for review.

Law on the Procedures for Investigation of Civil Servants art. 5 (Turk.).

[\[FN202\]](#). Aksoy, at 2276, P 52.

[\[FN203\]](#). See 1997 HRFT Report, *supra* note 147, at 14.

[\[FN204\]](#). See *id.*

[\[FN205\]](#). Article 2 of the Civil Servants Law imposes no time limit on the preliminary investigation. Article 5 states that the board will review the investigative report within one week, but imposes no time limit on further investigation.

[\[FN206\]](#). See Alturk Briefing, *supra* note 186.

[\[FN207\]](#). It is interesting to note that in the prosecution of the Diyarbakir Prison Case, the administrative board found that it lacked jurisdiction instead of exercising jurisdiction to grant permission to prosecute. This “jurisdictional avoidance,” also practiced by the court in that case, seems to reflect a reluctance on the part of both administrative boards and prosecutors to take responsibility for pursuing claims against members of the security forces, even in the most notorious cases. See *infra* Part II.C.1.c (discussing effects of delay on prosecution of suspects in Diyarbakir Prison Case).

[\[FN208\]](#). For a complete discussion of the use of torture-induced confessions in SSCs, see *supra* Part I.

[\[FN209\]](#). The students in the Manisa case were convicted in State Security Court on January 16, 1997. Although it resulted in acquittal, the trial of the police accused of torturing the students did not conclude initially until March 11, 1998, over a year later. Appeal is still pending. For a discussion of the Manisa case, see *infra* Part II.D.

[\[FN210\]](#). Convention Against Torture, *supra* note 3, art. 13.

[\[FN211\]](#). Crim. Proc. C. art. 153 (Turk.).

[\[FN212\]](#). *Id.* art. 163.

[\[FN213\]](#). *Id.* art. 165.

[\[FN214\]](#). Id.

[\[FN215\]](#). Interview with Cevdet Voltan, Ankara SSC Chief Prosecutor, in Ankara, Turk. (June 4, 1998).

[\[FN216\]](#). Id.

[\[FN217\]](#). See *Kaya v. Turkey*, Eur. Ct. H.R. judgment of Feb. 19, 1998, 65 Reports of Judgments and Decisions 297 (1998-I).

[\[FN218\]](#). Id. at 326, P 90.

[\[FN219\]](#). See *Aydin v. Turkey*, Eur. Ct. H.R. judgment of Sept. 25, 1997, 50 Reports of Judgments and Decisions 1866, 1896-97, P 106 (1997-VI).

[\[FN220\]](#). See *id.* The prosecutor in the Aydin case conducted important parts of the investigation through written correspondence with officials at the gendarmerie headquarters where the assault was alleged to have occurred. Id.

[\[FN221\]](#). As Adnan Günes, a prosecutor in the SSC in Istanbul, explained, “Prosecutors must rely on the police to apprehend criminals, to bring the suspects in, and bring the detainees to court.” Interview with Adnan Günes, Istanbul SSC prosecutor, in Istanbul, Turk. (May 27, 1998).

[\[FN222\]](#). One chief prosecutor interviewed by the delegation noted that “with only six prosecutors, it is difficult to oversee or keep up with the security forces. It also limits the effectiveness of our efforts to gather evidence.” Interview with Chief Prosecutor (name withheld), in (location withheld), Turk. (May/June 1998).

[\[FN223\]](#). See, e.g., Interviews with Chief Prosecutors in Adiyaman and Istanbul, Turk. (May/June 1998) (all noting that lack of judicial police force to handle torture cases was most significant obstacle to enforcing law against torture).

[\[FN224\]](#). Interview with (name withheld) SSC Prosecutor, (city withheld), Turk. (May/June 1998).

[\[FN225\]](#). This summary of the facts of the case is based primarily on two briefings of delegation members by Sezgin Tanrikulu and Fethi Gumus, lawyers representing the victims. See Briefing with Sezgin Tanrikulu and Fethi Gümüs, Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998); Interview with Tahir Elçi, in Diyarbakir, Turk. (May 28, 1998) [hereinafter collectively Diyarbakir Briefings]. Facts or quotations derived from sources other than these briefings are indicated by footnote.

[\[FN226\]](#). Interview with Sezgin Tanrikulu, in New York (Nov. 22, 1997). The State of Emergency Law provides that regional governors may request reinforcements with notification to the Ministry of the Interior. See State of Emergency Law art. 22(1)(b) (Turk.).

[FN227]. Interview with Sezgin Tanrikulu, in New York (Nov. 22, 1997). According to the Secretary of the Diyarbakir Chamber of Medicine, '[j]ust before the attack on the inmates, the hospital staff received a call from the district attorney[']s office. The staff was told to be ready for an emergency to receive [sic] a large group of injured inmates.' [Turkish] Prisons Oversight Committee, An Investigative Report of the Events in Diyarbakir Prison When Ten Kurdish Inmates Were Beaten To Death by Turkish Soldiers and Police (visited Nov. 18, 1997) <<http://www.Kurdistan.org/Prisons/diyarbakir.html>> (on file with the Fordham International Law Journal) (citing Dr. Necdet Ipekyuz, Secretary of the Diyarbakir Chamber of Medicine).

[FN228]. See Diyarbakir Briefings, *supra* note 225 (quoting guard interviewed).

[FN229]. Lawyers at the Diyarbakir Bar Association contend that Demir's death during the transfer admits of only two possible conclusions: either the doctor's report approving the transfer was a lie or something about the transfer killed Demir. The other transferred prisoners all told the Gaziantep prosecutor that they had been beaten during the transfer, but the court has not allowed these statements into evidence. The court trying the sixty-five security force members lists Demir as one of the victims, but the case covers only the events at Diyarbakir Prison prior to the transfer. In the meantime, another court is trying Dr. Gök under a fraud-related charge for his assessment that Demir was in a condition to be transferred. See Diyarbakir Briefings, *supra* note 225.

[FN230]. The case against the prosecutors and the Minister of Justice was quickly dismissed. According to lawyers from the Diyarbakir Bar Association, that case would not have been brought were it not for the pressures applied by human rights groups. Although perhaps expected, the quick dismissal raises concerns, since there is no indication that a special prosecutor or other independent investigator was assigned to the case. The need for such conflict-of-interest safeguards is apparent; a prosecutor could not be expected to investigate freely other prosecutors as well as the Minister of Justice, given that the Minister of Justice presides over the High Council of Judges and Prosecutors and determines prosecutors' career paths. Basic standards on independence of the judiciary preclude such direct conflict. See Principles on Judiciary, *supra* note 46, princ. 2; Guidelines on the Role of Prosecutors art. 4, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

Although the Turkish Constitution states that personnel decisions must be made within the parameters of principles of judicial independence, no checking mechanism exists to guarantee this, and many lawyers assert that the practice is not consistent with these principles. See Turk. Const. art. 159.

[FN231]. Diyarbakir Briefings, *supra* note 225 (quoting Sezgin Tanrikulu). In light of these investigative practices, it is worth noting that prison guards and the charging prosecutors both answer to the Ministry of Justice, again raising serious questions about the integrity and independence of the investigation.

[FN232]. According to Sezgin Tanrikulu, the Minister of Justice's permission was required to prosecute this case. Interview with Sezgin Tanrikulu, in New York (Nov. 22, 1997). This raises serious questions as to the independence of the proceedings because the Ministry of Justice was involved in the events at issue in the case. See, e.g., Letter from Judge Cernal Sahin Gurcal,

Director General of Prisons and Detention Centers, Ministry of Justice, to Diyarbakir State Prosecutor's Office (Sept. 24, 1996) (authorizing transfer of prisoners) (obtained from case file) (on file with author). Indeed, as mentioned above, the Minister of Justice was a named defendant in one of the investigations arising from the incident.

[FN233]. See *supra* Part II.B.1 (discussing Civil Servants Law).

[FN234]. See *supra* notes 182-187 and accompanying text (describing limitations on scope of administrative protections of Civil Servants Law).

[FN235]. See Diyarbakir Briefings, *supra* note 225.

[FN236]. The Court of Cassation is the country's high court of appeals. It has both civil and penal chambers. See Ansay & Wallace, *supra* note 182, at 176.

[FN237]. See Diyarbakir Briefings, *supra* note 225 (quoting findings of Council).

[FN238]. Article 15 of the Anti-Terror Law provides that “officials engaged in fighting terrorism ... shall be tried without being detained.” Anti-Terror Law art. 15(1) (Turk.). Although the Anti-Terror Law does not address suspension from duty pending trial, the delegation was informed that the accused almost always remain on duty.

[FN239]. See Diyarbakir Briefings, *supra* note 225.

[FN240]. Interview with Selim Karakoyun & Ziya Ozmen, in Ankara, Turk. (June 5, 1998).

[FN241]. Tahir Elçi, a lawyer for the victims, told the delegation that prosecutors were not involved in the early investigation. He suggested that the reasons might have been (1) a lack of resources and personnel, and (2) a lack of will on the part of the prosecutors to investigate police and gendarmes. ‘By law it is the duty of the prosecutor to either investigate or delegate, and the exception is that security forces investigate; however, the exception becomes the rule.’ Interview with Tahir Elçi, in Diyarbakir, Turk. (May 28, 1998).

[FN242]. Interview with Sezgin Tanrikulu, in New York (Nov. 22, 1997).

[FN243]. *Id.* Once attorneys for the victims pointed out that the gendarme was both a defendant and armed, the judge ejected him from the court. The witness then freely testified, according to these attorneys. *Id.* Since neither the judge nor the prosecutor have any control over the gendarmes' access to the witnesses outside the court, the witness probably was taking a risk in testifying.

[FN244]. As one lawyer explained, “The courts do not give credence to the statements of victims. They only consider such statements to be allegations. As evidence, they are virtually ignored.” Interview with Mehmet Ali Kirdök, defense lawyer, in Istanbul, Turk. (May 25, 1998).

[FN245]. Under Turkish law, a medical examination is required at the beginning and at the end

of the detention period in order to document the physical condition of the detainee. Moreover, various circulars from the Ministry of Health have defined how the examination should be conducted. According to these circulars and under standards of the Turkish Medical Association, the examination physician should record all physical and psychological complaints, including the victim's account of the circumstances under which the injuries were suffered. The physician should conduct a thorough physical examination including the genital region and should make use of x-rays and laboratory tests where necessary. The information should be recorded on a separate forensic report signed by the physician. The examination should take place outside the presence of the police in order to encourage candid communication between the victim and the physician. See 1996 HRFT Report (describing protocol for assessment of torture and citing both Ministry of Health and Turkish Medical Association).

[\[FN246\]](#). The delegation interviewed Dr. Sebnem Korur Fincanci, Vice President of the Forensic Medical Association of Turkey and Professor of Forensic Medicine at Istanbul University, as well as representatives of the HRFT, but did not undertake a systematic survey of doctors regarding their experience with torture victims. This section is concerned primarily with the legal use of medical reports and therefore relies on interviews with lawyers as well as doctors. For a comprehensive study of the medical profession and torture in Turkey, see Physicians for Human Rights, *Torture in Turkey*, supra note 1; Vincent Iacopino et al., *Physician Complicity in Misrepresentation and Omission of Evidence of Torture in Postdetention Medical Examination in Turkey*, 276 *J. Amer. Med. Assoc.* 396 (1996).

[\[FN247\]](#). The torture report document itself is critical; the delegation was informed that it is unusual for the doctor who prepared the report to be called to testify directly at the trial itself, and forensic doctors are rarely called as expert witnesses to interpret torture reports. Interview with Dr. Sebnem Korur Fincanci, Vice President of the Forensic Medical Association of Turkey, in Istanbul, Turk. (May 23, 1998).

[\[FN248\]](#). See, e.g., Interview with Emir Ali Demirpence, Istanbul SSC, in Istanbul, Turk. (June 1, 1998) (noting that police often alter date of detention so that they can exceed four-day detention period and that by time defendants get to doctor for examination, signs of torture have dissipated).

[\[FN249\]](#). Interview with Dr. Sebnem Korur Fincanci, Vice President of the Forensic Medical Association of Turkey, in Istanbul, Turk. (May 23, 1998).

[\[FN250\]](#). See id.

[\[FN251\]](#). This is especially true in the southeast. See Physicians for Human Rights, *Torture in Turkey*, supra note 1, at 129.

[\[FN252\]](#). According to Dr. Fincanci, only 20 of 43 medical schools in Turkey have forensic medicine departments, and consequently many of the doctors who perform forensic examinations have never been properly trained. Interview with Dr. Sebnem Korur Fincanci, Vice President of the Forensic Medical Association of Turkey, in Istanbul, Turk. (May 23, 1998).

[\[FN253\]](#). Interview with Oguz Demir, Istanbul SSC, in Istanbul, Turk. (June 1, 1998).

[\[FN254\]](#). See Physicians for Human Rights, Torture in Turkey, *supra* note 1.

[\[FN255\]](#). See *id.* at 127-39.

[\[FN256\]](#). See *id.*

[\[FN257\]](#). See *id.*

[\[FN258\]](#). See Radikal, Oct. 15, 1998.

[\[FN259\]](#). See Lawyers Committee for Human Rights, Report of Trial Observation Team (Jan. 27, 1999) (on file with Crowley Program).

[\[FN260\]](#). As one lawyer explained:

When a police officer conducts an interrogation, he puts his number on the file, not his name. Finding out who that number corresponds with or the rank of the person can be very difficult. The police will not tell whose number it is. They claim that security concerns prevent them from releasing that information. A State Security Court will rarely compel the police to release the information. If you need to find out who the person is, then you will have difficulty discovering other information such as whether the officer has the authority to interrogate the defendant. Interview with Zeki Ruzgar, in Ankara, Turk. (May 25, 1998).

[\[FN261\]](#). See Anti-Terror Law art. 20(1)-(2) (Turk.) (providing that “[t]he State shall take necessary protective measure for officials involved in fighting terrorism or anarchy” and enumerating examples of such measures).

[\[FN262\]](#). See *supra* note 238 and accompanying text.

[\[FN263\]](#). Diyarbakir Briefings, *supra* note 225; Anti-Terror Law art. 15(1) (Turk.).

[\[FN264\]](#). Diyarbakir Briefings, *supra* note 225.

[\[FN265\]](#). The delegation was told that the law permits such arrangements where the witness cannot afford, or in the case of prisoners cannot obtain permission, to come to the court to testify. See *id.*

[\[FN266\]](#). *Id.*

[\[FN267\]](#). See Part II (describing criminal procedure under Anti-Terror Law, including procedures designed to safeguard identity of those engaged in fight against terrorism).

[\[FN268\]](#). Trial Observation, Esas [Case] No. 1997/125, Diyarbakir Heavy Penal Court III (June 5, 1998).

[\[FN269\]](#). Interview with Sezgin Tanrikulu, in Diyarbakir, Turk. (June 5, 1998).

[\[FN270\]](#). Id.

[\[FN271\]](#). Id.

[\[FN272\]](#). See Report on Autopsy Video (June 5, 1998) (copy on file with Crowley Program).

[\[FN273\]](#). See Interview with Sezgin Tanrikulu, in Diyarbakir, Turk. (Jan. 29, 1999).

[\[FN274\]](#). See 1996 Council of Europe Statement, *supra* note 1, para. 7.

[\[FN275\]](#). See 1996 HRFT Report, *supra* note 1, at 4.

[\[FN276\]](#). See, e.g., *supra* note 155 (discussing skepticism of prosecutors toward claims of torture).

[\[FN277\]](#). Interview with Hulya Ucpinar, Director, Izmir HRA, in Izmir, Turk. (Jan. 27, 1999).

[\[FN278\]](#). Eventually, seven more students were released pending trial.

[\[FN279\]](#). The conviction of the students was also overturned, and they are being retried in State Security Court.

[\[FN280\]](#). See *Radikal*, Oct. 15, 1998.

[\[FN281\]](#). The victims' lawyers will have another opportunity to appeal the case. They plan to do so. They will also file a petition with the European Commission. See Interview with Pelin Erda, in Manisa, Turk. (Jan. 27, 1999).

[\[FN282\]](#). Human Rights Watch Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* (1995).

[\[FN283\]](#). Of course, in Turkey, as elsewhere, men are not immune from the use of rape as torture. The delegation was informed that it is common for security forces to rape men in detention with batons. See Interview with Ercan Kanar, in Istanbul, Turk. (May 29, 1998).

[\[FN284\]](#). Id. Kanar noted that rape was a sensitive and emotional issue in Turkey. It is viewed as a grave violation, as the social consequences for women are often permanent. Therefore, there is great social pressure for conviction when rape is credibly alleged. Kanar asserted that the justice system has responded to this sensitivity by specially insulating officials accused of rape. He said that police officers accused of rape are not called in to appear in court. See *id.* This is a serious obstacle to successful prosecution since, in addition to the *de facto* requirement of corroboration, the absence of the accused in court denies a victim the opportunity to identify the accused as the rapist before the court.

[\[FN285\]](#). Interview with Eren Keskin, in Istanbul, Turk. (June 2, 1998); see Turkish Legal Aid Project Against Rape and Sexual Harassment Under Detention, *The Stories of the Victims* (Aug. 28, 1997) [hereinafter Turkish Legal Aid Project, *Stories of the Victims*].

[\[FN286\]](#). Interview with Eren Keskin, in Istanbul, Turk. (June 2, 1998).

[\[FN287\]](#). See *id.*

[\[FN288\]](#). Interview with Muruvet Yilmaz, Director of the Kurdish Women's Organization, in Istanbul, Turk. (June 2, 1998).

[\[FN289\]](#). See *id.*

[\[FN290\]](#). See *id.*; Interview with Ercan Kanar, in Istanbul, Turk. (May 29, 1998).

[\[FN291\]](#). Interview with Eren Keskin, in Istanbul, Turk. (June 6, 1998).

[\[FN292\]](#). See *id.*

[\[FN293\]](#). This account and the account of the Case of X are drawn from a report by the Turkish Legal Aid Project Against Rape and Sexual Harassment Under Detention. See Turkish Legal Aid Project, *Stories of the Victims*, *supra* note 285. In addition, certain facts from the Aydin case are drawn from the findings of the European Court in *Aydin v. Turkey*, Eur. Ct. H.R. judgment of Sept. 25, 1997, 50 Reports of Judgments and Decisions 1866, 1896-97, P 106 (1997-VI).

[\[FN294\]](#). The Village Guards are, by tradition, the locally appointed police forces in Turkish villages, though they are increasingly under the control of Turkey's central security apparatus. They are overseen by the gendarmeries in the provinces in which they operate, and they are paid by the gendarmerie. In zones under a state of emergency, Village Guards are under the command of the state of emergency regional governor and afforded the same legal protection as other security forces. See Decree Having the Force of Law on the Establishment of the State of Emergency Regional Governancy, No. 285, art. 4(b), (d) (1987), as amended by Decree No. 286 (1987), in Kurdish Human Rights Project, *Due Process: State Security Courts and Emergency Powers in South-East Turkey* app. 3 (1997).

[\[FN295\]](#). See *id.*

[\[FN296\]](#). Batman Heavy Penal Court, Esas [Case] No. 1996/139 (case documents on file with author). The primary source for the procedural and factual history of this case is an interview with Sedat Ozevin. See Interview with Sedat Ozevin, President, HRA of Batman, in *Batman*, Turk. (May 26, 1998).

[\[FN297\]](#). While Mr. Ozevin was cautiously optimistic about the new judge, Ms. Keskin stressed that public awareness about the case had created pressures on the judges and prosecutor that had not been there before. See Interview with Eren Keskin, in Istanbul, Turk. (June 2, 1998).

[\[FN298\]](#). See Turk. Const. arts. 17, 19, 22, 26, 33 (providing for right to liberty and security of person); see also Universal Declaration, *supra* note 49, arts. 3, 10, 11, at 72-73; European Convention, *supra* note 3, arts. 3, 5, 19, 20, at 224, 226, 234. The respective authoritative interpretations of those provisions provide additional expressions of these rights.

[\[FN299\]](#). For a discussion of these rights and Turkey's obligations under international law, see *supra* Part I.C.

[\[FN300\]](#). See Martin Flaherty, Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland, 7 Harv. H. Rts. J. 87-97 (1994).

[\[FN301\]](#). Principles on Lawyers, *supra* note 47.

[\[FN302\]](#). *Id.* pmbl.

[\[FN303\]](#). *Id.* princ. 16.

[\[FN304\]](#). *Id.* princ. 17.

[\[FN305\]](#). *Id.* princ. 18.

[\[FN306\]](#). For a more extensive discussion of this problem in the context of SSC representation, see *supra* Part I.C.

[\[FN307\]](#). In the same spirit, lawyers should comply with all lawful searches, warrants, and other court orders.

[\[FN308\]](#). Principles on Lawyers, *supra* note 47, princ. 12. In addition, Principle 13(b) qualifies counsel's duty to the client, limiting the representation to "assist[ing] clients in every appropriate way." *Id.* princ. 13(b) (emphasis added).

[\[FN309\]](#). *Id.* pmbl.

[\[FN310\]](#). Diyarbakir SSC III, Esas [Case] No. 1993/658 (Dec. 22, 1993).

[\[FN311\]](#). They are Sabahattin Acar, Hüsnüye Olmez, Tahir Elçi, Mesut Bestas, Meral Danis Bestas, Vedat Erten, Mehmet Selim Kurbanoglu, Imam Sahin, Aruz Sahin, Mehmet Arif Altunkalem, Fuet Hayri Demir, Baki Demirhan, Mehmet Gazanfer Abbasioglu, Nevzat Kaya, Sinasi Tur, and Niyazi Cem. The nine other lawyers in the case were charged by supplemental indictment. They are Mehmet Bicen, Zafer Gür, and Sinan Tanrikulu (charged Jan. 13, 1994); Feridun Celik (charged Feb. 2, 1994); and Abdullah Akin, Edip Yildiz, Fevzi Veznadaroglu, Cabbar Leygara, and Sedat Aslantas (charged Sept. 21, 1994).

[\[FN312\]](#). The specific periods of detention are as follows: Sabahattin Acar (Nov. 15-Dec. 10), Sinasi Tur (Nov. 15-Dec. 10), Hüsnüye Olmez (Nov. 16-Dec. 10), Tahir Elçi (Nov. 23-Dec. 10), Mesut and Meral Danis Bestas (Nov. 16-Dec. 10), Mehmet Arif Altunkalem (Nov. 16-Dec. 10),

Baki Demirhan (Nov. 16-Dec. 10), Nevzat Kaya (Nov. 18-Dec. 10), Nevzat Kaya (Nov. 18-Dec. 10), Vedat Erten (Nov. 23-Dec. 10), Mehmet Selim Kurbanoglu (Nov. 23-Dec. 10), Mehmet Gazanfer Abbasioglu (Nov. 30-Dec. 10), and Niyazi Cem (Nov. 23-Dec. 10), Fuet Hayri Demir (Dec. 3-10), and Imam and Aruz Sahin (Dec. 10-21).

[FN313]. An application on behalf of fourteen of the defendants was introduced to the European Commission on December 3, 1993 and registered, under Application No. 23145/93, on December 21, 1993. The application of the remaining two defendants, Arzu and Iman Sahin, was introduced on April 28, 1994, and registered, under Application No. 25091/94, on September 8, 1994. On December 2, 1996, the European Commission deemed admissible the allegations of “torture, ill-treatment and undue pressure under police custody” under Article 3 of the European Convention, but found seven of the applications inadmissible for procedural reasons under Article 26 of the European Convention. See *Elçi and Others v. Turkey*, App. No. 23145/93, (Eur. Comm'n H.R. Dec. 2, 1996).

[FN314]. The applications also alleged that Turkey violated other provisions of the European Convention, including Article 5 (protecting right to liberty and security of person); Article 8 (protecting right to respect for privacy); Article 25 (binding High Contracting Parties to respect right to petition Commission); and Article 1 of Protocol 1 (protecting right to peaceful enjoyment of possessions).

[FN315]. With regard to the claims under Article 3, the Commission found that the applicants had met their obligation to exhaust domestic remedies by raising allegations of torture and ill-treatment before the examining judge on December 10, 1993, and before the State Security Court on February 17, 1994, and April 28, 1994. Importantly, the Commission found that even though the applicants did not lodge criminal complaints against their abusers, they had “done all that was expected of them under the circumstances.” In coming to this conclusion, the Commission stated that

[t]he applicants raised in proceedings before the examining judge or the State Security Court their complaints concerning their alleged ill-treatment during their time in police custody. These allegations of torture or ill-treatment were duly entered into official records, and it should have been a matter of considerable concern to the judicial authorities that a large number of lawyers--members of the Bar--complained of having been subjected, almost at the same time, to such treatment during their detention. Nevertheless, and despite the duty of the authorities under Turkish law to act *ex officio* when confronted with suspicions of torture, the examining judge, the State Security Court and the public prosecutor who was present at these hearings before the court all chose to ignore the complaints and not to examine the allegations or transmit them to the local public prosecutors' offices or to local administrative bodies.

*Elçi and Others v. Turkey*, App. No. 23145/93, (Eur. Comm'n H.R. Dec. 2, 1996). The Commission also found the applicants' Article 5 claims admissible, except for those that were time-barred under Article 26. The claims under Articles 8 and 25 of the European Convention were likewise deemed admissible. Seven of the applications, however, were deemed inadmissible because they had been filed too late, in violation of Article 26 of the European Convention.

[FN316]. The following account is a summary of the delegation's interview with Meral Bestas.

See Interview with Meral Danis Bestas in Diyarbakir, Turk. (May 30, 1998). English language quotes reflect the contemporaneous translation of Ms. Bestas's responses, which she delivered in Turkish.

[FN317]. The following account is a summary of the delegation's interview with Sabahattin Acer. See Interview with Sabahattin Acer, in Diyarbakir, Turkey. (May 30, 1998).

[FN318]. See Lawyers Committee for Human Rights, *Law Under Siege* (1995) [[[hereinafter *Law Under Siege*]; Lawyers Committee for Human Rights, *Justice Undermined* (1996); The International Commission of Jurists, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* (1993-94); Kurdish Human Rights Project, *Due Process: State Courts and Emergency Powers in South-East Turkey* (1997); 1992 Council of Europe Statement, *supra* note 171; 1996 Council of Europe Statement, *supra* note 1.

[FN319]. See Convention Against Torture, *supra* note 3, art. 12 (imposing duty on parties to investigate allegations of torture “whenever there is a reasonable ground to believe that an act of torture has been committed”); *Yasa v. Turkey*, Application No. 22495/93, Judgment No. 63/1997/847/1054, Sept. 2, 1998, P 107 (Eur. Ct. H.R. decision not yet published in Series A) (visited Apr. 13, 1999) <<http://www.dhcour.coe.fr/hudoc2doc2/HEJUD/199810/yasa%baj.doc>> (on file with the Fordham International Law Journal) (asserting that failure to investigate killing by force violates Article 2 of European Convention); *Kaya v. Turkey*, Eur. Ct. H.R. judgment of Feb. 19, 1998, 65 Reports of Judgments and Decisions 297, 318, PP 61, 62 (1998-I); see also *Velasquez Rodriguez*, Case 4 Inter-Am. C.H.R. 61, OEA/ser.C./4 (1988), reprinted in 9 Hum. Rts. L.J. 212 (1988), [28 I.L.M. 291](#) (1989) (stating that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure to the victim adequate compensation”); Principles on Lawyers, *supra* note 47, princ. 17 (stating that “[w]here the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities”).

[FN320]. See *Law Under Siege*, *supra* note 318, at 19. The questions put to the defendants under detention--such as why they “helped prepare press releases that denounced human rights abuses” and why they “filed applications with Strasbourg”--also support this contention.

[FN321]. Turkey has accepted the competence of the European Court to receive individual petitions and has undertaken not to hinder in any way the effective exercise of this right under Article 25 of the European Convention.

[FN322]. The protests included unfurling a banner in the Grand National Assembly and presenting a petition with over 350,000 signatures to the Deputy Minister of the Parliament. The students allege that while in detention, they suffered various types of torture including having their feet beaten, electric shocks, and being strung up on what is known as the “Palestinian hanger.” See Amnesty International, *Turkey: Student Campaigners Tortured and Imprisoned* (Sept. 1997).

[\[FN323\]](#). Interview with oenal Sarihan, in Ankara, Turkey (June 5, 1998). Although five of the students were convicted and sentenced to long prison terms--ranging from 12 to 20 years in jail--their convictions were overturned on appeal. Jailed during the pendency of the case, the students were recently released after being acquitted in the re-trial.

[\[FN324\]](#). Trial Observation, Instanbul SSC, in Istanbul, Turk. (June 2, 1998).

[\[FN325\]](#). Meeting with members of the Izmir Bar Association, in Izmir, Turk. (May 29, 1998).

[\[FN326\]](#). Interview with President of the Ankara Bar Association, in Ankara, Turk. (June 3, 1998). Nonetheless, presidents of bar associations around Turkey were sufficiently alarmed by the Aydin incident to meet together with the Prime Minister of Turkey, who assured them that swift and immediate action would be taken to punish those present and to prevent such events from reoccurring.

[\[FN327\]](#). Meeting with members of the Izmir Bar Association, in Izmir, Turk. (May 29, 1998). They based this belief in part on the presence of the chief of police in the courtroom before the hearing and on the police's limitation of courtroom access to journalists and lawyers rather than the general public. During the hearing, the interviewees added, plain clothed police officers blocked the exit routes of the courtroom.

[\[FN328\]](#). Istanbul SSC III, Esas [Case] No. 1997/127. Interview with defense lawyers Gulizar Tunler, Yuksel Hos, Ilknur Asku, Muharrem Gopur, and Savim Akat in Istanbul, Turk. (May 30, 1998) (statement from Savim Akat).

[\[FN329\]](#). Interview with Dr. Hikmet Sami Turk, then State Minister for Human Rights, in Ankara, Turk. (June 5, 1998).

[\[FN330\]](#). Prosecutors in the SSCs expressed to the delegation sharply divergent attitudes towards defense lawyers who work in the SSCs, with prosecutors in the Ankara SSCs having the most antagonistic views toward defense lawyers, while prosecutors in the Istanbul SSCs and the southeast having views more consistent with professional and international standards.

[\[FN331\]](#). Defense attorneys in the SSCs at times also faced hostility from lawyers and other members of Turkish society. Some lawyers and other members of the Turkish legal community have explicitly or implicitly endorsed the idea that defense lawyers in SSCs are themselves "terrorist lawyers." In the Diyarbakir Prison Case, for example, the lawyers for the accused members of the security forces have openly called the lawyers for the victims "terrorist lawyers." The lawyers for the accused have also in court said, "we are defending the honorable and high gendarmes and police, and these attorneys are defending terrorists." Interview with Tahir Elçi, victims' lawyer in the Diyarbakir Prison Case, in Diyarbakir, Turk. (May 28, 1998).

[\[FN332\]](#). During a meeting with the president and leading members of the Ankara Bar Association, the Director of the Turkish Foreign Relations Committee, who was also present, told members of the delegation that the "[l] awyers who face harassment are members of terrorist organizations. But lawyers who simply practice law are not harassed at all." He added that

Turkey's priority was not to protect defense lawyers but its integrity. "At the moment, Turkey has to safeguard its existence. In this struggle, it is very difficult to keep normalcy. From time to time, we witness events we regret. But our initial goal is to fight the threat to our integrity." Interview with Unsal Toker, President and Foreign Relations officer of the Ankara Bar Association, in Ankara, Turk. (June 3, 1998).

[\[FN333\]](#). Interview with Keles Ozturk, defense lawyer, in Istanbul, Turk. (May 27, 1998).

[\[FN334\]](#). Meeting with members of Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998) (presentation by Sezgin Tanrikulu).

[\[FN335\]](#). Interview with Tahir Elçi, in Diyarbakir, Turk. (May 28, 1998). Mr. Elçi is one of the lawyer-defendants in the Twenty-Five Lawyers Case.

[\[FN336\]](#). Meeting with members of Diyarbakir Bar Association, in Diyarbakir, Turk. (May 25, 1998) (presentation by Sezgin Tanrikulu).

[\[FN337\]](#). Mehmet Kemal Aydin, for example, told the mission that he has not experienced harassment. He further stated that he has had no problem with the police because he has no connection with them and the only time that he sees them is in court when they testify. Members of the mission met Mr. Aydin at the Istanbul SSC VI where he was defending clients accused of being members of an illegal organization, the Communist Party of Construction Organization ("KPIO"). Mr. Aydin's clients alleged that members of the security forces tortured them while they were in detention. Interview with Mehmet Kemal Aydin, defense lawyer in Istanbul SSC, in Istanbul, Turk. (May 29, 1998).

[\[FN338\]](#). See, e.g., Ilnur Cevik, Editorial, Is this How the State Pictures Itself?, Turkish Daily News, Oct. 28, 1998.

[\[FN339\]](#). Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. GAOR, 53d Sess., 85th plen. mtg., U.N. Doc. A/RES/53/144 (1998) [hereinafter Defenders Declaration].

[\[FN340\]](#). Id. art. 9.

[\[FN341\]](#). Id. art. 10.

[\[FN342\]](#). Id. art. 12.

[\[FN343\]](#). European Convention, *supra* note 3, art. 10, at 114.

[\[FN344\]](#). Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 27, P 63 (1992).

[\[FN345\]](#). See Anti-Terror Law art. 8 (1991) (Turk.).

[\[FN346\]](#). Criminal Procedure Code art. 312 (Turk.).

[\[FN347\]](#). See *Zana v. Turkey*, Eur. Ct. H.R. judgment of Nov. 25, 1997, 57 Reports of Judgments and Decisions 2533, 2546, P 47 (1997-VII).

[\[FN348\]](#). *Id.* at 2547, P 51(i).

[\[FN349\]](#). More generally, these standards have been developed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which were drafted by experts on international law, national security, and human rights and endorsed by the U.N. Commission on Human Rights. See Article 19, International Centre Against Censorship & Kurdish Human Rights Project, *State Before Freedom: Media Repression in Turkey* (July 1998). Comparative law sources point to similar standards. See *The Article 19 Freedom of Expression Handbook* (S. Coliver ed., 1993); *Meir Schnitzer & 2 Others v. Chief Military Censor & Minister of Defence*, 42(4) P.D. 617, para. 13 (Isr.); [Brandenburg v. Ohio, 395 U.S. 444, 447 \(1968\)](#).

[\[FN350\]](#). *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547 (1998-IV); see *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) (1992) (holding that conviction of senator belonging to Basque separatist organization, for article contending that Spanish government was responsible for violence in Spain's Basque region, violated freedom of expression.)

[\[FN351\]](#). See *Zana v. Turkey*, Eur. Ct. H.R. judgment of Nov. 25, 1997, 57 Reports of Judgments and Decisions 2533 (1997-VII).

[\[FN352\]](#). *Id.* at 2549, P 60.

[\[FN353\]](#). European Convention, *supra* note 3, art. 11, at 232.

[\[FN354\]](#). *Ezelin v. France*, 202 Eur. Ct. H.R. (ser. A) at 38 (1991).

[\[FN355\]](#). See Theo Van Boven, *The Role of Non-Governmental Organizations in the Promotion and Protection of Human Rights*, in *The Hong Kong Bill of Rights: A Comparative Approach* (Johannes Chan & Yash Ghai eds., 1993); Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary 387* (1993). See generally Lawyers Committee for Human Rights, *The Neglected Right: Freedom of Association in International Human Rights Law* (1997).

[\[FN356\]](#). *Lavissee v. France*, App. No. 14223/88, 70 Eur. Comm'n H.R. Dec. & Rep. 218 (1991); *Van der Heijden v. Netherlands*, App. No. 11002/84, 41 Eur. Comm'n H.R. Dec. & Rep. 264 (1985).

[\[FN357\]](#). Defenders Declaration, *supra* note 339, art. 16.

[\[FN358\]](#). The Turkish legal system all but guarantees such prosecutions with an array of broadly worded security laws. For an example of the most commonly employed provisions, see Law of

Associations art. 2908 (Turk.) (prohibiting “disseminating separatist propaganda” and “inciting enmity between people through racial and regional discrimination”); Anti-Terror Law art. 8(1) (Turk.) (banning “disseminating separatist propaganda”); and Penal Code art. 312(2) (Turk.) (forbidding “inciting enmity between people”).

[\[FN359\]](#). Unless otherwise indicated, this summary is based upon Human Rights Association of Turkey, Prosecutions, Cases and Convictions Launched in the Last Two Years Against the Human Rights Association and its President Mr. Akin Birdal (1997).

[\[FN360\]](#). Birdal was sentenced to one year in prison by the Konya SSC under Article 312 of the Turkish Penal Code for a speech that he made in a meeting during a “1995 Peace Week” held in Mersin. The case is pending before the court of appeals.

In another action he was sentenced to three months in prison in connection with a poster discussing a campaign against disappearances. That sentence was commuted to a fine of TL450,000. And in July 1998, Birdal was sentenced to one year in prison by the Ankara SSC after being retried for a speech that he made on “World Peace Day” in 1996. (The court of appeals had overturned the original conviction, under which Birdal had also received a one-year sentence as well as a fine of TL420,000.). See Turk Rights Campaigner Sentenced to One Year in Jail, Reuters, July 28, 1998. The court of appeals affirmed this second conviction on October 28, 1998. See Prison for Rights Advocate, N.Y. Times, Oct. 28, 1998.

[\[FN361\]](#). Birdal was tried and acquitted in connection with (i) a written statement made in a book published by the HRA entitled, Present to Emil Galip Sandalci; (ii) a speech that he made on December 10, 1996, during “Human Rights Week”; (iii) a speech that he made on Yüksel Street in Ankara on June 17, 1997; and (iv) a speech that he made in connection with the “Peace Journey” in Gölbaşı on September 2, 1997. Birdal along with three other members of the HRA (Hüsnü Ondül, the former Secretary-General, Sedat Aslantas, the former Chair of the Diyarbakir branch, and Erol Anar) were tried and acquitted in the Ankara SSC in connection with the HRA's 1993 Regional Report entitled, A Cross-Section of the Burnt Out Villages. Along with 17 members of the HRA's executive board, Birdal was tried and acquitted in connection with a special edition of a bulletin entitled, The Sole Solution Is Peace. And together with ten other HRA executive board members (Kamil Atesogullari, Selahattin Esmer, Meral Bekar, Sedat Aslantas, Lutfi Demirkapi, Mahmut Sakar, Eren Keskin, Erçan Demir, Nazmi Gur, and Gurseli Kaya), Birdal was tried and acquitted in the Heavy Penal Court No. 4 on February 23, 1998, for organizing a meeting on Peace and Politics during Human Rights Week in December 1996. See Lawyers Committee for Human Rights, Advocacy Alert: Update, Human Rights Association--Turkey (1998).

[\[FN362\]](#). Birdal faces a possible sentence of one to three years if convicted in the Istanbul SSC of charges under the Anti-Terror Law in connection with a speech that he made at a symposium in February 1996. He faces the same term for charges under Article 312 of the Turkish Penal Code in connection with a speech that he made in Istanbul during “Peace Week” in 1995. He is also facing trial in connection with (i) a speech that he made on April 13, 1997, during a “Democracy Meeting” to protest an event known as ‘the Susurluk incident’; (ii) a meeting organized for a campaign called “One Million Signatures for the Peace”; (iii) a speech that he made marking the opening of the HRA's Mardin branch; (iv) his attendance at a peace

conference in Rome in October 1997; (v) a mission that he undertook to Northern Iraq to obtain release of Turkish soldiers captured by the PKK (now before the court of appeals); (vi) a speech made in connection with the United Nations Habitat Conference in Istanbul; (vii) a speech published in the newspaper Cumhuriyet on February 14, 1996, concerning a mission to Güçlükonak to investigate an incident there; (viii) a speech that he gave in Ankara in May/June 1998 that allegedly undermined the State; and (ix) a meeting by political parties and non-governmental organizations in Kizilay Square on April 13, 1997. Other defendants in this action include Ufuk Uras, President of the Freedom and Solidarity Party (“ODP”), Yavuz Onen, President of the Turkish Human Rights Federation, and Ahmet Türk, Deputy Chair of the People's Democracy Party (“HADEP”).

[FN363]. For example, on September 8, 1997, Birdal and ten other members of the HRA's national executive board (Nazmi Gur, Kamil Atesogullari, Selahattin Esmer, Meral Bekar, Sedat Aslantas, Lufti Demirkapi, Mahmut Sakar, Eren Keskin, Ercan Demir, and Gurseli Kaya) appeared before Ankara Heavy Penal Court No. 4 to face charges of “disseminating separatist propaganda” and “inciting enmity between people through racial and religious propaganda” under Article 2908 of the Law on Associations. The charges stemmed from an event called “Human Rights Week” that the HRA organized in December 1996, during which leading HRA members and other intellectuals decried Turkish human rights violations and criticized government policies in southeastern Anatolia. On February 28, 1998, the heavy penal court in Ankara acquitted the defendants on all charges. Although welcoming the acquittals, the delegation remains concerned that had the prosecutions been successful, domestic human rights advocacy in Turkey-- already severely tested by harassment, intimidation, and outright violence-- would have been seriously undermined. Moreover, the delegation is concerned that nothing prevents the government from initiating similar prosecutions against the defendants or other human rights advocates at any time.

[FN364]. Interview with Nazmi Gur, Secretary General, HRA of Turkey, in Ankara, Turk. (June 4, 1998).

[FN365]. Turk Rights Campaigner Sentenced to One Year in Jail, *supra* note 360.

[FN366]. For their part, the leaders of the Diyarbakir branch of the HRA have steadfastly denied the charges. In an earlier interview with the Lawyers Committee, Sinan Tanrikulu, one of the members initially detained, stated, “We are not against the integrity of the State. We are not against the rights and freedoms of others and, far from obstructing justice, we are always working for the rule of law.” Towards this end, the Diyarbakir branch in particular had achieved a reputation for collecting evidence and otherwise facilitating complaints to the European Commission and the European Court. These applications, many of which have been successful, have proven to be especially embarrassing to the Turkish government, which is bound by the provisions of the European Convention.

[FN367]. Meeting with Dr. Hikmet Sami Turk, then-State Minister for Human Rights, in Ankara, Turk. (June 5, 1998).

[FN368]. The closing of the Diyarbakir branch of the HRA marked the beginning of a series of

similar closures that lasted from two weeks to eighteen months. These included branches in Malatya (closed June 4, 1997, reopened July 23, 1997), Izmir (closed June 27, 1997, reopened July 4, 1997), Konya (closed June 24, 1997, reopened July 18, 1997), Urfa (closed June 27, 1997, reopened Dec. 22, 1998), Balikesir (closed July 9, 1997, reopened 30 days later), and Mardin (closed August 6, 1997, reopened six months later).

[FN369]. Such concerns were hardly diminished when, during this wave of HRA closings, Ankara prosecutor Nihat Ogan threatened to shut all fifty of the HRA's branch offices, along with its Ankara headquarters, on the ground that the group violated the Law on Associations.

[FN370]. On October 22, 1998, security forces, including members of the Anti-Terror branch, raided the headquarters, searched documents, computer files, and archives, and retained several of the items that they found. The officers conducting the raid did not produce any search warrants, but instead stated that they were merely performing a routine inspection according to Article 45 of the Law on Associations. One day later, the Istanbul Governor's office issued an order to stop all transactions in Mazlum Der bank accounts in light of a call from the press to contribute to the work of human rights non-governmental organizations, including Mazlum Der.

[FN371]. During March 1998, for example, inspectors from the Ministry of Finance seized all the account books for the last five years from both the Ankara headquarters and the Istanbul branch. The inspectors filed a complaint accusing the organization of lax record-keeping and claiming that the headquarters was coordinating illegal activities committed by the branches. Although the state prosecutor dropped all charges, the investigation still continues and the books have yet to be returned.

[FN372]. In addition, the government has taken steps against Mazlum Der and its members outside the major cities. In Sanliurfa, no fewer than eight prosecutions and one investigation are proceeding against Sehmuz Ulek, a lawyer who is a director of the local branch. Six of the proceedings involve alleged violations of the Law of Associations, while the other allege violations of Article 312 (inciting religious enmity) and Article 158 (causing disrespect for security forces) of the Turkish Penal Code. On October 11, 1998, Ulek was also briefly detained after the nationwide "headscarf" demonstration. Police officers told Ulek that he had been detained "for his own safety." In similar fashion, police asked Prof. Nihat Bengisu, the director of the Kayseri branch, to go to the police station after a press conference that he organized. Elsewhere, two investigations are also proceeding against the director of the Mazlum Der branch in Konya. See Letter via electronic mail from Yilmaz Ensaroglu, Mazlum Der, to the Lawyers Committee (Nov. 11, 1998).

[FN373]. While the delegation was still in Turkey, the Council of Europe awarded the HRFT with one of the two human rights awards that it presents annually. Other honors presented to the HRFT include the 1994 Roger Baldwin Medal of Liberty Award.

The work of the HRFT, including independent human rights monitoring as well as rehabilitation for torture victims, is especially needed in southeastern Anatolia, where Turkish armed forces have been fighting Kurdish guerrillas for fourteen years, and where human rights violations have been most widespread. Amnesty International confirmed this ongoing need just days after the Diyarbakir closing in a report stating that "torture continue[s] to be widespread and

systematic in police stations and gendarmeries.” Amnesty International, Turkey: Human Rights Defenders at Risk (1994). Onen, who characterized the HRFT as a de facto “Ministry of Human Rights,” told the mission that official intimidation has been a fact of life for his organization throughout its existence. Among other examples, HRFT officials pointed to the prosecution of a doctor who had helped identify torture in Adana, as well as anonymous phone threats made to other doctors who aid the organization. The same officials further stated that the government recently banned an exhibition on torture that was to have been held at Izmir University.

More serious still, the HRFT claims to have evidence that the group was targeted at a Ministry of Foreign Affairs human rights training session, during which an ambassador told the police in attendance that “the judiciary can't cope with the HRFT, so it's up to you.” Onen attributes this hostility to the HRFT's success before the European Court and European Commission as well as the organization's ability to disseminate its findings in English. As he put it, “it is not easy to issue the types of reports we do without being subject to intimidation .... If you are a human rights activist, you are treated like a collaborator.” Interview with Yavuz Onen, President of the HRFT, in Ankara, Turk. (June 4, 1998).

[\[FN374\]](#). Moreover, the Diyarbakir closing is not the first time that the authorities have sought to hinder the HRFT's work in this manner. According to Onen, it took over a year to get the HRFT established in the first place because government authorities objected to the term “torture treatment center” in its bill of establishment. Since its 1990 opening, the HRFT has facilitated treatment for over 3000 torture victims. Interview with Yavuz Onen, President of the HRFT, in Ankara, Turk. (June 4, 1998).

## Appendix One

Crowley Program/Lawyers Committee for Human Rights Mission to Turkey, Itinerary, May 23- June 5, 1998

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT  
DISPLAYABLE

## APPENDIX TWO

### TRIAL OBSERVATION REPORTS: THE DIYARBAKIR PRISON KILLINGS

#### INTRODUCTION

From May 22 to June 5, 1998, the Joseph R. Crowley Program in International Human Rights (“Crowley Program”) and the Lawyers Committee for Human Rights (“Lawyers Committee”) conducted a fact-finding mission in Turkey that focused, inter alia, on the prosecution of security officers for alleged violations of human rights. One of the most important prosecutions is the trial of sixty-five police officers and gendarmes for the deaths of ten inmates of Diyarbakir E-Type Prison (‘Diyarbakir Prison Case’). [\[FN1\]](#) Although the killings took place on September 24, 1996, the case was still pending as of May 17, 1999. On June 5, 1998, a

member of the delegation observed a hearing in the case. A second Lawyers Committee delegation observed a hearing on January 29, 1999. Below are the trial observation reports of each delegation, followed by a brief assessment of the significance of their observations to the broader issue of police impunity. The reports are intended to provide the reader with a sense of how the procedural obstacles to effective redress of police abuse in Turkey, analyzed in the main report, are manifested in an important impunity case.

## I. TRIAL OBSERVATION AND INTERVIEWS

Each of the two following accounts includes interviews with lawyers litigating the case, as well as observations of the hearings themselves.

### A. June 5, 1998 Hearing [\[FN2\]](#)

On June 5, 1998, we arrived at the court building at approximately 9:30 a.m. There was no unusual commotion outside the courthouse, although we later learned that several members of the victims' families had been denied entrance to the building. \*2251 We saw no journalists. The hearing was scheduled to begin at 10:00 a.m., but was delayed. We entered the offices of the Diyarbakir Bar Association, located inside the judiciary building, and spoke with victims' lawyers while we waited for the case to be called.

#### 1. Interviews with the Victims' Lawyers

We met with Sezgin Tanrikulu, Tahir Elçi, and Fethi Günüs, who represent the victims and their families. They briefly reported on what had happened in the previous hearing and since, and on what they expected in this hearing.

The lawyers told us that at the last hearing autopsy photographs had been shown to forensic doctors. The victims' lawyers at the time had requested a copy of a videotape of autopsies that had been performed on the bodies of the victims. The videotape is an important piece of evidence because when the bodies of the victims were brought to the morgue, the forensic specialist refused to work overtime to perform the autopsies. As a result, non-forensic medical staff performed the autopsies and the procedures were videotaped. Mr. Tanrikulu told us that the tape is fifteen minutes and fifteen seconds long. The victims' lawyers requested a copy of the tape to enable them to have an independent forensic expert review it. Although the court denied the request, it granted an alternative request to have the court send the tape to forensic experts for review.

The lawyers expected one topic of the hearing to be the report of the forensic experts, although they had not yet seen the report. They were informed that as of June 4, the day before the hearing, the report had not yet reached the court. According to the lawyers, the court told them that it had taken a long time to get the video to the forensic doctors, delaying the report. As it happened, the court faxed the report to the Diyarbakir Bar Association office during our meeting with the lawyers. The report arrived one-half hour before the scheduled starting time of the hearing. Although the hearing was delayed an hour, the lawyers still had only one and one half hours to review and consider the report. The report had been requested on April 24, 1998, one and one half months earlier. Moreover, the report was only one page in length. It stated no cause of death for any of the victims. Mr. Tanrikulu commented that a professional autopsy \*2252 was not necessary to see from the pictures that brain trauma was the cause of all the

deaths. He noted that the doctors stitched up the dead victims' heads to stop their bleeding. The report gave no reason for the failure to determine and include an official cause of death. We retained a copy of the one-page report.

The lawyers expected a second topic in the hearing would be the ongoing effort to locate defendants in order to obtain their testimony. The court had not been able to locate five of the defendants and therefore had been unable to obtain testimony from them. The court had written to four or five other defendants to invite them to testify at courts in the cities in which they were now posted. Seven prison guards had been invited to testify at the day's hearing. [\[FN3\]](#) The victims' lawyers said that these seven guards were “the last important witnesses to be heard” because the court had denied a request to bring transferred prisoners from Gaziantep to testify. The court had also denied a request to compel the defendants to appear in court during the hearings.

The third topic for the hearing to consider was a reply from prison management to a court request for an explanation of prison visitation procedures. The victims' lawyers argue that, following standard prison practice on the day of the killings, prison officials did not inform the prisoners generally that they were to receive visitors until an hour before the visit and did not specifically identify the individual prisoners that actually had visitors until ten minutes before the prisoners were called to meet them. The victims' lawyers contend that this standard practice belies the defense's theory that a pre-planned prisoner riot precipitated the violence.

We noted that the prosecutor's indictments against the defendants do not allege murder. The indictments charge that the police and gendarmes “abused their duty” in “causing death by injury in a way that the perpetrators cannot be determined and in a manner exceeding the limits of necessity and without intention to kill.” [\[FN4\]](#) Given the nature of the charge, we asked Mr. \*2253 Tanrikulu what was the prosecution's theory of the case and whether the prosecution accepted the defense's theory that the violence had been precipitated by a pre-planned prisoner riot and resulting fight between inmates and security forces. In response, Mr. Tanrikulu first noted that the question of whether any initial disturbance had occurred is irrelevant to the question of whether excessive force was intentionally used on prisoners after any disturbance had been quelled. Mr. Tanrikulu then explained that the prosecutor's office, despite being legally responsible for the investigation, did not conduct an independent inquiry and had relied entirely upon police and gendarme reports, which, not surprisingly, minimized the officers' responsibility. [\[FN5\]](#)

## 2. Trial Observation

We met with the lawyers for about an hour and one half. The case was called around 11 a.m. It took some time to climb the stairs and pass through a hallway into the courtroom because the police were searching those entering. Police officers searched us twice. A group of German nationals was not allowed to enter with their bags ‘by order of the head of the court.’ They had no translator, so our interpreter translated the police officers' instructions to them.

While waiting to enter the courtroom we spoke with two young lawyers interning with the Diyarbakir Bar Association. They told us that the police normally try to prevent people from observing such trials and that they are especially resistant to the interns attending. The interns told us that they can usually maneuver their way in. We entered the courtroom and seated ourselves in the gallery, with a direct and unobstructed view of the proceedings.

The court was the Diyarbakir Third Heavy Penal Court. \*2254 The gallery where we sat was raised up from the floor of the court. It raked up at a sharp angle, so that when we took our seats we looked downward on the proceedings. The gallery had about twelve rows of finished white stone benches. It was quite full when we entered, but two people moved back to give us seats in the center of one of the forward rows.

Below and facing us sat the three judges behind a judicial bench raised from the courtroom floor. The chief judge sat in the center. One of the other two judges was a woman. To the left of the judges on the same level sat the public prosecutor. [FN6] A relief bust of Mustafa Kemal Atatürk, the father of modern Turkey, surveyed the scene from the center of the high marble wall, above the chief judge.

Below and before the public prosecutor, Fethi Günüs sat in the lead victims' lawyer chair. In front of him were twelve other victims' lawyers. Directly opposite the victims' lawyers sat the two defense lawyers, Ziya Ozmen and Selim Karakoyun. No defendants were present in court. The bailiff called the names of four or five prison guards who were witnesses, but none were present. The bailiff then called as a witness, Serafettin Cammur, who entered the courtroom and took his place facing the judge.

At first, the judge conducted his own questioning. Responding, Cammur testified that he knew some of the accused because of their popularity and high rank. He told the court that he had worked the night shift and slept in the prison guest house, near the prison on the night of September 23, 1996. He left the prison in the morning of September 24, but returned in the afternoon between 2:30 and 3:00 in the afternoon, even though it was his day off. He stayed in the prison for one hour.

Cammur testified there were crowds around the prison, as well as gendarmes. He had heard that gendarmes had entered the prison, but did not see them himself. Cammur told the court that he himself saw ambulances going in and out of the prison and that he saw people carrying out the injured. Cammur testified that later that night he had learned that there had been fatalities. The judge asked if Cammur knew whether prisoners had been transferred from the prison and when any transfer\*2255 had occurred. Cammur responded that he had been told that there had been a prisoner transfer, but that he did not know what time it had occurred. When asked by the judge if he had 'heard anything,' Cammur testified that he heard an argument between prisoners and police. He further testified that he did not see the argument.

The chief judge then turned to the victims' lawyers to submit questions. [FN7] Mr. Tanrikulu stated to the court that Cammur had previously told investigating gendarmes that he had not only heard, but also seen the events surrounding the alleged confrontation between prisoners and police. Mr. Tanrikulu asked the court to explore the apparent discrepancy between the witness' testimony and his prior statement. [FN8] The judge then asked the witness what he had seen, to which Cammur responded that he had seen 'a few things . . . people coming in and out.' He testified that he had not seen any bodies close up. Victims' lawyers pressed by confronting Cammur with a photo of the split head of a victim and asking how he could "hear" dead bodies.

Victims' lawyer Tahir Elçi questioned why Cammur was at the prison on his day off. Cammur responded that he was there because he had been staying in the prison guest house. Cammur insisted that he had not been called to report to the prison. He added that even in an emergency, he would not have been called to the prison on his day off.

At this point, defense lawyer Ziya Ozmen leapt to his feet and asserted that the deaths resulted from an argument or altercation. The judge asked whether the witness knew of police

hitting the victims. The witness replied that he only knew of deaths and injuries and not who had inflicted them.

\*2256 The chief judge and the lawyers probed further inconsistencies between Cammur's prior statement and his testimony. They confronted him with his earlier statement that he had actually seen some of the events. He responded that he had seen the injured being taken out from far away. Fethi Günüs asserted the area was not large enough for the witness to have seen from far away. "It's not an airport!" said Günüs--a statement the chief judge put into the record.

Günüs criticized the court and prosecutor for the delays and lack of resolution in the case and for reports that victims' families and the public had been denied access to the current hearing. Günüs stated that some victims' family members had been detained trying to attend. He complained that only foreigners and lawyers had been allowed in the courtroom even though the court had not declared the hearing closed to the public. (Observers in the gallery that we spoke with told us that they were lawyers, legal interns, or policemen, along with the German nationals). In response, the chief judge said witnesses' and families' protection were the prosecutor's responsibility. The prosecutor, who had been silent to this point in the hearing, said nothing. [FN9] Mr. Günüs also asked why only one of the seven called witnesses had come. The chief judge replied that the court had written to all seven, and to the defendants, but had received no reply.

The chief judge read out the prison authorities' letter on visitation procedures and the forensic report on the videotaped autopsy. Mr. Günüs argued that these, along with the fact that the prisoners took no hostages indicated that, contrary to the defense's contention, there was no organized rebellion. He pointed out that even the one-page report revealed gaping head wounds. He emphasized that the wounds were in the same spot on each victim. He argued that the killers had all hit at the same target and that this was not consistent with the kind of wounds that they would have sustained in a fight with the security forces. He asserted that the victims had been taken out of the corridor \*2257 and beaten. Mr. Tanrikulu made three requests. He asked that the video of the autopsy be shown in court, that the court provide enough security so that the public and victims' families could get from the street to the courtroom, and that the court order the arrest of the defendants.

Defense counsel countered that the Turkish Penal Code prohibited detention of the accused during the trial, on the grounds that if they were found not guilty, the state would not compensate them. [FN10] Defense counsel further asserted that the victims had no grounds for claiming that a prisoner riot leading to the incident was "impossible." Defense counsel also objected to the German nationals taking notes because they had no translators and could obviously not understand the proceedings. To this, the chief judge replied that they were permitted to take notes. The court then took a recess to consider the lawyers' other requests.

Outside the courtroom during the recess, lawyers told us that hundreds of people, including members of the public and victims' relatives, had been waiting across the street from the judiciary building because they had been denied admission to the hearing. The police had reportedly detained some of them, but subsequently released them when lawyers intervened. The lawyers speaking to us said that two or three relatives of the victims had been able to enter the courtroom.

When the hearing resumed, two more victims' lawyers were present on the left. The chief judge reported that the court was unable to locate one of the defendants to invite him formally to appear in court. Although the chief judge then noted that under Turkish Penal Procedure Code section 223, defendants normally are required to appear, the court did not order their appearance.

The chief judge stated into the record that the court had determined that it needed autopsy reports for each victim and that it needed to know what had happened to the clothes that the defendants had been wearing at the time. He also rejected the victims' request to have the defendants arrested. The chief \*2258 judge then announced the date of the next hearing and adjourned the court.

As the court adjourned, the mother of one of the victims who had been seated with the victims' lawyers stood up and--speaking in Kurdish--began asking the court for her rights. Someone near us in the gallery who spoke Kurdish translated her words to us. According to that person, she said to the court, "If we don't get results in this court, we will go to the European Court," meaning the European Court of Human Rights.

As we gathered our belongings to leave the courtroom, a man in sunglasses approached us and asked who we were and what we were doing. Upon our asking him the same, he told us that he was from the police. We asked whether he was on duty. He told us he happened to be on duty, but had only come to the hearing out of curiosity. We asked him about the reports that victims' relatives had been denied access to the hearing. He said, "You got in, didn't you?" When we pressed him, he told us no one had prevented the families from getting into court. The officer visibly chafed under our questions, and we ended the interview. After the hearing, we went to the airport in Diyarbakir for our return flight to Ankara.

### 3. Interview with Defense Lawyers

On the afternoon of June 5, 1998, on the return flight from Diyarbakir to Ankara, we saw two of the defense lawyers from the hearing, Ziya Ozmen and Selim Karakoyun. We formulated some questions in the hope of interviewing them. Upon landing, we approached them. They offered us a car ride from the airport into the city, which we accepted. This ride gave us the opportunity to interview them briefly regarding the case and to record observations that they wanted to make regarding the human rights issues that the delegation was investigating.

The defense lawyers spoke of the facts of the case as they saw them, as well as the roles of the lawyers involved. They first said that the intervention of the special police unit at the prison was warranted because the governor's permission was granted. The lawyers were referring to a special anti-terror police unit that had been ordered into the prison and, according to the victims' families and lawyers, had participated in the violence against prisoners. In the case of a riot, they said, the police may \*2259 enter the prison with the governor's permission. They said that the police had entered to 'split communication between parts of the prison.'

Regarding the prosecution, the defense lawyers said that the job of the judiciary was to find those guilty of a charged crime. If a perpetrator could not be found, there should be no conviction. [\[FN11\]](#)

Implying that other prisoners killed the victims, the defense lawyers said that those who died were all informants who after their arrest had provided information to the police about alleged 'illegal organizations.' The lawyers buttressed this assertion by claiming that every subsequent search of the prison had turned up makeshift weapons---such as knives made from forks, spoons, iron bars, and radiators---illegal documents, and evidence of communications in and out of the prison. The defense lawyers said that they did not have this evidence, but that it was documented by the court and the prosecutor should have it.

We asked them about the reliability of the police's internal investigation in this case. They said that the investigations were reliable because the police were obligated to follow specific procedures in such investigations.

The defense lawyers had a number of criticisms of the victims' lawyers. The defense lawyers stressed that only the victims' lawyers saw inconsistencies between the testimony and prior statement of the day's one witness. The defense lawyer's seemed to imply that the victims' lawyers were improperly basing their position on matters outside of the court record. The defense lawyers also criticized the victims' lawyers for seeking the death penalty in a case where the individual perpetrators are not identifiable. Finally, the defense lawyers criticized the victims' lawyers for requesting that the defendants be detained.

Explaining why they traveled from Ankara for the case, the defense lawyers explained that they had to come in from Ankara because no Diyarbakir lawyer would defend members of the security forces. They also said that a large number of lawyers were listed as victims' lawyers in this case, while the two of them toiled alone for the defendants. [FN12] When questioned about any dangers \*2260 to lawyers representing members of the security forces, the defense lawyers said that they did not themselves feel intimidated. They knew of one lawyer, Sadik Tokucoglu, however, who was shot on his way to Izmir to participate in such a case. The defense lawyers also noted that their clients felt much pressure--for the defendants Diyarbakir is a hostile environment where no lawyers would defend them and everyone assumed their guilt.

The defense lawyers expressed an underlying distrust of human rights activists in general. Mr. Karakoyun told us that in police trials, human rights activists tend to sabotage the proceedings. Both Karakoyun and Ozmen said that the activists' tactics were to appeal to conscience in order that judicial principles would be undermined. They felt that terrorist and political defendants 'held all the power in their hands.' They asserted that Turkish human rights organizations are tools for illegal organizations such as the Kurdistan Workers' Party ("PKK"). They felt that the Human Rights Association does 'politically motivated work.'" The defense lawyers also felt that foreign criticism of Turkey's human rights record was unfair. They reminded us, in a pointed comparison to the United States, that there had been no judicial executions in Turkey since 1980. [FN13]

With respect to the independence of the judiciary, the lawyers emphasized the immunity of judges and prosecutors from both criminal and civil actions for acts undertaken in a judicial capacity. They felt that decisions on transferring judges and prosecutors, however, are made on a political basis.

We told the defense lawyers that our delegation had spoken with several prosecutors. We then asked the defense lawyers about the role of the prosecutor in cases involving alleged police abuses. They told us that the prosecutor represents the victims, in the name of the government. They spoke of the prosecutor's investigative role and noted that defendants in this case had been interviewed in the prosecutor's office. With respect to the prosecutor's apparent passivity at the day's hearing, the lawyers told us that only the victims' lawyers were probing the witness's purportedly inconsistent prior statements because only the victims'\*2261 lawyers saw these inconsistencies. They asked why the prosecutor would probe an inconsistency that he did not see.

The interview was brief--about an hour--but we were able to ask some of the questions that we had formulated on the flight to Ankara. Karakoyun and Ozmen seemed pleased to have a chance to report their opinions on the Diyarbakir proceedings.

B. January 29, 1999 Hearing [\[FN14\]](#)

### 1. Interviews with Victims' Lawyers

The evening before the hearing, January 29, 1999, we interviewed three of the lawyers representing the victims' and their families, Sezgin Tanrikulu, Mustafa Ozer, and Emin Otkar. These lawyers believe that this case, which has now gone on for two and one-half years, is being deliberately delayed. They report that there have been seven or eight different judges assigned to the case and that the prosecutor has been less than diligent in pursuing the testimony of witnesses. Often a hearing will last less than a quarter of an hour because the witnesses do not attend, a file is lost, a report has not arrived, etc., and then another month goes by before another hearing is scheduled.

In this case, because of the poor job done by the prosecutor in the initial investigation as well as the bureaucratic confusion of the administrative council process, the witnesses have never officially been interviewed in any detail. This means that their testimony is being taken for the first time two and one half years after the killings occurred. Many of the witnesses are no longer working in the region and must be interviewed in remote areas by judges and prosecutors unfamiliar with the case. This does not seem to be a process well-calculated to disclose the truth of what happened. With a reluctant judge and prosecutor and two and one half years of delay, ascertaining what happened in this case will be very difficult.

The victims' lawyers were very pessimistic about any prospects for improvement in the climate of impunity enjoyed by members of the security forces. They were not surprised that a court in Manisa had recently reinstated its decision to acquit police accused of torture there. They noted that the chief prosecutor\*2262 in Manisa had previously been in Diyarbakir. According to the victims' lawyers, it is no accident that those judges and prosecutors who can be relied upon to protect the interests of the state end up in the controversial cases.

### 2. Trial Observation

This hearing was one in a series of evidentiary hearings in the trial of the police and gendarmes accused of beating ten prisoners to death.

On the morning of the hearing, we met victims' lawyer Sezgin Tanrikulu at his office and went to the court house with him. At 9:30 a.m., the security at the court was somewhat higher than we have seen outside the southeast region but did not seem particularly heavy. We spoke with journalists and explained our interest in the case. The press attention in Diyarbakir was substantially less than that in both Manisa and in Afyon, where a hearing in the trial of police accused of killing Metin Goktepe had taken place two days before. [\[FN15\]](#) We made a point of connecting this case with the Afyon and Manisa cases regarding the impunity question. The cases do not seem to be so linked in the minds of those monitoring the impunity issue outside this region.

Around 10:00 a.m., the case was called. As we entered the courtroom, we were searched and filmed by police and by journalists. The judge took care of some administrative details and then began to report on witness testimony that had been taken at a different location by another judge. Two witnesses had been interviewed in this manner. Five testified in court this day.

The witnesses all reported similar variations on the same story, depending on where they had been located in the prison during the incident. They reported that it was visitation day and that this cell block was to be the third to meet visitors. On the way to the visitation center, the prisoners began talking with other prisoners in other cell blocks, apparently in violation of prison rules. Although the guards warned them not to do this, \*2263 one witness acknowledged that this was not particularly unusual behavior. The prisoners were confrontational, and one of them hit the chief guard. After that, a fight erupted. At this point, the guards closed the gates to block off the corridor. The trapped prisoners forced the fifth gate open and asked their friends in other cell blocks to give them extra clothes. Sezgin Tanrikulu later explained that this suggested that the prisoners expected that they might be beaten and wanted the extra layers of clothes to protect themselves from truncheon blows. The fight among the prisoners and guards continued until the guards were ordered to leave the area. The director of the prison and the chief prosecutor called for reinforcements and the police and gendarmes were sent in.

The next involvement of the guards was to carry the wounded from the detention center. Those who testified had either carried prisoners themselves or seen others doing so. They admitted that most of the wounded had to be carried. The judge asked about the location of the wounds, and they said they were all over their bodies, especially on their heads. One of the witnesses said that he fainted because of the sight of all the blood. The wounded were carried to the visitation room. This room is where the victims' lawyers allege that nine of the victims were killed, though none of the witnesses mentioned this fact today. One of the witnesses paused before answering critical questions such as "Did you see what happened after the security forces were let in?" A Turkish observer later expressed the opinion that the witness had paused to convey to observers that he was being compelled to lie under the circumstances.

This story was repeated by all of the witnesses with some variations depending on their individual situations. The judge appeared to the delegates to be reasonably even-handed and conscientious in his questioning. This observation was later confirmed by the lawyers for the victims. They felt that he accurately recorded the testimony when he summarized it for the court reporter. Nevertheless, the judge did not pursue certain obvious questions such as whether the "injured" detainees were still alive at the time that they were removed. There was no mention of anyone who had been killed, only injured. Also, the judge did not show any of the photographs of the victims to the witnesses. It seems that this action would have been relevant and useful as \*2264 they testified about the appearance of the victims and the extent of their injuries.

Following the testimony, the victims' lawyers made several requests. They asked that the defendants be arrested--none are currently--and they asked that the witnesses be shown pictures of the victims when they are questioned. The evidentiary status of the photographs is still in question. They also asked that the doctor responsible for sending the prisoners to the hospital be indicted. They requested an investigation of the crime scene and to be provided a copy of the Ministry of Justice investigator's report on the testimony of one of the witnesses. Finally, during the course of his argument, one of the victims' lawyers compared this case to Goktepe and Manisa as a test of Turkey's resolve to prosecute human rights violators.

The defendants' lawyers responded, arguing that the doctor should not be charged, that the defendants should not be arrested, and that the photographs should not be used in evidence. We were not able to speak with the defense lawyers as they are based out of Ankara and left immediately following the hearing. According to the victims' lawyers, the theory of the defense seems to be that there was a riot in the prison and that this force was necessary, though perhaps unfortunate. The victims' lawyers also believe that the defense lawyers mean to imply that the

prisoners may have attacked one another. This is consistent with the comments of these lawyers to other delegation members observing an earlier hearing.

Interestingly, the defendants' lawyers also specifically objected to the comparison of this case to Goktepe and Manisa. They said that, unlike those cases in which the victims were presumably innocent, this case involved a prison riot. Hence, the actions of the police were justified here. Note, however, that the prisoners here had not been convicted of any crime. They were imprisoned pending their trial. The only distinction between their status and that of the accused police and gendarmes in this case is that the police and gendarmes are free and remain on duty.

The hearing lasted approximately two hours. After the testimony and the lawyers' arguments, the court recessed briefly, and we left the courtroom. As we left, we were again filmed by press and police. After about ten minutes, the court reconvened. The \*2265 judge announced that the motions to arrest the defendants and to charge the doctor were denied at least for now. A ruling on the photographs and the other motions was postponed.

By the time we left the court, security had increased considerably. Outside the courtroom, there were police overseeing and filming our exit. Outside the building, there were many more police and police vehicles, and they seemed to be restricting foot traffic around that courthouse. The police continued to videotape us as we proceeded out of the courtroom, through the courthouse, outside and across a parking lot, where we entered our car and drove away.

## II. ASSESSMENT

The Diyarbakir Prison Case involves the prosecution of police officers accused of gross violations of human rights. It has garnered local and international attention as a test case for the Turkish government's commitment to hold members of the security forces accountable for their actions. To date, the Turkish government has a poor record in this regard, though it notes that more police are facing trial than in the past.

The case is a stark example of how the judicial system can fail victims of official abuse. Public prosecutors, under a legal duty to investigate and prosecute crimes fully, look no further than the version of events supplied by the police's internal interviews. Defendants fail to appear in court. Witnesses from the security forces cannot be compelled to appear. Inmates who witnessed the incident have been transferred to prisons in other towns, and the court continues to deny them permission to travel to Diyarbakir to testify. Some testimony from these ostensibly unavailable witnesses is taken in the remote locations in which they are now imprisoned. Judges and prosecutors unfamiliar with the case take that testimony without even the benefit of the case file. Victims' lawyers are not present because the expense and danger are prohibitive.

The trial has been subject to numerous debilitating delays and postponements. For example, after nearly two years of hearings, the court does not yet have autopsy reports. It was not until the June 5, 1998 hearing that the court acknowledged the need for autopsy reports on each victim. Delays continue while the court and lawyers await forensic evidence of obvious materiality. \*2266 The witnesses' and defendants' unavailability has also caused numerous delays. In each of the two hearings that we observed, the court denied motions to arrest the defendants. Only one of seven 'invited' guard-witnesses appeared at the June hearing. The testimony of the others was postponed. Seven months later, five more appeared. During the period in which they failed to appear, the absent guards were living and working in Diyarbakir, where the court is located.

We saw examples of two other problems that seem to undermine attempts to prosecute alleged police impunity in Turkey: the victims' lawyers' lack of access to potential evidence, and prosecutors' and judges' failure to investigate and prosecute the alleged crimes fully. As to evidence, the lack of important witness testimony created a number of problems in the two hearings. At the June hearing, when lawyers questioned the six guards' failure to appear, the court could only respond that they had sent the guards 'invitations' and that the latter had simply failed to respond. Even the witnesses that the court does schedule fail to appear. More postponements result. Eventually, the witnesses appear and contribute their pieces of the story, and a meager factual picture emerges piecemeal as months of litigation turn into years.

Other witnesses--the transferred prisoners--never appear in Diyarbakir to give their eyewitness accounts. The court has denied them permission to come. Earlier in the mission, delegates had reviewed the court's denials. The court gave no explanation except that the law permitted them to deny the motions.

The defendants were conspicuously absent from both hearings, as they have been throughout the trial. This absence protects the defendants from being identified by witnesses. Moreover, in both hearings, the court denied motions to arrest the defendants. The defendants remain on active duty and in a position to influence the testimony of others.

In the June hearing, the defense argument against arresting the defendants was that the Turkish Penal Code prohibited arrest on the ground that the defendants' loss of freedom would be uncompensable should the court find them not guilty. The transferred prisoners, meanwhile, are still detained nearly three years later, many of them still awaiting trial on the charges against them in State Security Courts. The fact that the law provides\*2267 such a double standard seems to be complemented by a sense that the victims here deserve the inferior treatment that they received. The defense lawyers' objection to arresting the defendants, and the court's yielding to it, revealed an easy acceptance of this double-standard. In the second hearing, the defense lawyers distinguished the Manisa and Goktepe cases on the very ground that the Diyarbakir victims were prisoners, implying that they deserved such treatment.

The observed hearings also underscored the importance of in-court testimony as opposed to testimony collected at remote locations. The victims' lawyers, denied much of the evidence to support their version of events, were nevertheless able to discredit the guards' version by impeaching the one witness who did appear in June. The fact that one witness presented this opportunity highlights the potentially debilitating effect of the continued absence of other witnesses. Not only do missing witnesses represent missing pieces of the story, but also they protect the official story by precluding opportunities to challenge it.

Unequal access to evidence is an additional handicap for the victims' lawyers. For example, the defendants' lawyers reported that weapons and documents were discovered in searches of the prison. To date, none of this evidence has been made available to the victims' lawyers. Moreover, the defendants and their colleagues have direct access to the prison, calling into question the integrity of evidence turned up in those searches. The victims' lawyers, by contrast, are afraid to enter the prison to interview witnesses or search for evidence. They say that the opportunities are rife for the security forces to find some pretext to detain the lawyers if they venture into the prison. Cases such as that pending against twenty-four Diyarbakir lawyers (some of whom represent the victims in this case) would seem to support these fears.

Put to such disadvantage, the victims' lawyers are reduced to implying by circumstantial proof that some story other than that presented by the defense exists. In the first hearing, these lawyers tried to use the prisons' visitation policy to cast doubt on the defense and prosecution

theory that the deaths resulted from a riot. The victims referred to the one-page autopsy indicating identical head wounds to question the defendants' assertion the blows were random. Meanwhile, witnesses who might have provided positive proof of a different scenario remain absent from \*2268 the courtroom because, as the court said, the law permits their absence.

The prosecutor has refused to make an independent inquiry beyond the story as presented by the police in their internal investigation. Defense lawyers note that investigating officers are bound by certain procedures in questioning their colleagues and that guards were interviewed in the prosecutor's office. The security forces' statements in the record, however, are short and lacking in detail. Moreover, we observed no willingness on the prosecutor's part to probe in-court witnesses beyond their own previous statements. This responsibility is left to the victims' lawyers.

In both hearings, the chief judge appeared fair in his questioning. He allowed the victims' lawyers to probe the witnesses and recorded the proceedings faithfully. As the delegation at the January hearing observed, however, he omitted some obvious questions. Moreover, he denied the victims' evidentiary motions without explanation, again and again.

In Turkey, the standard of proof for criminal conviction is guilt to a moral certainty. The victims' lawyers have been denied the use of evidence to support affirmatively their version of events and are limited to challenging the occasional witnesses' inconsistent statements and employing circumstantial proof such as the visitation policy to cast some doubt on the official story. Under these circumstances, it is difficult to see how the victims' lawyers can meet the burden of proof for conviction. No one denies that the additional witnesses exist. It is only the lawful refusal to allow them to testify at trial and, in the case of security officers, the lawful refusal to compel their appearance, that impose these fetters on the victims. These, in combination with the prosecutor's lack of diligence, may prove fatal to the victims' case.

If the prosecution fails for these reasons, the victims may be denied the effective remedy required by international law. As the European Court of Human Rights said in *Aksoy v. Turkey*, the right to an effective remedy includes a 'thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the \*2269 complainant to the investigatory procedure.' [\[FN16\]](#) Nearly three years after ten prisoners' skulls were caved in, such a remedy continues to elude those prisoners' families.

[FN1]. For a complete summary of the facts of the case, see notes 225-39 and accompanying text in the main report.

[FN2]. Marko Maglich of Fordham University School of Law with a translator represented the Crowley Program/Lawyers Committee delegation at the June 5, 1998 hearing.

[FN3]. Under the laws protecting civil servants, criminal defendants who are civil servants are not required to appear in court. Moreover, under the Law to Fight Terrorism, security forces accused of crimes while on duty may remain on active duty pending determination of the charges.

[FN4]. Note that there is a separate case against the prison guards where the indictment alleges 'injury,' a different crime. The victims' lawyers stressed in an earlier meeting with the delegation that the procedural maneuvers that allowed the various cases to be severed also allowed inconsistent charges against the different defendants in an incident in which it appeared that the

guards, police, and gendarmes acted together.

[FN5]. The delegation previously obtained copies of the gendarmes' reports. These consisted of virtually identical statements by different defendant-gendarmes, taken by two gendarme investigators and one police investigator. The reports are short, lack detail, and contain clear misstatements of fact. For example, the reports refer to the imprisoned victims as the "arrested and convicted," while the victims were in fact pre-trial detainees. The reports also assert that the victims had not been beaten on the head, while the autopsy pictures clearly show gaping wounds in the backs of the victims' heads.

[FN6]. Our other trial observations in Turkey had, by this time, made us familiar with this arrangement. In Turkey, the prosecutor--considered part of the court--sits on an equal level with the judges, while the defense or victims' lawyers sit below.

[FN7]. The normal procedure in Turkey is for lawyers to question witnesses through the judge; they would propose a question and the judge would ask it. Sometimes the lawyers would propose a question and the judge would pursue a line of questioning in that area. Occasionally, however, lawyers would address the witness directly. The witness faced the bench throughout, his back to us.

[FN8]. Police reports and statements from defendants argue that the victims died from injuries sustained during a fight with prison officers. The victims' lawyers contend that the fatal beatings took place in a separate room, outside the corridor where the original confrontation took place, and after the victims were bound and subdued. This contention is consistent with statements made by guards and other prisoners to the victims' lawyers outside the courtroom. However, because of obstacles to producing witnesses and to using witness testimony in civil servants' trials, the victims' lawyers have not been able to introduce any direct testimony supporting their version of events.

[FN9]. The delegation noted the apparent lack of participation by the prosecutor in the hearing. The prosecutor sat silently throughout. He did not question the witness. When the chief judge told the victims' lawyers that the safe passage of the families and the public into the courthouse was the prosecutor's responsibility, the prosecutor sat quietly, covering his mouth and looking down--a posture that he had adopted for much of the hearing.

[FN10]. While most or all of the victims had been in long-term pre-trial detention when they were killed, their arrests were for crimes within State Security Court jurisdiction and this Turkish Penal Code protection therefore did not apply to them.

[FN11]. We note here that facts as presented in the trial have not yet identified the specific officers alleged to have done the killings.

[FN12]. There are 83 lawyers of record for the victims.

[FN13]. As this report goes to press, Turkish authorities must decide whether to end this de facto moratorium and allow a June 29, 1999 sentence of execution to be carried out on Abdullah

Ocalan, leader of the outlawed Kuridstan Worker's Party ("PKK"). See Turkey: Will Ocalan Die?; Economist, July 3, 1999, at 41.

[FN14]. The members of the second Lawyers Committee delegation were Prof. Tracy Higgins of Fordham University School of Law, Sam Scott Miller, of the law firm of Orrick, Herrington and Sutcliffe, and a translator.

[FN15]. This delegation also observed a trial in Manisa, as well as the one in Diyarbakir, in a five-day trial observation mission to Turkey in January 1999. The full report on the Manisa trial is available from the Lawyers Committee for Human Rights and from the Joseph R. Crowley Program in International Human Rights at Fordham University School of Law.

[FN16]. Aksoy v. Turkey, Eur. Ct. H.R. judgment of Dec. 18, 1996, 26 Reports of Judgments and Decisions 2260, 2287, P 98 (1996-VI).

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