

TURKEY

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

Turkey has a population of 65,293,000 people.¹ While the majority of the population is of Turkish ethnic origin, the Kurds, who mainly live in the South East of the country, constitute around 20% of the population. There are also Armenian, Assyrian and Greek communities.

The Republic of Turkey was founded on 29 October 1923. It is a republican parliamentary democracy and a unitary state divided administratively into 81 provinces. The present Constitution was adopted on 7 November 1982. Article 2 spells out the core constitutional principles: "The Republic of Turkey is a democratic, secular and social state ruled by law, respecting human rights in the spirit of social peace, of national solidarity and of justice, bound by the nationalism of Ataturk and founded on the principles pronounced in the preamble."

The Constitution contains a section on fundamental rights and duties in its Part Two. A range of civil, political, economic and social rights are guaranteed, such as the inviolability of the person, prohibition of forced labour and the right to personal liberty and security.² Moreover, Article 36 stipulates that everyone has access to the courts either as plaintiff or defendant through lawful means and procedure. According to Article 40, anyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. Citizens have the right of petition, namely to apply in writing to the competent authorities and to the Turkish Grand National Assembly with regard to requests and complaints concerning themselves or the public.³

The judicial system is divided into ordinary, administrative and military justice systems. The courts of first instance are composed of criminal courts (magistrate courts, general criminal courts and heavy penal (felony) courts) and civil courts (civil courts of peace, general civil courts and commercial courts) as well as specialised first instance courts, such as the state security courts. The Supreme Court of Appeals is the court of last instance for reviewing decisions and judgments rendered by the first instance courts.⁴ The administrative court system is in the first instance composed of administrative courts, tax courts and regional administrative courts. The Council of State is the last instance for reviewing decisions and judgments rendered

¹ See for general information "Core Document forming part of the Reports of states Parties: Turkey" UN Doc. HRI/CORE/1/Add.116, 1 October 2001, paras.1-10.

² See Articles 17 - 65 of the Constitution.

³ Article 74 of the Constitution.

⁴ Article 154 of the Constitution.

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by administrative courts.⁵ The highest court is the Constitutional Court. It examines the constitutionality of laws, decrees having the force of law as well as the rules of procedure of the Turkish Grand Assembly and issues final and binding decisions.⁶ The Constitution guarantees the independence of the courts and judges.⁷

Military justice is exercised by military courts and military disciplinary courts.⁸ The appeal courts are the Military High Court of Appeals and the High Military Administrative Court of Appeals.⁹ Military courts have jurisdiction to try military personnel for military offences, for offences committed by them against other military personnel or in military places, or for offences connected with military services and duties. They are also competent to try civilians for military offences and for offences committed while performing their duties specified by law, or against military personnel in military places specified by law.¹⁰

1.2. Incorporation and Status of International Law in Domestic Law

Turkey has ratified the following relevant international treaties:

- Genocide Convention (31 July 1950)
- Geneva Conventions 1949 (10 February 1954)
- European Convention on Human Rights (18 May 1954)
- Refugee Convention (30 March 1962)
- CEDAW (20 December 1985, Optional Protocol: 29 October 2002)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) (26 February 1988)
- Convention against Torture (1 September 1988; Turkey has also recognised the competence of the committee against torture under Article 21 and 22)
- CRC (4 April 1995)
- CERD (16 September 2002)

Turkey has signed but not ratified the International Covenant on Civil and Political Rights and is not a party to the two additional protocols to the Geneva Conventions.

International treaties become domestic law following the promulgation and entry into force of the law approving their ratification, adopted in accordance with Article 90 of the Turkish Constitution.¹¹ The question of the status of international treaties in the

⁵ Article 155 of the Constitution.

⁶ See Articles 146 to 153 of the Constitution.

⁷ Article 138 of the Constitution.

⁸ Article 145 of the Constitution.

⁹ Articles 156 and 157 of the Constitution.

¹⁰ See Military Criminal Code, No. 1632.

¹¹ Article 90 (1): "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification; (5) International agreements duly put into effect carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the ground that they are unconstitutional."

Turkish hierarchy of norms has not been finally clarified but most scholars appear to hold the view that international treaties are equal or above the Constitution.¹² Danistay, the Highest Administrative Court, held in 1991 that international agreements are hierarchically superior to the Turkish codes and have binding effect on administrative and judicial bodies.¹³ The provisions of international human rights treaties ratified by Turkey may therefore be directly invoked before Turkish courts.

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of Torture

The military conflict between Turkish government forces and the PKK (Kurdistan Workers Party) lasted from 1984 to 1999. This conflict has reportedly been accompanied by serious violations of human rights and humanitarian law by both parties to the conflict. Turkish government forces are reported to have employed extra-judicial killings, disappearances, torture and destruction of villages in the Southeast of Turkey on a large scale.¹⁴ In 1987, the Government declared a state of emergency in 8 provinces of South Eastern Turkey. The emergency law is laid down in the State of Emergency Act of 1983, Law No. 2935 (25 October 1983), Decree No. 285 (1987) which was amended by Decree No. 430 in 1990.¹⁵ In 1991, Turkey passed Act No. 3713, the Law to Fight Terrorism. After the military conflict subsided in 2000, the state of emergency was lifted in the various regions. Diyarbakir and Sirnak were the last two provinces - in November 2002.

In 2000, the Turkish government began to convert prison dormitories to smaller units, the "F-Type" Prisons. This move caused widespread concern by human rights organisations and the European Committee for the Prevention of Torture (CPT) in regard to possible prolonged solitary confinement. A large number of prisoners vehemently opposed the plan. This apparently led to an armed attack on the prisoners, resulting in the death of 30 prisoners and two soldiers and subsequent hunger strikes by more than 1,000 political prisoners.¹⁶

There are numerous reports that torture has been employed systematically in the fight against the PKK and other proponents of the Kurdish movement as well as other political opponents throughout the 1990s. Furthermore, there is evidence that

¹² See overview in Bingöllü, Mehves and Tanrikulu, Sezgin. *Turkey - A comparison of the EU Racial Equality Directive & Protocol 12 with anti-discrimination legislation*, European Roma Rights Centre, Interights, Migration Policy Group, Brussels, 2002, at pp. 6, 7. See also the ruling of the Constitutional Court No. 1980/11, cited in the above-mentioned publication, in which the Court declared that the Universal Declaration of Human Rights and the European Convention on Human Rights should be taken into consideration while assessing the compatibility of the disputed norm with the Constitution.

¹³ Danistay 5. Chamber, No. 1991/933, cited in Bingöllü, Mehves and Tanrikulu, Sezgin, *ibid.*

¹⁴ As evidenced in the cases against Turkey before the European Court of Human Rights beginning in the mid-1990s, see e.g. list of judgments in Kurdish Human Rights Project (KHRP) assisted cases in the European Court of Human Rights in KHRP, *Kaya v Turkey & Kiliç v Turkey: Failure to protect victims at risk*, June 2001, Appendix G.

¹⁵ Decree No. 430 replaced Decree No. 424 and 425, the adoption of which had necessitated a notice of derogation by Turkey to the Council of Europe as foreseen in Article 15 of the European Convention of Human Rights.

¹⁶ See OMCT, KHRP, *Euro-Mediterranean Human Rights, The F-Type Prison Crisis and the Repression of Human Rights Defenders in Turkey, Report from a Fact-Finding Mission to Istanbul and Ankara on 5-11 May 2001 with Updates*, October 2001.

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torture has also and continues to be employed frequently in the course of criminal investigations. The large numbers of torture survivors who have contacted Turkish treatment centres are indicative of the scale.¹⁷ The main perpetrators of torture appear to be members of the police force (responsible for public security in cities), the gendarmerie (part of the army and responsible for public security in the rural areas), and the army. The main victims of torture have been political activists, Kurds in general, persons detained for criminal offences, refugees and illegal immigrants as well as homosexuals and transsexuals.¹⁸ It has also been reported that women have frequently been subjected to sexual torture,¹⁹ and that children have been tortured in several cases.²⁰ The perpetrators of torture are said to employ a wide range of torture techniques that have apparently become more sophisticated over the last few years.²¹

Prison conditions in Turkey have also given rise to concern, including the continuing practice of incommunicado detention.²²

2.2. Domestic Responses

The Turkish government has not openly spoken out against torture even though it has recently adopted several laws and issued circulars aimed at curtailing the practice. In late 2001 and early 2002, the then government passed a number of laws relating to torture,²³ such as Law No. 4748,²⁴ but did not include the definition of torture set out in Article 1 of the Torture Convention in its bill on a new Penal Code. In November 2002, the new government of the AKP (Justice and Development Party) announced its intention to initiate legal reforms concerning torture, and in January 2003 it adopted a law reform package which, inter alia, provided that sentences for torture are not to be suspended, that the requirement of prior authorisation for the prosecution of public officials, which had been a major impediment to such

¹⁷ See the number of people who have applied for treatment for torture to the Human Rights Foundation Treatment and Rehabilitation Centres as mentioned in the annual reports of the Human Rights Foundation Turkey (HRFT), www.tihv.org.tr. In 1999, for example, 649 persons who had applied for treatment were diagnosed as having been subjected to torture. See, for a detailed analysis of torture methods, medical diagnosis and treatment, HRFT Treatment and Rehabilitation Centres Report 1999, pp. 23-45.

¹⁸ See for a detailed break-down, *HRFT Treatment and Rehabilitation Centres Report* 1999 *ibid.*, pp. 25 et seq. On the patterns of torture in Turkey, see also Amnesty International, *Turkey: Systematic torture continues in early 2002*, September 2002, AI-Index: EUR 44/38/00, Amnesty International, *An end to torture and impunity is overdue*, November 2001, AI-Index: EUR 44/026/2002, pp.14 et seq., and International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: The Balkans, The Caucasus, Europe, Central Asia and North America*, Report 2002 (Events of 2001), pp. 303, 304.

¹⁹ See Sexual Violence: perpetrated by the state, A Documentation of Victim Stories, by Project "Legal Aid for Women Raped or Sexually Assaulted by State Security Forces", 2000, documenting the stories of 113 women who approached the Istanbul based project from its inception in August 1997 to the end of 1999. See also, Amnesty International, End sexual violence against women in custody, February 2003, AI Index: EUR 44/006/2003, pp.15 et seq.

²⁰ OMCT, *Report concerning the Application of the Convention on the Rights of the Child by Turkey*, 2001, pp.17 et seq.

²¹ See HRFT Report, *supra*, pp. 32 et seq.

²² AI, End to torture, *supra*, p.9.

²³ See Amnesty International, *Turkey: Briefing on Law. No. 4744 ("Mini-Democracy Package")*, February 2002, AI-Index: EUR 44/012/2002.

²⁴ See *infra* IV, 1.2.

prosecutions, is abolished. It also specified that detainees are to be given medical examinations and that medical reports are to be issued upon entry and departure from prison.²⁵

The Turkish government has set up a number of human rights institutions in the course of the last decade, among them the Human Rights Inquiry Commission of the Turkish Grand National Assembly, established pursuant to Law No. 3686 of 5 December 1990.²⁶ The Human Rights Commission issued a widely publicised report in 1998 in which it highlighted the systematic nature of torture committed by state agents. The then Chairperson of the Commission, Sema Pişkinsüt, was not re-appointed in 2000 which was widely seen as a reaction to the exposure of torture in the above-mentioned 1998 report.²⁷ In November 2000, the Government established Human Rights Councils in all provinces and districts of Turkey.²⁸

2.3. International Responses

There have been strong international responses to the practice of torture in Turkey. The UN Committee against Torture considered, in a report following an inquiry under Article 20 CAT, that “even though only a small number of torture cases can be proved with absolute certainty, the copious testimony gathered is so consistent in its description of torture techniques and the places and circumstances in which torture is perpetrated that the existence of systematic torture in Turkey cannot be denied.”²⁹ Likewise, the European Committee for the Prevention of Torture observed in 1996 that “resort to torture and other forms of severe ill-treatment remains a common occurrence in police establishments in Turkey... it would be wrong to assume that the problem of torture and ill-treatment is simply an unfortunate consequence of the scale of terrorism in Turkey. The problem may well have been exacerbated by terrorism, but its roots go far deeper.”³⁰

The scale of the practice of torture has also been highlighted in numerous cases before the European Commission on Human Rights and the European Court of Human Rights relating to disappearances, torture and other serious human rights violations in which Turkey has been held to have violated its obligations under the Convention.³¹ The lack of implementation of the judgments of the European Court of

²⁵ Law 4778, published in *Rezmi Gazete* on 11 January 2003.

²⁶ See for the mandate of the Commission, Turkey: Core Document, *supra.*, para. 70.

²⁷ See for latest developments Saliha Çolak, Those who write the reports will suffer, not the torturers, 800 officers accused of torture did not face justice on account of the statute of limitations but Members of Parliament Sema Pişkinsüt and Hüseyin Akgül who prepared torture reports face prosecution, *Milliyet*, 11 October 2002.

²⁸ According to the Core Document, *supra.*, para. 81, the Councils are entrusted with investigating complaints of human rights abuses, transmitting their findings to the relevant authorities and providing information to local communities about human rights. By mid-2002, they appeared not to have played any significant role in combating the practice of torture. Para. 76 of the Core Document also refers to the Human Rights Council within the government structure, which was established by Law No. 4643 of 12 April 2001.

²⁹ Summary account of the results of the proceedings concerning the inquiry on Turkey, UN Doc. A/48/44/Add.1, 15 November 1993, at para. 38.

³⁰ CPT, Public Statement on Turkey, CPT/Inf (96) 34, 6 December 1996, para. 11.

³¹ See cases mentioned in the KHRP report, *Failure to protect victims at risk*, *supra.* In January 2003, Justice Minister Cicek stated that there were some 4,820 applications regarding Turkey to the European Court of Human Rights as of 23 January 2003. Of the decisions that have been taken so far, 286 verdicts had been against and 12 verdicts in favour of Turkey, 513 outcomes could be described as friendly solutions and 107 applications had been

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Human Rights has been recently criticised by the Parliamentary Assembly.³² While the CPT and the Special Rapporteur on Torture have commended Turkey on a number of legislative measures taken to combat torture in recent years, they have also observed that there continues to be a significantly high number of torture cases.³³

Finally, the observance of human rights is one of the criteria for the accession of Turkey to the European Union for which Turkey has applied in 1989.³⁴ The European Union has repeatedly stated that the human rights record of Turkey is such that, despite some improvements, it fails to meet the accession standards.³⁵

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

The prohibition of torture is stipulated in Article 17 (3) of the Turkish Constitution: "No one shall be subjected to torture or ill-treatment; no one shall be subjected to penalty or treatment incompatible with human dignity." Torture is also a crime according to Article 243 of the Turkish Penal Code (TPC), 1926, which contains the following definition of torture: "A civil servant or other public employee who resorts to torture or cruel, inhuman or degrading treatment in order to make a person confess a crime, to prevent a victim, plaintiff, somebody participating in a trial or a witness from reporting incidents, to prevent them from filing a formal complaint or because they filed a formal complaint or for any other reason, shall be sentenced to a heavy prison penalty of up to eight years and permanent or temporary disqualification from service."³⁶ There are no exceptional circumstances under which torture is permitted.

At the time of writing, a new Penal Code was being considered by the Turkish parliament. The latest draft of 2000 differentiates between simple, qualified and severe torture but does not incorporate the definition contained in Article 1 of the Torture Convention.³⁷

Article 135 (a) of the Criminal Procedure Code (TCPC)³⁸ and Article 23 of the 1998 regulation on Apprehension, Police Custody and Interrogation³⁹ contain specific prohibitions of torture.

rejected. The total amount of compensation paid or due to be paid by Turkey was TL 2.9 trillion. Turkey already paid \$425,516 compensation as of 23 January 2003 and still had to pay \$15,022,228 compensation. See Parliament paves way for retrial of former DEP deputies, see Turkish Daily News, 24 January 2003.

³² Res. 1297, 23 September 2002.

³³ *See Report to the Turkish Government on the visit to Turkey carried out by the CPT from 2 to 14 September 2001*, CPT/Inf (2002) 8, 24 April 2002 and *Report of the Special Rapporteur: Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, Addendum: Visit by the Special Rapporteur to Turkey*, UN Doc. E/CN.4/1999/61/Add.1, 27 January 1999.

³⁴ See Human Rights Association, Copenhagen Political Criteria and Turkey (Legislative Screening), October 2000.

³⁵ See section on civil and political rights in Commission of the European Communities, 2002 *Regular Report on Turkey's Progress towards Accession*, SEC (2002) 1412, 9 October 2002, pp.28 et seq.

³⁶ Translations are from AI, *Turkey, End to torture*, supra.

³⁷ See AI, *Turkey, End to torture*, supra, p.7.

³⁸ "The statements of the defendant and the testifying person must reflect his own free will. Physical or emotional interventions such as ill-treatment, torture, forceful administration of medicine, tiring or deception to hinder such a

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law

1.1. Criminal offences and punishment

Torture is a crime according to Article 243 of the TPC. It is punishable by up to eight years imprisonment and permanent or temporary disqualification from service. If the tortured person dies as a result of the injuries, the perpetrator will be punished according to the provisions of Article 452,⁴⁰ and if this torture has caused the victim permanent loss of an organ or any other permanent disability, the perpetrator will be punished in accordance with the provisions of Article 456 (battery). Article 245 of the TPC makes ill-treatment a crime which carries a punishment of three months to five years imprisonment.⁴¹

Murder is a crime according to Article 448.⁴² If the homicide is committed with torture, Article 450(3) provides for the death penalty. Battery, i.e. causing bodily pain, injury to health or mental disorder without the intention of killing, is punishable with various punishments ranging, depending on the degree of injuries, from six months to ten years.⁴³ Rape is a crime that carries a punishment of heavy imprisonment for not less than seven years.⁴⁴ Rape in custody does not constitute an aggravating circumstance.

reflection, or the use of physical force or violence or devices which distort the will are prohibited. No illegal advantage can be promised. Even if there is consent, testimonies extracted by use of the above- mentioned prohibited methods cannot be considered as evidence." The Minister of the Interior issued a circular, dated 24 July 2001, which clarifies duties and obligations of law enforcement officials with respect to custody, formal arrest, detention and interrogation of suspects. The Circular explicitly prohibits the use of torture and ill-treatment.

³⁹ "The statements of the suspect must be based on his own free will. Statement obtained through forbidden measures, even with the consent of the suspect, cannot be considered as evidence. For this reason, the person under custody; a) Cannot be submitted to physical or emotional interventions which disrupt free will, such as mistreatment hampering free will, torture, administering medicine by force, tiring, misleading, use of physical force or violence, use of devices."

⁴⁰ "Where an act of wounding or battery, not committed with intention of killing, results in the death of a person, the perpetrator shall be punished by temporary heavy imprisonment for not less than fifteen years in cases specified in Article 450" (Homicide as a result of torture).

⁴¹ "Those persons authorized to use force and all police officers who, while performing their duties or executing their superiors' orders, threaten to ill-treat or to cause bodily injury to a person or who actually beat or wound a person in circumstances other than those prescribed by laws and regulations, shall be punished by imprisonment for three months to five years and shall be temporarily disqualified from the civil service. Where the offence committed is more serious than the offences defined herein, the punishments for such offences shall be increased by one third to one half."

⁴² "Whoever maliciously kills another, shall be punished by heavy imprisonment for twenty-four to thirty years."

⁴³ See Articles 456-460 TPC.

⁴⁴ Article 416 TPC: " Whoever ravishes a person who is over fifteen years of age, by using force, violence or threats, or a person who, because of a physical or mental defect or on account of a cause other than the perpetrator's action or on account of a fraudulent means used by the perpetrator, was not in a state to resist the offender, shall be punished by heavy imprisonment for not less than seven years." See for a critical assessment of the narrow law on sexual violence in Turkey, AI, Turkey: End sexual violence, supra, p.14.

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The misuse of authority by a public officer is subject to a punishment of imprisonment for six months to three years.⁴⁵

According to Article 354 TPC (Law No.4449 (1999)), those concealing torture, by means of issuing inaccurate reports, particularly medical personnel, face sentences of between 4 and 8 years imprisonment.⁴⁶

Attempts are also punishable⁴⁷ and participation in crimes (aiding and abetting) carries in principle the same punishment as the one prescribed for that act.⁴⁸

1.2. Disciplinary Sanctions

Perpetrators of torture face disciplinary action according to criminal as well as administrative law. In criminal law, Article 243 of the TPC foresees permanent or temporary disqualification from service whereas Article 245 TPC stipulates temporary disqualification from service as a sanction.⁴⁹ Article 125 of the Law No. 657 (Law on Public Servants) and the relevant circulars for Police and Gendarmerie issued by the Minister of Interior, contain a list of measures that can be taken by competent superiors as disciplinary punishments. Article 125 lists as possible sanctions condemnation, lack of promotion, a fine, suspension or dismissal from office depending on the gravity of misconduct. The imposition of a sanction is in theory independent of the outcome of any criminal prosecution of an alleged perpetrator of torture.

2. The procedural law

2.1. Immunities

There is no amnesty law as such for perpetrators of torture. However, according to Article 8 of the Legislative Decree 430, which applies to Emergency Regions (see above), certain high-ranking officials enjoy absolute immunity, including from criminal prosecutions.⁵⁰

2.2. Statutes of Limitation

⁴⁵ Article 228 TPC.

⁴⁶ The concealment of other crimes carries a lesser punishment.

⁴⁷ Article 61 and 62 TPC.

⁴⁸ Articles 64 and 65 TPC.

⁴⁹ See Article 20 TPC for the meaning/consequences of a "Disqualification to hold public office". ((Art. 20 disqualification for physicians etc. specified by law, see wording, see also Article 35)). According to Article 31 TPC, heavy imprisonment for more than five years disqualifies the convicted person from holding office public office for life. Heavy imprisonment for three to five years disqualifies the convicted person from holding public office for a period equal to the sentence.

⁵⁰ "No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative degree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have caused without justification."

Statutes of limitations apply, as from the date of the commission of the criminal act, and vary depending on the length of punishment prescribed. Thus, a public prosecution for torture, including death resulting from torture (Article 243 TPC) would be dismissed after ten years.⁵¹ The statute of limitations for public prosecution can be interrupted through a variety of events, such as questioning of the accused.⁵² The effect of such an interruption is that the statute of limitation for the offence in question is extended for an additional period of half the period prescribed in Article 102 TPC. This means that there is an absolute statute of limitation in torture cases of fifteen years.

2.3. Investigations into torture

2.3.1. Criminal Proceedings

A complaint against a police officer can be made by a victim or by a lawyer on his behalf with the police, public prosecutor or local administrative authorities in writing or orally.⁵³ Complaints against public employees must not be abstract and general in nature, and individuals and/or incidents must be mentioned. Public prosecutors or bodies authorised to grant permission were until January 2003 bound not to process complaints that were not in accordance with this requirement.⁵⁴

Until the recent changes in January 2003, the public prosecutor⁵⁵ was authorised, subject to the required permission to prosecute, to make investigations either directly or through police officers that are obliged to execute orders of the prosecutor concerning legal procedures.⁵⁶

The public prosecutor is obliged to investigate allegations of torture *ex officio*.⁵⁷ Previously, if the complaint or the information about an alleged offence of torture concerned a public servant, i.e. a member of the police or the gendarmerie,⁵⁸ the public prosecutor was, until January 2003, according to Law 4483 (1999), not permitted to proceed with the investigation without prior permission of the respective

⁵¹ Article 102 (3) TPC.

⁵² See Article 104 TPC.

⁵³ Articles 151 to 153 TCPC. See also, the general right to petition a competent authority as stipulated in Article 74 of the Constitution.

⁵⁴ Article 4 (2) and (3) Law 4483.

⁵⁵ According to Articles 147 and 148 TCPC, the Public Prosecutor is a representative of the executive branch of the government.

⁵⁶ See Article 154 TCPC.

⁵⁷ Article 148 TCPC.

⁵⁸ Article 1: "The purpose of this law is to determine the bodies authorised to grant permission for the prosecution of civil servants and other public employees for crimes committed in connection with their duties and to arrange the procedure to be followed;" Article 2: "This law is applied for crimes committed by civil servants and other public employees who are performing their principal and permanent duties required by public services conducted by the state and other public authorities in accordance with the principles of general administration. The provisions of law concerning those who are subject to special investigation and prosecution procedures because of their duties and positions and provisions concerning the investigation and prosecution procedures mentioned in laws based on the character of the crime are reserved. Cases of being caught in the act that require heavy punishment are subject to general provisions. Provisions concerning discipline are reserved."

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superior.⁵⁹ The recent reforms that abolished this requirement⁶⁰ are welcome, given that it was one of the principle impediments to the prosecution of public officials.

Under the previous system, the public prosecutor had to secure any evidence that might otherwise be lost and send the case file to the superior in question without carrying out any investigation of its own.⁶¹ The competent authority had to open an internal investigation and prepare a report, made up of a factual part, stating the result of the investigation, and its views.⁶² The competent administrative body subsequently had to take a decision as to whether the investigation should proceed.⁶³ If permission to open an investigation was refused, the complainant, who had to be notified of the decision, or the public prosecutor could have lodged an appeal to the administrative court⁶⁴ within 10 days.⁶⁵ The court had to take a final decision within 3 months.⁶⁶

With regard to all investigations, medical examinations must be carried out before a person is taken into custody and after his/her release.⁶⁷ Article 10 of the 1998 Regulation on Apprehension, Police Custody and Interrogation stipulates that medical treatment of persons in police custody shall be conducted without police officers being present. In case of death in custody, an autopsy has to be made.⁶⁸

An investigating judge may order the arrest of the accused only on the basis of one of the grounds laid down in Article 104 TCPC.⁶⁹ Depending on the outcome of the investigations the prosecutor might either bring charges or decide not to prosecute. In the latter case, the complainant is to be informed of the decision pursuant to

⁵⁹ See Article 129(6) of the Constitution: "Prosecution 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." See, on Law 4483, Amnesty International, *Turkey - New Law on the Prosecution of Civil Servants: not a major step towards ending impunity for torturers*, July 2000, AI-Index: EUR 44/38/00.

⁶⁰ The need for prior authorisation has been removed by Article 33 of Law 4778, published on 11 January 2003.

⁶¹ Article 4 Law 4483: " Chief public prosecutors, upon receiving any information or complaint about civil servants and other public employees that falls within the scope of this law, or having informed about such a situation, shall take no action other than determining the evidence which needs to be compiled quickly and which may disappear, and without taking the testimony of the civil servant or other public employee against whom information or a complaint is received, shall forward a copy of the document to the relevant authority and request permission to initiate an investigation. Other authorities, civil servants and public employees, upon having been informed of a crime that falls under the scope of this law on the basis of information, complaints, documents or data, shall forward the issue to the body which is authorised to grant permission."

⁶² Article 5 and 6 Law 4483.

⁶³ Article 7 of Law 4483.

⁶⁴ Either to the Supreme Administrative Court or the Regional Administrative Court depending on the rank of the accused.

⁶⁵ Article 9 (1) – (3) Law 4483.

⁶⁶ Article 9 (4) Law 4483.

⁶⁷ This is now expressly stipulated in Article 32 of Law 4778 for the OHAL (Emergency Rule) Region, published on 11 January 2003.

⁶⁸ Article 79 TCPC.

⁶⁹ Each of these grounds might warrant an arrest: Strong indication of guilt; indications that the accused is planning to remove evidence; danger that the accused might escape; offence committed against the authority of the state or the government or against the security of the public or against public morals.

Article 164 TCPC, and can lodge an appeal against this decision to the Chief of the nearest court.⁷⁰ The Court might either refuse the petition in which case a new public prosecution may only be opened after newly discovered evidence has been produced or might order, if it finds the petition to be well founded, the public prosecutor to open a public prosecution.⁷¹

Victims of torture and their lawyers and/or witnesses do not enjoy any right to protection during criminal investigations. They also have limited procedural rights. A victim of a crime has the right to appeal if the Prosecutor decides not to prosecute and can bring a personal action without demanding the Public Prosecutor's participation in certain cases of minor offences, according to Article 344 TPC. An individual may bring such an action for battery (Article 456) but not for torture (Art. 243) and ill-treatment (Art. 245).

2.3.2. The Human Rights Inquiry Commission

The Human Rights Inquiry Commission is mandated to examine individual applications relating to alleged violations of human rights and to forward these to the relevant authorities when it deems necessary. There are neither formal requirements nor time limits for lodging a complaint. The Commission may, when investigating complaints, request information from ministries and other government departments and conduct inquiries on their premises. It is not empowered to initiate prosecutions of officials but may refer a specific case to the judiciary with a request to do so.⁷²

2.4. Trials

In case of an indictment against an alleged perpetrator of torture, there will be a preparatory judicial investigation.⁷³ If a decision to bring an accused to trial is made, the charges determine which court is competent. The Heavy Penal Court is competent to hear charges of torture (Art. 243 TPC) and murder and the Magistrates Court (Lower Criminal Court) is competent to hear charges of ill-treatment (Art. 245 TPC). Members of the army are tried by civilian courts for ordinary offence and by court-martial for military offences.⁷⁴ The procedural law applicable in trials is laid down in Articles 219 - 288 of the TCPC. It provides for an inquisitorial system.

Victims are able to join as a party to the procedure pursuant to Art.365 TCPC and may submit evidence in this respect. The court weighs the evidence submitted and renders judgment according to Article 253 of the TCPC. Guilt must be established

⁷⁰ Article 165 TCPC: "If the petitioner is, at the same time, the aggrieved, he may within fifteen days after notice, object to the Chief Justice of the nearest court which sees the Aggravated Felony cases and with which the Public Prosecutor is connected. The objection must be accompanied by proof and facts which justify the opening of prosecution, and must be signed by a lawyer, if one has appeared on behalf of the petitioner."

⁷¹ See Articles 167 and 168 of the TCPC respectively.

⁷² See on the Commission and its powers, Turkey: Core Document, supra, paras. 69 et seq.

⁷³ Articles 147-170 TCPC.

⁷⁴ See Article 145 (1) of the Constitution and Articles 9-14 of Law No. 535 on the establishment of courts martial and their rules of procedure. If the offence in question is a "military offence" under the Military Criminal Code Law no. 1632, criminal proceedings are in principle carried out in accordance with Law No. 353.

beyond a reasonable doubt. The right to appeal against judicial decisions is open either to the Public Prosecutor or the accused but not to the victim of the crime.⁷⁵

Judges have discretionary sentencing powers, and a sentence can be suspended pursuant to Article 89 TPC.⁷⁶ Following the changes adopted by Parliament in January 2003, sentences for torture and ill-treatment can no longer be suspended for the crime of torture.⁷⁷ The recently enacted Law No. 4616 stipulates that in cases where no judgment has been passed or ratified, a trial or judgment may be postponed for five years for offences committed before 23 April 1999 that carry a maximum sentence of less than 10 years imprisonment.⁷⁸ However, the provisions of Article 4 shall not be implemented with regard to, amongst others, Articles 243 TPC (Torture) and 414-418 TPC (Rape).⁷⁹

3. The Practice⁸⁰

3.1. Complaints

Torture survivors have lodged numerous complaints against alleged perpetrators. However, there are a large number of torture survivors, especially those charged with ordinary crimes, that have not complained out of a mistaken view that law-enforcement personnel has a right to torture them or because they are not aware of their rights. Moreover, a substantial number of torture survivors refrain from lodging complaints out of fear of repercussions. In rape in custody cases, the majority of women do not complain because of the negative stigma attached to rape.⁸¹ It also appears that a considerable number of torture survivors decide against lodging complaints in the light of evidentiary hurdles faced by victims and the small likelihood of a conviction and punishment of the perpetrators.

3.2. Investigations

⁷⁵ Article 289 TCPC.

⁷⁶ "If a person, who has no previous conviction other than a fine rendered by a judicial court, is sentenced to heavy or light fine, or temporary banishment, or imprisonment or light imprisonment for six months or less for a crime he has committed, and if the court, considering his past conduct and moral attitudes, believes that suspension of his punishment will cause him to abstain from committing felony in the future, the execution of his sentence may be suspended. In this event, the reasons for suspension shall be indicated in the text of the judgment."

⁷⁷ See Article 1 of Law 4778, published 11 January 2003.

⁷⁸ Article 4 of Law No. 4616 (21/12/2000) regarding conditional release and postponement of trials and sentences resulting from offences committed before 23 April 1999. See on Law 4616, Amnesty International, *The "Amnesty Law"- an ambiguous step*, August 2001, AI-Index: EUR 44/052/2001.

⁷⁹ Article 5 (a) of Law 4616.

⁸⁰ The information on this part is based on interviews with Turkish human rights lawyers unless indicated otherwise.

⁸¹ According to figures provided by Eren Keskin, who runs the project "Legal Aid for Women Raped or Sexually Assaulted by State Security Forces", out of 156 clients who approached the project during the period of January 2000 to June 2002, 65 were to afraid to take their cases further. See on this point also AI, Turkey: End sexual violence, supra, pp. 34 and 35.

In a considerable number of cases, permission to open an investigation has been refused by the respective administrative body or, after the introduction of Law 4483 in 1999, by the relevant authority.⁸²

Turkish human rights lawyers confirmed the findings of the European Court of Human Rights in its jurisprudence on Turkey: that in most cases, no prompt and impartial investigation is initiated.⁸³ Public officials accused of torture are reportedly hardly ever interrogated. In many cases, they are said to provide statements denying the allegations or, as happened in several cases, lodge counterclaims against the victims. Victims' claims have in several cases been dismissed out of hand. Instead of being assisted, numerous victims have apparently found themselves being the subject of interrogations by prosecutors or the police acting on their behalf concerning their alleged terrorist activities. Members of the police have reportedly failed to co-operate in investigations by not providing custody records, which are often not produced in the first place contrary to existing regulations, by shielding perpetrators or by manipulating evidence.

The majority of cases have apparently been dropped by prosecutors on the grounds of insufficient evidence. This relates in particular to the difficulty of identifying the perpetrators as torture victims are routinely blindfolded and to the lack of conclusive medical evidence. Detainees often only obtain access to doctors after the physical signs of torture have disappeared or, in rape cases, after the rape can no longer be reliably proven.⁸⁴ Doctors have repeatedly failed to carry out proper examinations, often because the examination is being carried out in the intimidating presence of police officers. Moreover, courts usually request medical reports from the State Forensic Institute, which has in several cases not carried out thorough investigations and dismissed allegations of torture. Furthermore, in death in custody cases, doctors often accept the reasoning of the police as to the cause of death, such as self-inflicted injuries or suicide, without further questioning. Some courts have, however, in the course of the last years, shown a willingness to accept medical reports issued by independent institutions as evidence. This is of special importance with respect to the psychological evidence of torture.⁸⁵

Victims, witnesses, victims' lawyers and human rights defenders have also faced harassment and intimidation for lodging complaints or for speaking out against torture practises. Victims have also apparently been pressurised by law enforcement

⁸² See the annual human rights reports of the Human Rights Foundation of Turkey and official figures contained in Response of the Turkish authorities to the report of the CPT on its visit to Turkey from 2 to 14 September, 24 November 2002, according to which, for the period from 1 January 1995 to 30 April 2002, permission was refused in 77 out of 640 cases that related to torture (Article 243 TPC) and 834 out of 5404 cases that related to ill-treatment (Article 245 TPC). According to figures released by the General Directorate of Police for the period of January 2000 to October 2001, permission was refused in 71 out of 535 cases that related to torture and in 1341 cases out of 4362 that related to ill-treatment. See Press Release, BIA Haber Merkezi, 26.6.2002, www.bianet.org/2002/06/26/haber_11165.htm. It should be noted that the figures released by the GDP do not correspond with those provided by the Turkish authorities to the CPT. For example, according to the GDP figures, no permission was given in 1341 cases to prosecuted officials on charges under Article 245 TPC in the period January 2000 to October 2001, while there have been only 834 cases where permission was refused according to the Turkish authorities' response to the CPT, which covered the period from 1 January 1995 to 30 April 2002.

⁸³ See on this point also the KHRP study cited above on (KHRP) assisted cases in the European Court of Human Rights in KHRP, *Kaya v Turkey & Kiliç v Turkey*.

⁸⁴ See AI, Turkey: End sexual violence, supra, pp.36 et seq.

⁸⁵ See generally, the recent annual reports by the Treatment Centers of the Human Rights Foundation and as to the role of doctors, AI, *End to torture*, supra, pp. 28 et seq.

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personnel into withdrawing their complaints. There is a particularly high risk for victims who complain while still in custody. Moreover, in some instances, victims who have been planning to take a case against Turkey to the European Court of Human Rights faced various threats and other forms of intimidation.⁸⁶ Finally, lawyers and human rights defenders have been attacked, have received death threats or have had a number of different charges brought against them for their human rights related work.⁸⁷

Even though confessions elicited through torture are not admissible in court,⁸⁸ the allegations of torture raised in court have in the majority of cases been dismissed by judges and not been followed up by independent investigations into the substance.

3.3. Prosecutions: Indictments, convictions, sentences

Against this background, only very few torture cases have come before the courts.⁸⁹ This includes cases forwarded by the Human Rights Inquiry Commission.⁹⁰ In those cases, the majority of the alleged perpetrators have been charged with ill-treatment under Article 243 TPC rather than torture under Article 245 TPC.⁹¹ There have also been several charges of rape in custody under Article 416 TPC rather than Article 243 TPC. The majority of trials ended without the conviction of the alleged perpetrators, the trials either being discontinued or the alleged perpetrators acquitted. A large number of trials against torturers have lasted for several years and have been delayed for such a long time that they had to be dropped. Many observers question

⁸⁶ So for example in the case of *Aksoy v Turkey*, ECHR, Case No.100/1995/606/694, it was alleged that Mr. Zeki Askoy was killed for bringing a complaint to the European Court of Human Rights. As the facts of the case were disputed, the Court could not find a violation of the right of petition under Article 25 of the Convention.

⁸⁷ *Promotion and Protection of Human Rights Defenders*, Report submitted by Ms. Hina Jalina, Special Representative of Secretary-General on Human Rights Defenders pursuant to the Commission on Human Rights Resolution 2000/61, UN Doc. E/CN.4/2002/106, 27 February 2002, paras. 364-384.

⁸⁸ Articles 135 (a) and 238 (2) TCPC.

⁸⁹ See figures released by Inspector General of Police and official figures for 1998/1999 referred to in AI, *End to torture*, supra, p.36, according to which the majority of cases were not prosecuted and only 1.7% and 2.9% of those accused for torture or ill-treatment were convicted respectively. The EC, 2001, Regular Report, supra, p.22, cites figures by Turkish authorities according to which, during the period 2000-2001, 1,472 proceedings for charges of ill-treatment and 159 proceedings for charges of torture were opened against security force members, as a result of which 36 persons were given prison sentences and another 50 were expelled from service.

⁹⁰ The Commission has received over 5000 applications since its inception. However, according to public information referred to in AI, *End to torture*, supra, p.36, out of 451 cases forwarded by the Commission to 41 prosecutor's offices, it only received a response in 69 cases. In 43 cases, the prosecutor's offices decided not to prosecute and in six cases the time limit had been exceeded. Only one case resulted in a trial.

⁹¹ According to official statistics, contained in Response of the Turkish authorities to the CPT report supra, out of the 640 officials in respect of whom a judicial investigation had been opened with regard to Article 243 TPC (Torture) in the period from 1 January 1995 to 30 April 2002, only 48 were convicted (no information as to sentences imposed, if any, given). The other data are as follows: Trial pending (against 139 officials); acquittal (278); decision not to commit for trial (81); decision not to prosecute (77); adjournment under law no.4616 (17). Out of the 5404 officials in respect of whom a judicial investigation had been opened in the period from 1 January 1995 to 30 April 2002, 255 were convicted. The other data are as follows: Trial pending (956); acquittal (1187); decision not to commit for trial (1572); decision not to prosecute (834); adjournment under law no.4616 (600). The figures released by the GDP, supra, are as follows: 535 investigations relating to Article 243 TPC (Torture) resulting in 18 police officers sentenced; 203 officers acquitted; 71 cases in which permission to prosecute was refused; 15 cases suspended adjourned under Law No.4616; and 48 cases where no prosecution was brought. 180 cases were still pending in June 2002. Out of the 4362 cases investigated in relation to Article 245 TPC (ill-treatment), 168 police officers were sentenced; 944 officers acquitted; 1341 cases in which permission to prosecute was refused; 472 cases where no prosecution was brought; 314 cases adjourned under Law No.4616; and 472 cases where no prosecution was brought. 1123 cases were still pending in June 2002.

the independence of judges, as apparently evidenced by their deferential attitude towards members of the police and army, lack of vigour in questioning the accused and in requesting and considering evidence, particularly medical reports.

The sentences imposed for torture have been comparatively low and have exceeded one year imprisonment in only a small number of cases. The Supreme Court Penal Board, in reducing a sentence in a torture case in 1995, ruled that the sentence, taking into consideration the circumstances of the case, should be closer to the lower limit laid down in Article 243 TPC.⁹² This case apparently reflects a general practice, which is not confined to torture cases, to apply the lower ceiling of the sentences stipulated for specific crimes. The execution of sentences has also been suspended in a considerable number of cases and those convicted of torture have been released after serving only a small portion of their overall sentence. While Law No. 4616 supposedly does not apply to torture,⁹³ figures released by the General Directorate of the Police in June 2002 include cases in which investigations in torture cases have been suspended on the basis of Law No. 4616. Moreover, Law No. 4616 does apply to cases of ill-treatment according to Article 245 TPC.

A recent exception is the sentence of ten police officers for the torture of the "Manisa children." In this case, which has attracted a great deal of attention world-wide, sixteen young people, aged 14 - 26, had been tortured⁹⁴ at the police headquarters in Manisa, western Turkey, between December 1995 and January 1996. Initially, the accused police officers had been acquitted in 1998. The prosecutor had also attempted to reduce the charges from torture to ill-treatment. However, in the retrial, the Manisa High Criminal Court found all eleven accused police officers guilty of torture and sentenced them to between five and eleven years imprisonment.⁹⁵ The case has been appealed on procedural grounds. The Appeal Court has to issue its decision by 25 June 2003 as this is the date when the time limit to confirm the sentences expires.

Independent disciplinary investigations against alleged perpetrators of torture have been instituted but have only in a few cases resulted in the imposition of administrative sanctions.⁹⁶ In the majority of cases, the only sanction has been an

⁹² In the case of Hasan Benek, a non-commissioned gendarmerie officer was sentenced by the Bolvadin Heavy Penal Court to 5 years imprisonment and removal from office for 40 months for torturing Cafer Bayrak and Abdulkadir Pamuk for two days in 1993. The Supreme Court overturned this decision and reduced the punishment in its binding decision of 13 July 1995 to 3 years and 4 months imprisonment and removal from office for 20 months, stating the following reasons: "The defendant acted with the aim of carrying out his duty and finding out the criminals, but committed a crime because of his youth, lack of professional experience, and the surrounding atmosphere. The defendant does not have a personal motive or interest involved in it. A sentence quite above the lower limit is in contravention of the law considering the aim of the defendant, the reason and the motive for the commitment of the crime and the social status of the defendant, who does not have a previous criminal record." See Human Rights Foundation, Turkey, Annual Report 1995, p.248.

⁹³ *Supra*.

⁹⁴ According to the victims, they were stripped naked, sexually assaulted, hung by the arms and subjected to electro-shocks.

⁹⁵ See Amnesty International: **Turkey: Sentencing of police officers a positive step in the fight against torture**, Press Release, October 2002, AI Index: EUR 44/052/2002.

⁹⁶ According to official statistics, see response of the Turkish authorities to CPT report, *supra*, administrative investigations had been opened from 1 January 1995 to 30 April 2002 in respect of 380 officials in relation to Article 243 TPC (Torture). The result was as follows: No penalty considered necessary (371 cases); Various penalties (7); Dismissal from the force (1). With regard to Article 245 TPC (Ill-treatment), 4409 administrative investigations had been opened in the same period, of which no penalty was considered necessary in respect of 4093 officials and various penalties were imposed against 316 officials. According to the GDP, *supra*, in the 535 cases investigated in

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entry in the personal file of the public official in question. Public officials suspected of having committed torture that are under investigation are commonly not suspended from service. It is only after a criminal conviction for torture that public officials have been dismissed from office.

relation to torture, internal administrative action was taken in 323 cases (not specified) and in the 4362 cases investigated in relation to ill-treatment, administrative investigations were opened in 3585 cases, resulting in the imposition of disciplinary sanctions in 221 cases and no action taken in 3364 cases.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

1.1. Constitutional Law

The Turkish Constitution stipulates that the state is obligated to provide compensation for unlawful treatment by holders of public office but it does not contain an express right to reparation. The relevant articles are Article 40 (right to access to authorities),⁹⁷ Article 125 (strict liability of administration)⁹⁸ and Article 129 (action for damages to be brought against the administration).⁹⁹

1.2. Administrative Law

Section 13 of the Administrative Courts Procedure Act, Law No. 2577 (6 January 1982) provides the basis for a claim for compensation. It reads: "Anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, and in any case within five years after the act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings."¹⁰⁰ Section 13 of Law No. 2577 allows a person who has suffered concrete, personal, actual and direct damage to take legal action against the government authority responsible for the wrongful treatment which will in the majority of torture cases either be the Minister of Interior or the Police Director.

There are no immunity laws and the provisions in the emergency laws do not exclude legal action against the responsible authority.¹⁰¹ In terms of procedure, a torture survivor has to claim compensation within one year after the alleged act was committed by firstly applying to the responsible authorities for compensation. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring proceedings before the competent administrative court.¹⁰² The

⁹⁷ "Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. Damages incurred by any person through unlawful treatment by holders of public office shall be compensated for by the State. The State reserves the right of recourse to the official responsible."

⁹⁸ "Recourse to judicial review shall be available against all actions and acts of the administration. The acts of the President of the Republic in his own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review. In suits filed against administrative acts, the statute of limitations shall be effective from the date of written notification. Judicial power is limited to the verification of the conformity of the actions and acts of the administration with law. No judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of an administrative action and act, or which removes discretionary powers... The administration shall be liable to compensate for damages resulting from its actions and acts."

⁹⁹ "Public servants and other public employees are obliged to carry out their duties with loyalty to the Constitution and the laws... Actions for damages arising from faults committed by public servants and other public employees in the exercise of their duties shall be brought against the administration only in accordance with the procedure and conditions prescribed by law, and subject to recourse to them."

¹⁰⁰ See also Article 13 Law No. 657 on Civil Servants, 1965: "People who are unjustly treated by public officials can bring a lawsuit directly to the public institution concerned which, in turn, has a right of recourse to the incriminated official."

¹⁰¹ Article 8, Decree No. 430.

¹⁰² See Law on the Organization and Duties of the Regional Administrative Courts, Administrative Courts and Tax Courts, Law No.2576, 6 January 1982; The Council of State Act, Law No. 2575, 6 January 1982.

applicable procedural law is laid down in the Administrative Courts Procedure Act.¹⁰³ The court will decide on the merits of the claim, i.e. determining whether the treatment specified in the application has been unlawful. The scope of compensation is determined by Articles 44 et seq. of the Code of Obligations, which is the applicable law for public and civil law cases. Whereas Article 46 of the Code of Obligations provides for pecuniary and Article 47 for non-pecuniary (moral) damages, the Code of Obligation does not envisage aggravated or punitive damages nor any other form of reparation.

Article 28 of the Administrative Courts Procedure Act specifies that a judgment should be implemented within thirty days. The losing side will have to pay all costs.

The state has the right to recover any compensation paid to the victim from the responsible public official.¹⁰⁴ On 26 March 2002, a new paragraph was inserted into Article 13 of the Law on the Prosecution of Civil Servants No. 657 by Law No. 4748, which provides a right of recourse of the state to officials responsible for compensation paid in accordance with the rulings of the European Court of Human Rights for torture, inhuman or degrading treatment.

1.3. Civil Law

In civil law, Article 41 of the Code of Obligation entitles a victim of a tort to seek damages from the tortfeasor. However, a legal action against the individual public official for damages inflicted in the course of the exercise of duties is as a general rule not possible according to Article 129 (5) of the Constitution and Articles 55 and 100 of the Code of Obligations. The torture survivor or relatives of the torture victim may, as an exception to this rule, bring a claim against the individual perpetrator before the competent civil court of first instance only in those cases where the act in question is held to be illegal and tortuous and thus would no longer constitute an "administrative act". This does not prejudice the right of the victim to sue the concerned authority on the basis of its joint liability as the employer of the responsible official.¹⁰⁵

In civil law, the victim must initiate an action within one year from the damage, or from when the aggrieved individual received knowledge of damage and of the person who had caused the damage. This cannot be longer than 10 years from the date when the act causing the damage occurred.¹⁰⁶ The case has to be brought before the competent court, the competence of which will depend on the amount of damages sought and the general rules on venue. The applicant must pay 5.5% of the amount of damages sought in advance.

Regarding the merits of the case, each party must prove the facts on which the claim is based, unless the contrary is stated by law.¹⁰⁷ There are several means of

¹⁰³ Administrative Courts Procedure Act, Law No. 2577 (6 January 1982).

¹⁰⁴ Article 129 of the Constitution and Article 13 Law No 657 on Civil Servants, 1965..

¹⁰⁵ Article 50 of the Code of Obligations.

¹⁰⁶ Article 60 Code of Obligations.

¹⁰⁷ Article 6 Code of Obligations.

evidence, in particular the testimony of witnesses and experts' reports.¹⁰⁸ The Civil Court is not bound by either the findings or the verdict in a criminal case concerning the guilt of the defendant.¹⁰⁹ In the final decision, in addition to deciding on the merits of the case, the costs to be paid by the losing party are fixed according to Articles 413 to 426 of the Code of Obligations whereby lawyer's fees are determined in accordance with an official tariff laid down in the law on practising lawyers.

The enforcement of judgements is regulated in the Turkish Code of Execution and Bankruptcy, Law 2004 (1932) and is carried out by the execution officer following application of the successful party.

1.4. Criminal Law

Victims of certain crimes may seek compensation as part of the criminal proceedings in accordance with Article 467 TPC.¹¹⁰ Such a course of action is however expressly confined to cases of homicide and battery and does therefore not apply to cases of torture, ill-treatment or rape. Article 467 TPC would therefore only be applicable if the act for which compensation was sought fell within the ambit of Part 9, Chapter I and II TPC. This could also apply to cases of torture under Article 243 TPC, which refers to the chapters concerning homicide and battery in stipulating the applicable punishment in cases of death or permanent injuries as a result of torture. Article 467 TPC does however arguably not apply in cases of ill-treatment not falling within the scope of Part 9, Chapter I and II.

The victim entitled to seek compensation under Article 467 TPC must file a personal suit. This will be judged separately by the competent criminal court. The conviction of an offender does not prejudice the right of those aggrieved by the offence from bringing an action for compensation for their damages or for restitution of their property.¹¹¹ In the event that the offence has injured a person's or a family's reputation, the court may order upon the request of the victim the payment of a sum to compensate for mental anguish, even if no material damages have resulted, in addition to restitution of property and compensation for damages.¹¹²

2. The Practice¹¹³

There have only been few cases in which torture survivor have initiated legal action to claim compensation but there are no cases known in which a torture survivor has received compensation for torture before domestic courts.¹¹⁴

¹⁰⁸ See Articles 245-274 and Articles 275-286 Code on Civil Law Procedures respectively. See for the types of evidence that can be brought before a Court, Articles 236-374 Code on Civil Law Procedures.

¹⁰⁹ Article 53 Code of Obligations.

¹¹⁰ "Damages or compensation or non-material loss arising from the crimes specified in these two chapters [refers to Part 9, Chapter I: Homicide and Chapter II: Battery] shall be separately adjudged upon the filing of a personal suit."

¹¹¹ Article 37 TPC.

¹¹² Article 38 TPC.

¹¹³ The information on this part is based on interviews with Turkish human rights lawyers.

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Several reasons account for the low number of cases and the lack of successful legal action. Torture survivors often lack awareness of their rights, especially in rural areas, or are afraid to come forward out of fear of repercussions. The outcome of compensation proceedings is in practice linked to the result of criminal investigations. The competent administrative court usually postpones the compensation case until the final decision is taken in respect of the criminal case, which might contribute to considerable delays given the lengthy practice in criminal cases.

A torture survivor may in principle be able to bring a civil suit against the responsible authorities without being able to identify the individual perpetrators but he or she would have to produce strong evidence, especially in the form of medical reports, to have any real prospect of success. In practice however, civil suits will only have a reasonable chance of success when the identity of the perpetrator is known. This is commonly not known due to the practice of blindfolding torture survivors.

There is no jurisprudence relating to civil claims for compensation. The lawyers interviewed in the course of this study did not consider that a civil action had a reasonable prospect of success. Moreover, the advance required to be paid by the plaintiff is seen as prohibitive. Also, legal aid is considered to be inadequate as it only covers court costs and not lawyers' fees.

Seeking compensation as part of criminal proceedings is likewise not viewed as a feasible option by lawyers, particularly in the light of the low conviction of alleged perpetrators of torture.

V. GOVERNMENT REPARATION MEASURES

There are at present no government reparation measures for torture victims.

Torture survivors may seek medical and psychological treatment in independent treatment centres¹¹⁵ but do not receive any specific support by the government. In contrast, victims of what is called terrorist activities are the beneficiaries of special state support.¹¹⁶

The Turkish parliament is presently considering a bill which envisages the setting up of a compensation fund for victims of serious human rights violations. This fund will however be used solely for compensating victims following judgments by the European Court of Human Rights that oblige Turkey to pay damages. Moreover, it does not foresee any other forms of reparation besides compensation.

¹¹⁴ The very fact that a large number of torture survivors and relatives of torture victims have taken their cases to the European Court of Human Rights is indicative of the failure of the Turkish legal system as applied to provide effective remedies resulting in adequate reparation.

¹¹⁵ The Turkish Human Rights Foundation has nationwide treatment centres and there are additional services provided by Tohav, a human rights organisation based in Istanbul.

¹¹⁶ Law No. 3713: Law to Fight Terrorism (12 April 1991), Article 22: "Citizens who are not civil servants, but suffer from terrorist activities with loss of life or property shall get special support from the Social Welfare and Solidarity Fund. The scope and amount of the support will be determined by the local authorities administering the Fund."

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES

1. Prosecution of acts of torture committed in a third country

1.1. The Law

1.1.1. Criminal Law

Article 5 TPC stipulates the active personality principle,¹¹⁷ and article 6, the passive personality principle.¹¹⁸ Moreover, Article 4 and 7 TPC allow for the prosecution and trial of foreigners who commit crimes in connection with the performance of an office or mission on behalf of Turkey in foreign countries or against a Turk or the Turkish Republic. Article 6 TPC stipulates the *aut dedere aut judicare* (extradite or prosecute) principle for crimes that carry a minimum punishment of three years.¹¹⁹

The TPC does not allow for the prosecution of foreign perpetrators of torture, whether the torture was committed against a Turk or a foreign national, since Article 243 TPC does not carry a minimum sentence of three years. Rape (Article 416 TPC) and Murder (Article 448 TPC) committed by a foreign national outside of Turkey against a foreign national could however be prosecuted.

The prosecution of an alleged perpetrator of torture under the aforementioned provisions is contingent upon his/her presence in Turkey and a request of the Minister of Justice.¹²⁰

Foreign diplomats are granted immunity from criminal proceedings as provided for in the Vienna Convention on Diplomatic Relations, which Turkey ratified on 24 December 1984.

1.1.2. Extradition Law

¹¹⁷ "A Turk who, in foreign countries, commits a felony other than one mentioned in Article 4 (which concerns crimes against the security of the Turkish Government), entailing a punishment under Turkish law which restricts personal liberty for a minimum period of three years, shall be punished, in accordance with Turkish laws, if he is in Turkey. If the felony committed entails a punishment restricting liberty for a minimum authorized period of less than 3 years, the initiation of prosecution may be upon the complaint of the injured party or the foreign Government. If the victim is a foreigner, the act must also entail a punishment according to the law of the country where it was committed."

¹¹⁸ "A foreigner who commits a felony other than one mentioned in Article 4, in a foreign country, against Turkey or a Turk, entailing punishment restricting liberty for a minimum period of one year under Turkish law, shall be punished in accordance with Turkish laws, if he is in Turkey. However, institution of prosecution is subject to the request of the Minister of Justice or the complaint of the injured party."

¹¹⁹ "If the felony is committed against a foreigner, the perpetrator shall be punished upon the request of the Minister of Justice, provided the following conditions exist: 1. The act, according to Turkish law, entails a punishment restricting liberty for a minimum authorized period of not less than three years; 2. No extradition treaty exists or the extradition of the perpetrator is rejected by the Government of the State in whose territory the felony was committed, or by the State of which the offender is a citizen. If a Turk or Foreigner commits felonies described in Chapter VIII, of Part 3 of the Turkish Criminal Code (which concerns Violence Against or Resistance to Government Forces and Opposition to the Laws) in a foreign country, prosecution shall be instituted directly, and the perpetrator shall be subject to the punishments provided for in the Articles of that Part."

¹²⁰ See Article 6 TPC, *ibid*.

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Extradition is granted in accordance with the conditions set out in Article 9 TPC which stipulates that no Turkish citizen can be extradited and that extradition for political or related crimes cannot be agreed to. In practice, extradition is carried out according to extradition treaties between Turkey and the requesting state, such as the 1957 European Convention on Extradition to which Turkey is a party, or, in the absence of such treaty, on the basis of reciprocity.

1.2. The practice

There have been no cases in which universal jurisdiction was exercised or extradition sought or granted in respect of torture.

2. Claiming reparation for acts of torture committed in a third country

The international jurisdiction of Turkish courts is established according to the rules of domestic law, i.e. the Code on Civil Law Procedure.¹²¹ As a general rule, jurisdiction is established at the domicile or residence of the defendant. In tort cases, suits can be filed with the competent court at the place where the action or omission constituting a tort was committed.¹²² According to these provisions, courts will only have jurisdiction if the perpetrator of torture has his/her domicile or residence in Turkey. A victim of torture committed abroad may also pursue a civil claim for compensation as part of any criminal proceedings taking place against the perpetrator according to the provisions outlined above.¹²³

Diplomats are granted immunity in line with the provisions of the Vienna Convention. There is no law on state immunity in Turkey and no precedents are known in which Turkish courts were called upon to rule on whether state immunity applies in cases relating to serious human rights violations such as torture.

There are no known cases in which foreign survivors have claimed reparation for torture committed abroad before Turkish courts.

¹²¹ Article 27 of the Law on Private International Law and International Law of Procedure, promulgated on 26 May 1982.

¹²² Article 21 Civil Procedure Code.

¹²³ Article 467 in conjunction with either Article 5 or 6 TPC.