THE PROTECTION OF CIVIL AND POLITICAL RIGHTS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS THROUGH ACCESSION OF TURKEY TO THE EUROPEAN UNION

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CHAPTER 1

1. Introduction

Since the signing of the Ankara treaty[1] in 1963, one of the most problematic issues facing Turkey regarding joining of the European Union has been the issue of Human Rights. Through this thesis I hope to present an understanding of the fact that in order for the problems to be solved there is a certain mentality, which needs to be adopted. The human rights which are most frequently violated in Turkey are being studied by the European Union. This is due to Turkey's application to become a member of the European Union; hence, all criteria must be met and sustained. The application of the Copenhagen criteria is the starting point for several reforms on human rights in Turkey. The guidelines for the reforms are based on the judgments of the European Commission of Human Rights (hereinafter referred to as the Commission) and the European Court of Human Rights (hereinafter referred to as the Court). This thesis shall attempt to objectively analyse how Turkey must develop in order to fulfil the Copenhagen Criteria in order to join the European Union.

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[1] Also referred to as the *Gumruk Birligi* Treaty.

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2. History

The concept of human rights appeared after the Second World War. "Atrocities of National Socialism" brought about a strong focus on the role of human rights. Statesmen realized that security in one's territory required international security as well. In that respect, human rights had to be adequately protected at the national level to provide not only peace in each country but also in the world. It was clear that the internal and external dimensions of human rights were not to be thought of separately. The United Nations gave expression to this concept by the *Universal Declaration of Human Rights*, adopted on 10 December 1948.

3. The Council of Europe

At the European level it was thought that external policies necessitated a consideration of the internal policies as well because of the fact that the development and implementation of an effective external policy could only be undertaken in the context of appropriate internal institutional arrangements so as to ensure reciprocity and consistency. The International Committee of the Movements for the European Unity organized a "Congress of Europe" at The Hague, which could be considered as a step towards the establishment of the Council of Europe in August 1949.

Although the primary aim of the Council of Europe was the facilitation of economic and social progress with the aim of greater unity at the first session of the Consultative Assembly of the Council of Europe, it instructed the Committee on Legal and Administrative Questions to consider the details of the collective guarantee of human rights. Shortly after this period, in November 1950, seeking "*to take the first step for the collective enforcement of certain rights stated in Universal Declaration*", the European Convention for the Protection of human rights and Fundamental Freedoms was signed and this entered into force on 3rd September 1953[2]. During the negotiations

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[2] 213 United Nations Treaty Series, No.2889, p.221; Council of Europe, European Treaty Series, no.5, 4 November 1950;Council of Europe, Collected Texts, Strasbourg, 1994,pp.13-36. Originally signed by 12 member States, this Convention has attracted a wide adherence. It has since been supplemented by various Protocols.

on the Convention, the idea of establishing a Commission and also a Court was expressed by the delegates. The Court and the Commission were eventually set up in order to ensure the observance of the engagements undertaken by the high contracting parties under the ensuing Convention.

4. The European Union

The process of European integration was launched on 9th May 1950 when France officially proposed to create *"the first concrete foundation of a European federation"*. Six countries – Belgium, Germany, France, Italy, Luxembourg and the Netherlands – joined from the very beginning[3]. This step has been considered as the first in establishing the European Union. Although human rights have become a cornerstone of the European Union, from 1953 to 1987, there was no mention of human rights in the European Council and European Federation[4]. During that period Europe was busy with extending economic relations. When in 1957 the Treaty of Rome created the European Economic Community, the need for the Single Market emerged. Economic co-operation in the form of the elimination of customs and quota restrictions without external tariffs raised the question of human rights in some fields such as drug trafficking, free movement of workers, discrimination and immigration. The protection of human rights came to be accepted as part of the European Identity[5].

Another evolution of the European Community was the European Court of Justice. Its main task is that of ensuring that Community law is reflected in the treaties. However in 1969, in the case of *Stauder,*[6] reference was made to human rights as it was stated that

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[3] See http://europa.eu.int/abc-en.htm, date accessed 30/05/03

[4] Except the Joint Declaration in 1977 which was issued by stating the prime importance of the protection of fundamental rights and it was also ensuring that in the exercise of State powers they would continue to respect these rights.

[5] See Neuwahl, N. A., and Rosas, A., (ed), *The Treaty on European Union: A Step Forward in The Protection of Human Rights?, The European Union and Human Rights*, Martinus Nijhoff, 1995.

[6] Case 29/69, *Stauder v. Ulm*, 1969, European Court Reports

"fundamental rights are enshrined in the general principles of Community law and protected by the Court".

In 1992, the Maastricht Treaty[7], constituted a further step in the human rights field. According to the positivist view this gave rise to a strict legal obligation to observe the European Convention on Human Rights.

5. Foreign Policy

When Europe was moving from a community with economic aims to a political community, human rights started to play an important role in internal policies as well as external policies. Since the 1970s the European Community applied human rights in the framework of *"European Political Cooperation"* and in its relations to the third States[8].

After the Maastricht treaty the European Union was established with three pillars: the European Community, Common Foreign and Security Policy and Co-operation in the Area of Justice and Home Affairs.

Under the First Pillar, the E.C. developed an external human rights policy by *inter alia*, insisting on placing specific human rights clauses in all agreements concluded with third world countries. In the ambit of the Second Pillar, Common Foreign and Security Policy established five objectives, one of which was the development of respect for human rights and Fundamental Freedoms. On the other hand, the Third Pillar contained references to other human rights standards.

These three pillars demonstrate that human rights are regarded as one of the basic and fundamental principles of the European Union, having achieved great importance in the Union's external and internal policy. So much so, respect for human rights has been established as an explicit pre-condition for EU membership in the Amsterdam Treaty[9].

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[7] Entered into force on 1st November 1993.

[8] Zwamborn, M., *'Human Rights Promotion and Protection Through The External Relations of the European Community and The Twelve'* (1789) NQHR 11

[9] Signed in October 1997, it entered into force on 1 May 1999.

In June 1993, at its meeting in Copenhagen, the European Council decided on a number of political and economic criteria that candidate countries in Central and Eastern Europe must meet. The Political Criteria, termed *"The Copenhagen Political Criteria for Accession to the European Union"*, include stability of institutions, guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

6. Turkey's Journey to the European Union

As an associated member of the Council of Europe, Turkey was one of the countries to become a party to the European Convention on Human Rights[10]. Turkey's first application for membership of the European Union was made in April 1987 by the Government of Ozal. However, the Commission did not open the negotiations until the confirmation of Turkey's eligibility and approval of the European Accession Strategy in December 1997, and this, owing to the economic and political objections of member countries. In December 1997, the Union recognized the full applicant status of Turkey but also pointed out that respect for the Copenhagen Political Criteria would constitute a prior requirement for the opening of accession negotiations. In June 1998, the EU strategy was set in motion, which includes co-operation between the Commission and the Turkish authorities to bring Turkish legislation in line with the *acquis communitaire*.

Although the Commission Report of 1997 announced the formal candidacy of Turkey for E.U. membership, in December 1999 the Helsinki European Council stated that there was still much ground to be covered on the road to membership owing to the serious shortcomings in terms of human rights, and especially regarding the protection of minorities[11]. The E.U. Accession Partnership Document adopted in late 2000 has been described as a *"road-map*

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[10] The European Convention on Human Rights was signed in November 1950 and ratified by the law no. 6366 of March 1954. Protocol 1 was signed and ratified at the same time. However until 1987, Turkey did not recognize the right to individual petition and the competence of the Commission. It was only in 1990, that it accepted the jurisdiction of the Court.

[11] European Commission Report on Turkey, October 1999

for reform". In March 2001, to show that the government will monitor progress in the field of human rights, democracy and the rule of law, a Turkish National Plan was adopted. This was a type of response to the E.U. Accession Partnership Document and an attempt to negotiate on the E.U. human rights demands[12].

Although Turkey wishes to fulfil the obligation of becoming *"a democratic State of law, guaranteeing human rights and the rule of law"* under the national program, the rules are falling very far short of the targets that are to be reached in the short and the long term according to the E.C. Accession Agreement.

Under the National Program, the Turkish Government plans to make changes in following subjects:

a. Right to life
b. Prohibition of torture
c. Freedom of thought and expression
d. Cultural rights and individual freedoms[13]

CHAPTER 2
The Right to Life

1. Under the European Convention on Human Rights

Of all the norms of international law, the right to life must surely rank as the most basic and fundamental right, which informs all other rights. Most of the international human rights instruments begin their list of individual rights with the right to life because of its essential importance in the light of the fact that without the right to life no other right can exist. To indicate the most popular few one can refer to Article 3 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Civil and Political Rights, Article 4 of the American Convention on Human Rights and Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms Protocol Number 11.

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[12] Report On Turkey, Human Rights Watch Report, September 2000.

[13] Due to the fact that this dissertation is presented in abstract form, the analysis which follows is based on the right to life and the prohibition of torture. The student's full dissertation also discussed the freedom of expression and minority rights.

Initially protection of the right to life was recognized in the European Convention on human rights in the following terms:

> *"Every State party ... shall guarantee to all persons within its territory the following rights: a. Security of life and limb..."*

However, following discussions with the Committee of Experts and the Committee of Ministers, it was decided that a definition of each right was to be stated in the Convention. This lead to the present Article 2 which reads:

> *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force, which is no more than absolutely necessary;*
> *a. in defence of any person from unlawful violence;*
> *b. in order to effect a lawful arrestor to prevent the escape of a person lawfully detained;*
> *c. in action lawfully taken for the purpose of quelling a riot or insurrection."*

Although the aim of the drafters was to offer a definition of each right, this does not mean that the ambits of application of such protection are clear and unambiguous. A concise study of the application of the right to life under the Convention is required in this study as it will set the basis for a comparison with the position of Turkish laws and practice.

Although Article 2 protects the right to life of *"everyone"*, issues immediately arise as to the parameters of application of such protection, especially when discussing abortion. Does *"everyone"* include the fetus? The question remained unanswered by the Commission until the report given in *X v. United Kingdom*[14], where it held that the use of the term *"everyone"* and the context in which the term has been used in Article 2 indicates that it is not meant to include the unborn child. The commission then considered whether

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[14] Application 8416/78, D & R 19(1980)

the term "life" includes an unborn life and concluded that this term might also have different meanings according to the contexts in which it is used[15].

However in later decisions[16] the Commission accepted that in certain circumstances the fetus may enjoy a certain protection under Article 2, even if it bypassed a direct decision on this particular question by finding that the State had not infringed the wide discretion allowed to it under the European Convention on Human Rights. An example of this is the application of *H. v. Norway*[17] wherein the Commission accepted that the legislation of Norway did not exceed the discretion allowed to States in this matter[18], thereby leaving the question unanswered. Contrary to this however, the Inter-American Convention is clearer and states that life starts at the moment of conception[19].

Another ambiguity in the protection of this right is whether it includes the right to die. Various definitions of euthanasia exist; for our purposes we may cite the following:

> *"Euthanasia is the intentional killing of a patient, by act or omission, as a part of his or her medical care."*[20]

From the outset one should consider whether allowing the performance of euthanasia by a person who is not the patient, such as the doctor or a relative, could be regarded as *"intentionally depriving somebody of his life."* The term *"deprivation"* seems to imply that the act is involuntary from the point of view of the person being so deprived. With respect to euthanasia the patient is deprived of his life by a doctor or relative upon the patient's instructions.

Consequently, this seems to suggest that the wording of Article 2 does not exclude euthanasia. In this context it is worth mentioning

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[15] As above, pp.250-251

[16] Shelton, D., *'International Law on the Protection of the Fetus in Abortion and Protection of the Human Fetus'*, edited by Frankowski S. and Cole G., Martinus Nijhoff Publishers, 1987, pp.1-14

[17] Application 17004/90, d & R 73(1992), p. 155 (167)

[18] The national legislation allowed self-determined abortion with the first twelve weeks of pregnancy; between the twelfth and eighteenth week abortion should be decided upon by the Board of Doctors and after the eighteenth week it is only allowed where the mother's life is in danger.

[19] Article 4 Inter-American Convention

[20] Keown, J., (ed.), *'Euthanasia Examined'*, Cambridge University Press, 1996

that there are close links between euthanasia and the prohibition of torture and other forms of ill treatment. It is arguable that prolonging one's life when the person is severely ill constitutes at lest degrading treatment within the meaning of Article 3 of the European Convention on Human Rights[21]. The case of *Diana Pretty v. United Kingdom*[22] gives an excellent and actual illustration of this. The applicant submitted that the right to life gave her the right to die; she alleged that denying her right to assisted suicide was, by prolonging her life, making her endure inhuman or degrading treatment. The Court rejected this argument and emphasized that State parties have a positive obligation to protect life:

> *"Article 2 could not, without distortion of language be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."*

As to whether denying her claim would amount to inhuman and degrading treatment the Court held that:

> *"the positive obligation on the part of the State which had been invoked would require that the State sanctions actions to terminate life, an obligation that could not be derived from Article 3."*

Moving on, the responsibility to protect the right to life has been placed upon the legislator[23] by stating that everyone's right to life shall be protected by law. However, it is difficult to define to what extent a State may be in default. For instance, Fawcett[24] when dealing with the protection of law has considered whether the State is in default when motorists are not subjected to speed limits. He concludes that the right to life does not afford a guarantee against all threats to life but only against intentional deprivation and careless

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[21] See Theodore, O.,et al (ed.), *'The right to Life / The Right to Die, in The Jurisprudence of Human Rights: A Comparative Interpretive Approach'*, Abo Akademi University, Turku/Abo, 2000, p.97

[22] Application no. 2346/02

[23] Application 6839/74, X v. Ireland, d & R 7(1997)

[24] Fawcett, J.E.C., *'The Application of the European Convention on Human Rights'*, 2nd edition, Oxford, 1987

endangering of life[25], saving the cases mentioned in the second paragraph of Article 2. On the other hand, protection by law requires that laws for the protection of the right to life should be in existence and should be adequate, and similarly for the remedies offered in respect of violations. The expression *"by law"* refers not only to the texts of laws in the constitution or ordinary laws but also to the entire system and machinery of law, including the legislative and executive branches[26].

Under the provisions of the Convention, Article 2 has a positive and negative component. Positively, the State must adopt measures that are conducive to allowing one to live. Negatively, the right relates to the prohibition from arbitrary or unlawful deprivation of life by the State or its agents; this therefore, amounts to a right not to be killed by the State. The State is consequently also responsible to investigate State killings and is duty bound to punish offenders for such State killings. As pronounced by the Court, State parties should take measures not only to prevent arbitrary deprivation of life and to punish such acts, but also to prevent arbitrary killing by their own security forces, since the typical example of a violation of the right to life is the arrest or abduction and subsequent arbitrary or summary execution of political opponents by members of the army or police forces and through enforced disappearance.

The protection accorded by Article 2 is however not absolute and exceptions are recognized in the second paragraph. One such exception is the taking of life in execution of a sentence of a Court following a conviction of a crime for which the death penalty is provided by law. Although the death penalty is justified under Article 2, it has been limited by the same Article and other provisions of the Convention, such as Article 6. These limitations include the following:

a. the judicial decision in question must have been taken after a fair and public hearing in accordance with Article 6;
b. the punishment must be proportionate to the crime committed;
c. the conditions for the execution must not constitute inhuman and degrading treatment in the sense of Article 3. For instance,

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[25] As above, p. 37

[26] Ramcharan, B.G., *'The Concept and Dimensions of the Right to Life, The Right to Life in International Law'*, Martinus Nijhoff Publishers, 1985

a prolonged execution system such as the death row phenomenon, may constitute inhuman and degrading treatment;

d. the decision ordering the death penalty should not have retrospective effect in terms of Article 7;
e. the imposition and execution of the death penalty should respect the prohibition of discrimination under Article 14;

Case law shows that the death penalty has become a difficult dilemma to solve. In the *Soering* case[27] the Court dealt with imminent extradition and death row, and held that extradition of a person to a country where the death penalty still exists cannot be considered as an issue under Article 2 or Article 3 of the Convention. The Court stated that the existence of the death penalty is not a violation of Article 3 because it falls within the exceptions recognized in Article 2; however, the same could not be said for the death row phenomenon.

Although Article 2 does not consider judicial capital punishment as a violation of the right to life, an additional protocol focusing on this issue was adopted in 1985[28]. Article 1 of the Protocol reads as follows:

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

According to Article 1, the death penalty should be abolished in times of peace and State parties are allowed to introduce or to keep it in force only in times of war or at times of an imminent threat of war, as provided for in Article 2. Obviously, State parties are free to abolish the death penalty even during times of war or at a time of an imminent threat of war.

The discussion on the death penalty issue was finalized in Europe in February 2002, when the Council of Europe adopted Protocol 13, thereby banning the death penalty under all circumstances, including during times of war and imminent threat of war. Furthermore, no derogation or reservation is allowed. The adoption of this ban is a strong political signal, declaring that the death penalty is unacceptable in all circumstances. It is worth

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[27] Judgment 7th July 1989 pp.40 - 41

[28] Signed April 1983, it entered into force March 1985

mentioning that Protocol 13 was adopted after the events of the 11th September 2001.

On the other hand, the second paragraph of Article 2 provides for four exceptions wherein the deprivation of life is justified on the grounds that it results from the use of force for a given purpose[29]. These four exceptions are:

a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest;
c) to prevent the escape of a person lawfully detained;
d) in action lawfully taken for the purpose of quelling a riot or insurrection.

One is not to say that these exceptions have no restrictions whatsoever, since the use of the phrase *"no more than absolutely necessary"* amounts to the principle of proportionality. Therefore, should the use of force not be in conformity with the principle of proportionality, that deprivation would amount to a violation of Article 2(1). There must be proportionality between the measure of force used and the purpose pursued which is the *sine qua non* requirement stated in the second paragraph of Article 2 in order for that deprivation to be justified. In *X v. Belgium*[30], the applicant alleged that the deprivation of her husband's life violated Article 2 since the police killed him intentionally. The Commission rejected this allegation on the grounds that even were one to assume that the police killed the applicant's husband, one could not say that the deprivation of life was intentional.

In the *Stewart*[31] case the Commission held that the use of force must be absolutely necessary for one of the purposes in Article 2(2) for a consequent deprivation of life to be justified[32].

The *McCann*[33] case on the other hand, concerned the shooting of three suspects by soldiers of the British and Gibraltar authorities.

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[29] Dijk van, P., and Hoof van, G.J.H., *'Theory and Practice of the European Convention on Human Rights'*, Third Edition, Kluwer Law International, 1998, the Hague, p. 305

[30] Application 2758/66, Yearbook XII (1969), p. 174 (192)

[31] Application 10044/82, D & R 39(1985), p. 162 (169 – 171)

[32] The Commission here considered whether the death of the boy was a consequence of the use of the force contrary to Article 2.

[33] Judgment 27th September 1995, A. 324, p. 59

The authorities suspected that the Irish Republican Army was planning a terrorist attack on Gibraltar by means of a remote-controlled car bomb. It was decided that three suspects should be arrested and during their arrest they were shot by soldiers at close range. Upon investigation no weapons or remote controls were found. The Court held that the use of force by agents of the State in pursuance of one of the aims mentioned in Article 2(2) may be justified under Article 2 where it is based on an honest belief which is perceived, for good reason, to be valid at the time, but which subsequently turns out to be mistaken. Having regard to the dilemma confronting the authorities in the circumstances of the case, the Court found that the reactions of the soldiers did not, in themselves, give rise to a violation of Article 2. However, the Court also observed that this showed a failure by the authorities in handling the arrest operation, noting that all soldiers shot to kill the suspects. On the basis of these circumstances, the Court held that the authorities had failed to respect the right to life of the suspects by failing to exercise the greatest care in evaluating the information at their disposal prior to transmitting it to the soldiers, who shot to kill[34].

The type of derogation allowed from this right must also be considered. Under Article 15 of the European Convention on Human Rights no derogation from Article 2 is allowed except in respect of deaths resulting from lawful acts of war. This derogation must however be according to the criteria set out in Article 15(1), and there must be a public emergency which is actual and imminent, affecting the whole nation and threatening the continuance of the organized life of the community[35].

2. Protection of the Right to Life under Turkish Legislation

2.1 The Constitution of the Republic

Article 17 of the Constitution guarantees the right to life and *"physical integrity"* recognizing as justified interference only cases of medical necessity and when prescribed by law. Article 17 runs as follows:

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[34] Van Dijk, P., and Van Hoof, G.J.H., above at note 29, p.308

[35] See The Greek case, Commission Report 5th November 1969, para. 153 yearbook 12 p.72; Ireland v. United Kingdom Judgment 18th January 1978, A.25

> *"Everyone has a right to life and the right to protect and develop his material and spiritual entity. The physical integrity of the individual shall not be violated except for medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his or her consent. No one shall be subjected to torture ... Cases such as the execution of death penalties under Court sentences, the act of killing in self-defence, occurrence of death as a result of the use of a weapon permitted by law as a necessary measure during apprehension, the execution of warrants of arrest, the prevention of the escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, carrying out the orders of authorized bodies during the martial law or State of emergency, are outside of the scope of the provision of paragraph 1."*

The death penalty is also mentioned in Article 38 of the Constitution[36], which limits the use of the death penalty to cases of terrorist crimes, times of war or imminent threats of war. Although this seems to be in conformity with Article 2 of the European Convention on Human Rights, the exception made in respect of terrorist crimes is not in conformity with Protocol 6, which recognizes as exceptional only cases of war and imminent threats of war.

Although Turkey, *de facto*, has not executed the death penalty since 1984[37], in practice, death sentences have continued to be imposed in terms of the Anti-Terrorist Law. In 2000, seventeen persons were sentenced to death, as were ten others between January and August 2001.[38] In the case of the PKK leader Abdullah Ocalan, the Turkish Government[39] has agreed to postpone the execution of the sentence till the case is finalized before the Courts.

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[36] As amended on 17th October 2001

[37] According to the Turkish Constitution, only the Turkish Grand National Assembly is authorized to confirm the execution of the death penalty passed down by the Courts (Article 87). The Assembly has not decided on any execution since 1984.

[38] 2001 regular report on Turkey's Progress towards Accession, prepared by the Commission of the European Communities, Brussels.

[39] A dilemma arises at this point, because according to Turkish law the Government has no authority to postpone the execution of the death penalty. It is the Assembly that decides these issues.

In view of its intention to join the European Union, Turkey must seek to align itself with the Copenhagen Political Criteria and to abolish the death penalty, signing and ratifying Protocol 6 to the European Convention on Human Rights.

2.2 Turkey before the European Court of Human Rights

A number of cases have been brought to the Court regarding violations of the right to life. The majority of the complaints concern extra-judicial killings, disappearances or destruction of property,[40] and the decisions given by the Court show that serious violations occur.

2.3 Extra-Judicial Killings

The term *"extra-judicial killings"* refers to *"the taking of a person's life by governmental authorities without the minimal guarantees provided by the due process of law."*[41] There are four types of extra-judicial killings which have been exemplified in the proceedings brought before the Court:

a. Deaths occurring while the person is in the custody of the police or the military forces, and for which the authorities do not take responsibility. In these cases responsibility is avoided by claims that the detainee died of natural causes[42], or that the persons was killed for a just cause[43], or was later killed by unknown assailants[44]. In some cases the authorities deny that the individuals were detained at all and claim that the alleged detainees were probably killed in a settling of accounts by a common criminal[45] or when participating with the PKK in an armed clash with security forces who acted self-defence[46].

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[40] See Akkoc v. Turkey, Application No: 22947/93, Application No: 22948/93, Akkum v. Turkey, Demir v. Turkey, Tanrikulu v. Turkey, Mentes & Ors v. Turkey

[41] Kaufmann, E., Fagen, P.W., *'Extra-Judicial Executions: An insight into the Global Dimensions of a Human Rights Violation'* (1981) 3(4) Human Rights Quarterly, pp.81-100

[42] Tanli v. Turkey, Judgement 10th April 2002; Sanli v. Turkey, Judgment 22nd May 2002

[43] Bilgin v. Turkey, Judgment 17th July 2002

[44] Aydin v. Turkey, Judgment 25th September 1997

[45] Celikbilek v. Turkey, Judgment 22nd June 1999

[46] Ikincisoy v. Turkey, Akkum v. urkey, Application No: 26144/95

b. Deaths that occur during security operations. In these circumstances, authorities deny responsibility and even though they initiate investigations, these investigations are either never concluded, or alternatively, they are concluded by a finding that the individual has been killed for a good purpose[47] or killed by the PKK[48].
c. Deaths for which the authorities hold officials accountable and proceed with an investigation, however the applications concern the inordinate delay in the investigation and/or the failure to prosecute[49].
d. Killings carried out by different branches of the military forces, police forces, unidentified civilians or private agencies with access to police support, and for which the government does not hold itself accountable. These deaths may occur as a result of an armed attack[50], or by abduction which often includes torture.

2.4 Disappearances

The European Convention on Human Rights does not contain a definition of forced disappearances, however reference may be made to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances which states that:

> *"Enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of government, or by organized groups, or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to*

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[47] Aytekin v. Tureky, Judgment 18th September 1997 – the victim was killed when he was driving to a security checkpoint

[48] Ergi v. Turkey, Judgment 28th July 1998; Kaya v. Turkey, Judgment 20th February 1998

[49] Avsar v. Turkey, Judgment 10th July 2001

[50] Kilic v. Tureky, Judgment 28th January 2000; Tanrikulu v. Turkey, Judgment 8th July 1999

acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.[51]"

In the judgment of *Velasquez Rodriguez v. Honduras*[52], the Inter-American Court stated that the practice of disappearances often involves the secret execution without trial of the individual and the concealment of his body. It also held that prolonged isolation amounts in itself to cruel and inhuman treatment, harmful to the psychological and moral integrity of the victim. This judgment has also been referred to by the European Court in the case of *Kurt v. Turkey*[53] were the Court affirmed that

"the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion. This complex of rights includes the right to life and the right not to be subjected to ill treatment."

Violation of the right to life in these circumstances arises on two grounds: first, when the person disappears that person is deprived of his life in circumstances for which the State is responsible. A presumption that the individual has died as a result of forced disappearance is sufficient to raise State responsibility. Secondly, the State's failure to observe its obligation to protect life by positive law in accordance with Article 2, includes its failure to conduct an effective official investigation into allegations of a disappearance at the hands of State agents[54].

Cases of forced disappearances normally involve persons who are last seen in the custody of the police or military authorities and who are not acknowledged as having been detained[55]. In this regard, the Commission has held that the State has a continuing obligation to account for the fate of missing persons[56].

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[51] Preamble to the United Nations Declaration of Protection of All Persons from Enforced Disappearances

[52] Velasquez Rodrigez v. Honduras, judgment 29th July 1988

[53] Kurt v. Turkey, Judgment 25th May 1998; Application No: 24276/94

[54] Cakici v. Turkey, Judgment 8th July 1999

[55] Kurt v. Turkey, Judgment 28th January 1998; Cicek v. Turkey, Judgment 27th February 2002

[56] Loizidou v. Turkey (1998) 25 European Convention on Human Rights CD.9

2.5 Destruction of Property

The majority of cases brought before the Court concerning the right to life also include the destruction of property. Damage to homes or other properties by agents of the State may raise issues under three articles of the European Convention on Human Rights, that is, Articles 2 and 3 of the Convention and Article 1 of Protocol 1. Violations of Article 2 arise from the deaths of persons caused during the course of these destructions[57], however, the destruction of the property in itself has not been found to be a violation of the right to life.

2.6 Changes under the National Programme

2.7 Abolition of the Death Penalty

According to the Constitution of the Republic of Turkey, only the Turkish Grand National Assembly is authorized to give effect to a final sentence of capital punishment. The Turkish Government, sustained by the Turkish Grand National Assembly has since 1984, adopted a practice whereby it does not infringe upon the essence of the right to life. The National Plan only states that:

> *"The abolition of the death penalty in Turkish criminal law, its form and its scope, will be considered by the Turkish Grand National Assembly in the medium term."*

2.8 New Changes

The Turkish Grand National Assembly has adopted reform laws in respect of the death penalty[58]. The amendment abolishes the death penalty in the Turkish legal system except for times of war and imminent threat of war, in line with Protocol No. 6 to the Convention. These changes fully meet the criteria established in the Accession Partnership.

According to Article 120 of the Turkish Constitution, the Turkish Government is entitled to declare a state of emergency, whereby emergency measures are introduced in order to combat extraordinary

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[57] Sahin v. Turkey, Judgment 25th September 2001

[58] Act No. 4771, Third EU Reform Package, Approval date 3rd August 2002

political and military situations. The emergency rule was first introduced in 1984 and is still in force in the southeast part of Turkey.

An additional form of emergency rule known as *"State of Emergency Regional Governance"* was established by the Council of Ministers on 10th July 1987. Emergency governance was then declared in eight southeastern provinces of Turkey in order to eliminate the separatist movements in that region. The governor of the region is empowered to establish all necessary organisations and to requisition all necessary public personnel, equipment, vehicles or buildings from public institutions and to issue orders to all private or public security forces, including the gendarmerie.

Turks face difficulties with violations of the right to life particularly in the south-eastern region of the country, as is evidenced by a number of judgments delivered by the European Court. Although the military no longer directly carries out operations in that region, the gendarmerie still do under the operational control of the military. Civilian and military authorities remain publicly committed to the rule of law and respect for human rights however members of security forces, soldiers and gendarmerie – including the special police teams, anti-terror squads and village guards – have committed serious human rights violations. The changes that have been carried out under the national programme plan are not sufficient to prevent these violations, since they do not ensure the protection of rights of people who live in that region. Other than that, mentality change is needed in the region, as well as in the administration of government. Further laws have also to be enacted making possible the punishment of security and military forces acting in that region as an organ of the State.

CHAPTER 3
Prohibition of Torture

1. Under the European Convention on Human Rights

> *"Torture is a particularly barbaric violation of the right to physical and mental integrity, and represents a direct attack on the core of the human personality"*[59].

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[59] Janusz, S., (ed.), *'Human Rights: Concept and Standards'*, Dartmouth Publishing Company Limited and UNESCO Publishing, 2000

The prohibition of torture is systematically found to be formulated in the general international instruments on human rights immediately after the right to life and it is given special and particular attention in human rights jurisprudence in much the same way as the right to life. The right not to be subjected to torture has been stated by the International Court of Justice to have created *"erga omnes"* obligations upon the members of the international community[60].

Similarly, the U.S. Supreme Court in *Wilkerson v. Utah*[61] stated that torture was one of the crimes against humanity. The Swiss Federal Supreme Court, in its decision of 22nd March 1983, held that the prohibition of torture is not only a part of international customary law but also a part of *jus cogens*[62]. In the *Siderman de Blake v. Republic of Argentina,* the Court concluded that official acts of torture attributed to Argentina constituted a violation of a *jus cogens* norm of the highest status within international law. The *jus cogens* nature of the crime of torture provides a justification for States exercising universal jurisdiction against torture wherever the act may be committed. International law provides that such crimes may be punished by any State because the offenders are *"common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution ...*[63]

All international human rights-related legal instruments have accepted and offer protection for the prohibition of torture. To mention a few, one can refer to Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[64], Article 5 of the American Convention on Human Rights, the Inter-American

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[60] In the *Barcelona Traction Case*, the International Court of Justice stated "... *such obligations derived, for example, in international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person.*" I.C. J. Reports 4, at 32, (1970)

[61] Wilkerson v. Utah, 99 U.S. 130, 136 (1879)

[62] Swiss Federal Court, Judgment 22nd March 1983

[63] Steiner H. and Alston P., *'International Human Rights in Context, Law, Politics and Morals'*, Second Edition, Oxford University Press, 2000 p. 1203

[64] Signed on 10th December 1984 and entered into force on 26th December 1987

Convention to Prevent and Punish Torture[65], Article 3 of the European Convention on Human Rights, Protocol No. 11, and the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment[66].

At the European level, the Statute of the Council of Europe[67] proclaims that

> *"every member of the Council must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realization of the aim of the Council."*[68]

On the basis of this statement, in 1969, Greece was found guilty of torturing and ill-treating detainees, opponents of military junta and was suspended from its right of representation and requested to withdraw. Protection against torture was also given importance in the European Convention on Human Rights in Article 3 providing that:

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

Although the Universal Declaration of Human Rights includes the term *"cruel"*, this was not included in Article 3. This omission was not explained in the debates of the drafting committee, but experts have agreed that the difference in wording between the Declaration and the Convention does not express any difference in substance. Proposals were also made to include the prohibition of physical mutilation, as well as medical or scientific experimentation against one's will, but this was not adopted[69]. Article 3 protects against torture, inhuman or degrading treatment or punishment. It

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[65] Signed on 9th December 1985 and entered into force on 28th February 1987.

[66] Signed on 26th November 1987 and entered into force on 1st February 1989

[67] Adopted on 5th May 1949

[68] The Statute of the Council of Europe, Article 3

[69] Kelberg, L., *'Torture: International Rules and Procedures, in An End to Torture: Strategies for its Eradication'*, edited by Bertil Duner, Lond 1998, pp. 3- 38. However the jurisprudence of the Court incorporates the term *"cruel"* into the European Convention on Human Rights such as in the case of *Ireland v. UK.*

does not define these terms, but the European Convention organs have amply established principles defining these concepts. In relation to the concept of torture, the Commission stated that torture

> *"is often used to describe inhuman or degrading treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment."*[70]

In the same case, the Commission understood *"inhuman treatment"* to refer to at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. On the basis of principles established by the Commission and the Court, torture is said to contain two elements, namely: severe inhuman treatment and a specific purpose.

In *Ireland v. United Kingdom*[71] the Court, basing itself on a distinction between torture and inhuman treatment, held that:

> *"it was the intention that the Convention, with its distinction between torture and inhuman treatment, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."*

However, it is not clear from this judgment whether it is sufficient merely to show this level of suffering or whether a particular purpose must also be shown. In a recent case, *Aksoy v. Turkey*[72], the Court considered the treatment complained of in the following terms:

> *"This treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining omissions or information from the applicant. In addition to the severe pain, which it must have caused at the time, the medical evidence shows that it led to paralysis of both arms, which*

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[70] The Greek Case, 12 Yearbook of the European Convention on Human Rights, p. 186

[71] Ireland v. United Kingdom, Judgment 18th January 1978, a. 25. pp. 66- 67; see also Aksoy v. Turkey, Judgment 18th December 1996, Vol. 26, para. 63

[72] Reports 1996 – VI, Vol. 26, Para 63

lasted for some time ... the Court considers that this treatment was of such a serious and cruel nature and it can only be described as torture.[73]"

The case-law indicates that torture may be non-physical. In the *Greek Case*[74], the Commission held that:

"the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault could also constitute torture."

A decisive element of the treatment prohibited by Article 3, is not solely the intention or motive of the actor that causes physical or mental suffering, but also the nature of the act and its effect on the person undergoing the treatment. Furthermore, the absence of the consent of the victim constitutes a relevant factor[75], even if its absence does not in all cases give an inhuman character to a treatment affecting human integrity.

A less distinct difference is made between inhuman treatment or punishment and degrading treatment or punishment. In the case of *Tyrer*[76] the Court stated that:

"the suffering occasioned must attain a particular level before a punishment can be classified as 'inhuman' within the meaning of Article 3."

In examining whether a given punishment is to be considered degrading, the Court considered the degree of humiliation occasioned in all the circumstances of the particular case, giving particular attention to the nature and context of the punishment and the method of execution. In its report of the 5th November 1969, the Commission held that a treatment or punishment that grossly humiliates the person before others or forces him to act against his will or conscience can be considered as degrading treatment or punishment.[77] Thus, all treatment violating Article 3 need not necessarily be defined as

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[73] Judgment 18th December 1996, Reports 1996-VI, Vol. 26, Para. 64; se also Yagiz v. Turkey, Reports 1996 – III, Vol. 13, para 554 -55

[74] Report 5th November 1969, Yearbook XII(1969), p. 461

[75] For more details, see Van Dijk P. and Van Hoof G.J.H., above at note 29, p. 317

[76] Judgment 25th April 1978, A. 26, p. 14

[77] See Guzzardi case, B.35 (1983), p. 33

atrocious or gross but it must "*reach a certain minimum level of severity ...*"[78]

In assessing this standard of severity, which in the nature of things, is a relative concept, it considers all the circumstances of the case. Since a complaint is considered on the basis of its particular circumstances, this could lead to a situation where the same act could in one case give rise to a violation, while in other circumstances could fall short of a violation. In *Zeidler v. Germany* no breach of Article 3 was found where the applicant, as a prisoner, was put in a strait jacket and subjected to solitary confinement; however, in the case of *X v. Germany,* these actions were held to amount to a violation because they were inflicted on a prisoner with poor health.

Article 3 does not permit of any limitations, and unlike other human rights articles in the European Convention on Human Rights, it does not contain any limitation criteria. Nor may it be derogated from, even in the event of public emergency[79]. On this basis, the obligation imposed upon States not to torture and to prevent torture is valid in every circumstance, as this obligation is absolute.

Several applications regarding violations of Article 3 have been made by detained persons. When considering imprisonment conditions, reference must be made to the United Nations Standard Minimum Rules which set out rules on various issues such as the separation of categories of prisoners, their accommodation, personal hygiene, food, medical services, clothing and bedding, religion, discipline and punishment and contact with the outside world. These rules have become a point of reference for the European Court of Human Rights. The *Greek Case* constituted the first systematic application of these standards.

It is possible to derive, from the jurisprudence of the Commission and the Court, that isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and lack of physical exercise, may constitute

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[78] Ireland v. United Kingdom, Report 25th January 1976, B. 23 – I, (1980), p. 388, Judgments of 18th January 1978, A. 25, p. 65

[79] Ireland v. United Kingdom, Judgment 18th January 1978; Ahmed v. Austria, Judgment 17th December 1996, Reports 1996 – VI, Vol. 26, Para. 40

a violation of Article 3 if there is no balance between the requirements of security and the basic individual rights[80].

A few cases also concerned physical force exercised by police or prison officers against a person arrested or detainee. In *Ribitsch v. Austria*[81] the Court stated that:

> *"In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and ... an infringement of the right set forth in Article 3."*

Furthermore,

> *"where an individual is taken to the police custody in good health and is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article3"*[82] .

When considering the prohibition of torture from a European perspective one cannot refrain from mentioning the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment[83]. Unlike the traditional conventions, its purpose is to prevent torture before it occurs. In order to realize this purpose, Article 1 establishes a Committee, which is empowered to visit any place in which individuals are deprived of their liberty by public authorities within the jurisdiction of the State parties, without requiring the permission of the State.

The Committee arranges periodic and *ad hoc* visits to countries and controls the consequences of its *ad hoc* previous visits through its following visits. Although in principle, the report of the Committee on these visits is of a confidential nature, these may be made public if the States themselves ask for its publication wherein it includes its own comments[84]. Furthermore, if the Committee considers that

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[80] Krocher and Moller v. Switzerland, Judgment 16th December 1982, D & R 34 (1983) p. 24 – 52

[81] Judgment 4th December 1995, A. 336, p. 26

[82] See Aksoy case, Judgment 18th December 1996, Reports 1996 – VI, Vol. 26

[83] Opened for signature in November 1987.

[84] Article 11

a State Party has failed to co-operate or to improve the situation in the light of the Committee's recommendations, then the Committee has the discretion to issue a public statement.[85] So far, the Committee has used this sanction three times, twice in respect of Turkey[86], and once in respect of Russia.

2. Prohibition from Torture under Turkish Legislation

Several grievances related to torture have been brought before the European Court against Turkey, and on occasions, the Court has found a violation, particularly when the complaint was based on interrogation techniques. Article 17 of the Turkish Constitution prohibits torture stating that:

> *"No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity ...".*

Moreover, the Criminal Code recognizes acts of torture and ill treatment as criminal offences in Article 243 and Article 245 respectively. Despite these legal provisions which aim to prevent torture and punish the torturer, in practice they are not effective since the governmental authorities directly or indirectly support law enforcement personnel who are the perpetrators of the crime of torture[87].

This permissive attitude towards the crime of torture and ill treatment also emerges from the practice and case law of the Turkish Courts. For example, the Constitutional Court, in its decision based on the 1961 Constitution, delivered three decisions directly related to the prohibition of torture and other ill treatment incompatible with human dignity. When considering a situation of a detainee restrained by leg irons, the Court found such practice unconstitutional. However, the 'no food punishment' regulated in the Military Penal Code was declared constitutional by the Court on the 27th December 1965[88].

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[85] Article 10(2)

[86] In 1992 and 1996

[87] Semih, G. M., *'The Institution Process of the Turkish Type of Democracy'*, Amac Publishers 1989, Istanbul p. 55

[88] Case No: 1965/65

The judgment of the Turkish Court of Appeal also showed up another difficulty since until 1987 the Court was unable to define and clearly distinguish between torture, inhuman treatment and cruel treatment. The decision given in 1987 was an effort to try to define these concepts but, it is argued, it was unable to reach an acceptable conclusion since it found that being beaten in a way that causes the victim to stay away from work for a week cannot be considered as torture but only as inhuman treatment.

Although the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was opened for signature in November 1987, Turkey only signed it in January 1988, even if it was the first State to deposit an instrument of ratification. It also signed the First and Second Protocols to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Since 1999, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the CPT) has visited Turkey eight times more than any other State party. Unlike other State parties that have been visited more than once, Turkey has authorized the publication of any of the materials related to these visits and there are two public statements made by this Committee on the position of Turkey.

The first public statement was made in December 1992 and sets out details of the findings of the Committee's first three visits. In 1990, the CPT concluded that all forms of torture and ill treatment still exist in Turkey. Medical professionals examined the detainees and observed physical marks or conditions consistent with their allegations of torture by the police. In the fact-finding process, Turkish authorities also gave false information to the Committee. Furthermore, the Committee found that no progress had been made by the police in eliminating torture and ill treatment. The CPT recommended that legal safeguards against torture needed to be reinforced, and furthermore, education on human rights law matters and professional training for law enforcement officials had to be intensified[89].

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[89] See website http://www.cpt.coe.int/en/docspublic.htm, date accessed 30/05/03

On 6th December 1996, the CPT issued its second public statement with regard to Turkey. Again in this statement, the CPT found clear evidence of practices of torture and other forms of ill treatment at the hands of the Turkish police forces. The medical members of the CPT found marks of recent ill treatment. Accordingly, the CPT concluded that the authorities had failed to acknowledge the gravity of the situation. The statement argued that although public prosecutors receive allegations from detainees regarding ill treatment at the hands of the police, they failed to give them serious attention. Moreover, the provisions of the Turkish Penal Code (Articles 243 and 245) and the policy of the Turkish Courts in relation to them did not correspond to the seriousness of the offences involved[90].

3. Changes under the National Progamme

a. The Government has been aiming at strengthening legal and administrative measures, ranging from enhanced training programmes on human rights to the thorough and timely investigation of incidents of torture and prosecution of those responsible. Some recent measures introduced in this context are the following:
b. A circular was issued by the Office of the Prime Minister in June 1999 on the effective implementation of the Law on Apprehension, Custody and Interrogation and on the strict supervision of the implementation of this law.
c. In August 1999, provisions of the Criminal Code on torture and inhuman or degrading treatment were amended so as to align the definitions thereof with those of international conventions. Moreover, sanctions were increased in general, and criminal penalties were introduced for health services personnel issuing false reports on incidents of torture.
d. The Act on Prosecution of Civil Servants and other Public Employees was amended in December 1999, thereby speeding up the investigation and prosecution of public personnel.
e. In addition to the Ministries concerned, the Human Rights Directorate of the Office of the Prime Minister was authorized

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[90] As above

to undertake the necessary measures for the prevention of incidents of torture and inhuman or degrading treatment that may arise despite measures already in force.

f. Furthermore, a series of laws and amendments are planned to enhance the fight against torture and inhuman or degrading treatment. In this context, in the short term, the Turkish Government plans to review the Act on the Duties and Competences of the Police[91] and the relevant regulations, the Act on the Organisation, Duties and Competences of the Gendarmerie[92], and the Act on the Coast Guard Command[93]. Furthermore, it is also undertaking a modernization of the Forensic Medicine Institute.

In the medium term, the Turkish Government has planned to enact a new Criminal Code and a Code of Criminal Procedure; to explore the availability of financial resources for training law-enforcement personnel for the prevention of human rights violations; increase the use of technology in order to monitor places where incidents of human rights violations continue to occur; and to introduce legal provisions on the joint and several liability of the perpetrators of torture.

The national program also recognizes that changes in laws and practice are to be made, in order to align legal practices and procedures related to pre-trial detention with the provisions of the European Convention on Human Rights, the decisions of the Court and the recommendations of the CPT. With this in mind the national program aims at:

a) Undertaking legal arrangements to extend education at Police Academies from nine months to two years;
b) Putting into action, with the framework of the UN Decade of Education for Human Rights, the Human Rights Education Project of the Ministry of Interior and its Affiliated Agencies (2000 – 2007); and
c) Training law-enforcement personnel, within a period of seven years, in the framework of a project developed under the 1997

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[91] Act no. 2559
[92] Act no. 2803
[93] Act no. 2692

– 2000 Police and Human Rights Program of the Directorate of Human Rights of the Council of Europe.

Under the second reform package[94], the Act on the Duties and Competences of the Police[95] and the relevant regulations, and the Act on the Organisation, Duties and Competences of the Gendarmerie[96] have been amended to include an article aimed at providing for the prosecution of personnel responsible for the cruel, inhuman or degrading treatment complained of, and making it possible to seek compensation[97].

It is undeniable that there are thousands of cases pending before the national Courts and before the European Court concerning the terrible toll of lasting physical and psychological damage inflicted on Turkish citizens by police officers and gendarmes whose proper duty was to protect them. Unfortunately, especially after the military coup, torture became part of the procedures adopted by the military and public forces against civilians. The practice of torture in Turkey has often been publicly recognized even by high Turkish officials, such as the former General T. Sunalp, who stated in an interview held in 1988 that *"there was torture in Turkey, there is torture in Turkey and there will be."*[98] This shows how torture had become a part of every day affairs in Turkey during the 1980s.

According to the international human rights organisations *incommunicado* detention is the key to the problem of torture in Turkey. While police forces still hold detainees *incommunicado* with the permission of the State, it is hard to see an end to the practice of torture. This is because *incomunicado* detention provides the right conditions for the perpetrator owing to the absence of witnesses, thereby allowing the perpetrator to obscure or minimize medical evidence of abuse. It is through indirectly allowing police officers to perform acts of torture and ill treatment and by refraining from taking the necessary steps against such perpetrators, that the Government also plays a part in the practice of torture.

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[94] A package that has been called the European Union Harmonisation Laws

[95] Act no. 2559

[96] Act no. 2803

[97] See website www.eturkey.org.tr/abportal/uploads/files/Law, date accessed 02/08/02.

[98] Semih, G.M., above at note 87, p. 55

On the other hand, reports concerning the political situation in Turkey show that security officials use methods that do not leave physical traces of abuse, such as beating detainees with weighted bags instead of clubs, or applying electric shocks to a metal chair where detainees are made to sit, rather than directly to the body. Commonly employed methods of torture practiced in Turkey also include systematic beatings, stripping and blindfolding, exposure to extreme cold or high pressure water hoses, beatings on the soles of the feet, hanging by the arms, vaginal or anal rape with truncheons and squeezing and twisting of testicles; female detainees also often face sexual abuse.

Turkish legislation requires that detainees are medically examined twice – once during detention and before being arraigned or released. However, in practice the examinations are either not carried out or else, the examination occurs too long after an incident of torture has taken place thereby not revealing any definitive evidence. In some cases, the Government even took action against doctors who attempted to report torture. Dr Sebnem Korur Fincanci, who had reported and certified the death by torture of a man while in detention, lost her position at the Government Forensic Medicine Institute[99].

The European Court has considered several complaints of torture and often held that the domestic legal remedies in Turkey were insufficient since prosecutors had not taken adequate steps to investigate claims of torture[100]. In view of its application to join the European Union, the Government is trying to establish effective procedures. On the 24th July 2001, the Ministry of the Interior issued a circular that clarifies the duties and obligations of law enforcement officers with respect to custody, formal arrest, detention and interrogation. This was a sure step seeking the prevention of torture by bringing this regulation further in line with the judgments of the European Court in respect of pre-trial detention.

The Circular followed the important amendment to Article 19 of the Constitution whereby the period of police custody was reduced to four days from a previous established one of fifteen days. Another

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[99] Preventing Torture, Human Rights Watch Report, http://www.hrw.org/reports/2000/turkey2/Turk0009-01.htm, date accessed 03/08/02.

[100] Yildiz v. Turkey Application No: 32979/96

important amendment to this article is reflected in the notice which is to be given to the next of kin of any person detained. While the original version of Article 19 permitted for situations where the next of kin of the person arrested would not be informed in *"cases of definite necessity pertaining to the risks of revealing the scope and subject of the investigation compelling otherwise"*, the amended version does not allow this exception. However, the Law is still far from ensuring the complete prevention of torture since it excludes from such protection abuses from the competence of the State Security Courts and abuses occurring in state of emergency provinces.

Statistics prepared by the UN and human rights monitory bodies show that the situation on torture and mistreatment has improved, however there are some factors that have contributed to this decrease that must be noted. Primarily, there is a decreased use of *incommunicado* detention and a slight decline in detentions in general. Another important factor is the near complete absence of PKK activities which have eased the treatment of detainees by security officials. There has also been an increase in the awareness of this problem and many are expressing concern. Despite this, torture remains widespread in the South East and especially, in regard to the treatment of political prisoners. On the other hand, according to the Turkish authorities, during 2000 – 2001, 1,472 proceedings for allegations of ill treatment and 159 proceedings for allegations of torture were initiated against security force members[101].

Under the national program, a number of legislative measures have now been adopted. There has been the enactment of a law amending Article 16 of the Anti-Terrorist Act, and a law on the Establishment of Monitoring Boards for Punishment Enforcement Institutions and Detention Houses. These are a few of the first steps taken towards the prevention of torture. Although the Government has made progress by the changes effected to the law and through the education programmes given to the staff in the public service, it is still not understandable how the Government can divide the fight against torture into short-term or medium-term categories. The

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[101] See 2001 Regular Report on Turkey's Progress Towards Accession, Commission of the European Communities, Brussels

eradication of torture can only succeed by a strict systematic plan, which aims to achieve the goal immediately.

Furthermore, the distinction between torture, inhuman or degrading treatment developed by the European Court is being used by the Government in order to claim that there is no torture but only inhuman treatment, even if all these acts are prohibited under the European Convention on Human Rights. This shows that although there have been changes in the legislation, the real will to end torture in Turkey is somewhat lacking.

CONCLUSION

When I planned to write this work, Turkish law and practice was far from fulfilling the Copenhagen Criteria. However, various steps have been taken with the aim of bringing the legal position in line with international human rights standards. The Turkish Parliament has since February 2002 adopted three reform packages: the first one was adopted on the 6th February 2002, the second one on the 4th April 2002 and the last one was adopted on the 3rd August 2002.

The aim of these packages is to seek to bring at least the legislation in line with international human rights standards and thereby satisfying one of the requirements which would lead Turkey to membership within the European Union. To mention a few of the changes planned, one can refer to the abolition of the death penalty and amendments made in relation to freedom of expression.[102] In fact, such amendments were proposed upon a study of not only human rights documents but also of the judgments delivered by the European Court of Human Rights. These reform packages are an important signal of the determination of the majority of Turkey's political leaders to further align Turkey's position to the values and standards of the European Union. These important programmes have in fact been adopted in record time and with an overwhelming majority, bringing along significant development in human rights protection within Turkey. It is with the implementation of these packages that broadcasting in different languages and dialects is

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[102] These amendments were discussed in the fourth chapter of the original work. However as indicated in the introduction, this chapter was left out from this abridged version.

being allowed, and that possibilities for the teaching of minority languages have been furthered.

However, there is still some concern to be mentioned. The Turkish Government has made all these changes with the aim of becoming a member of the European Union, and hence it was the pressure of the European Union which was strongly insisting on these reforms that has brought about these changes in the national laws. The changes were not, therefore, occasioned by a real national change of mentality on the fundamental importance of human rights in a democratic society. Secondly, although many provisions of the Constitution have been changed there was, and still is, no a desire of adopting a new Constitution. This results in forever working within the parameters of a Constitution which was adopted and accepted by the Military Government during the coup in 1980. Under the provisions of this Constitution, the Military have established a National Security Council which meets with the Government once a month to discuss issues related to political matters and security issues. Consequently, through the power that the military was granted under the 1982 Constitution, it continues to exert influence over politics in a manner largely incompatible with the concept of a democratic State. It still publicly airs its views on a wide range of non-military issues and justifies these intrusions by reference to its purported role as a guardian of the Republic. The State Security Courts are still under the control of Military even if such Courts may judge civilians as well.

Neither have there been many changes in the electoral system. The Electoral Law of June 1983 still maintains the system of proportional representation on a provincial basis, but subdivides the more populous provinces for electoral purposes. This often leads to a democracy based on the majority rule limiting pluralism and the role of political participation of minorities within this regime.

Although these developments have been initiated with the aim of obtaining membership to the European Union, they help in sustaining a hope for improvement, an improvement that is required in every country since protection of human rights is always developing. In that respect, what has to be done in Turkey is that the overall reform package needs to be carefully implemented in order to fully assess its impact. However, the most important power in the protection of human rights is the political will of the Government and the peoples of the country. Without this will, there

will be law without implementation, thereby leading to no protection or development at all. To be able to achieve this will in the minds of the people, education is necessary to make people aware of their rights and also aware of the protectors of their rights.

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