COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF ÖCALAN v. TURKEY

(Application no. 46221/99)

JUDGMENT

STRASBOURG

12 May 2005

In the case of Öcalan v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mrs E. PALM,
Mr L. CAFLISCH,
Mr L. LOUCAIDES,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr V. BUTKEVYCH,
Mr J. HEDIGAN,
Mr M. UGREKHELIDZE,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mrs A. GYULUMYAN, *judges*,

and Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 9 June 2004 and 19 January 2005,

Delivers the following judgment, which was adopted in its final form after further consideration on 22 April 2005.

PROCEDURE

1. The case originated in an application (no. 46221/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Abdullah Öcalan ("the applicant"), on 16 February 1999.

2. The applicant was represented by Sir Sydney Kentridge, Mr M. Muller and Mr T. Otty, who are London barristers, and Ms A. Tuğluk of the Istanbul Bar. The Turkish Government ("the Government") were represented by their Co-Agents in the present case, Mr Ş. Alpaslan, of the Istanbul Bar, and Mr M. Özmen.

3. The applicant alleged, in particular, violations of various provisions of the Convention, namely Articles 2 (right to life), 3 (prohibition of ill-treatment), 5 (right to liberty and security), 6 (right to a fair trial), 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of

expression), 13 (right to an effective remedy), 14 (prohibition of discrimination), 18 (limitation on use of restrictions on rights) and 34 (right of individual application).

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court).

5. On 4 March 1999 the Court requested that the Government take interim measures within the meaning of Rule 39, notably to ensure that the requirements of Article 6 were complied with in proceedings which had been instituted against the applicant in the National Security Court and that the applicant was able to exercise his right of individual application to the Court effectively through lawyers of his own choosing.

On 8 March 1999 the Government filed their observations. The applicant's representatives did likewise on 12 March 1999.

On 23 March 1999 the Court invited the Government to clarify specific points concerning the measures that had been taken pursuant to Rule 39 to ensure that the applicant had a fair trial.

On 9 April 1999 the legal adviser at the Turkish Permanent Delegation to the Council of Europe stated that the Government were not prepared to reply to the Court's questions, as they went far beyond the scope of interim measures within the meaning of Rule 39.

On 29 April 1999 the Court decided to communicate the application to the Government for their observations on its admissibility and merits.

The Government filed their observations on 31 August 1999. The applicant filed his observations in reply on 27 September and 29 October 1999.

On 2 July 1999 one of the applicant's representatives requested that the Court invite the Government to "stay the decision to execute the death penalty imposed on the applicant on 29 June 1999 until the Court has decided the merits of his complaints".

On 6 July 1999 the Court decided that the request for Rule 39 to be applied could be considered if the applicant's sentence were upheld by the Court of Cassation. On 30 November 1999 the Court decided to indicate the following interim measure to the Government:

> "The Court requests the respondent State to take all necessary steps to ensure that the death penalty is not carried out so as to enable the Court to proceed effectively with the examination of the admissibility and merits of the applicant's complaints under the Convention."

6. A hearing concerning both the admissibility and the merits of the complaints (Rule 54 § 4) took place in public in the Human Rights Building, Strasbourg, on 21 November 2000.

7. By a decision of 14 December 2000, the application was declared partly admissible by a Chamber of the First Section, composed of: Mrs E. Palm, President, Mrs W. Thomassen, Mr Gaukur Jörundsson,

Mr R. Türmen, Mr C. Bîrsan, Mr J. Casadevall and Mr R. Maruste, judges, and Mr M. O'Boyle, Section Registrar.

8. The Chamber delivered its judgment on 12 March 2003. It held unanimously that there had been a violation of Article 5 § 4 of the Convention on account of the lack of a remedy by which the applicant could have the lawfulness of his detention in police custody determined; unanimously that there had been no violation of Article 5 § 1 of the Convention; unanimously that there had been a violation of Article 5 § 3 of the Convention on account of the failure to bring the applicant before a judge promptly after his arrest; by six votes to one that there had been a violation of Article 6 § 1 of the Convention in that the applicant had not been tried by an independent and impartial tribunal; unanimously that there had been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b) and (c), in that the applicant had not had a fair trial; unanimously that there had been no violation of Article 2 of the Convention; unanimously that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 2, as regards the implementation of the death penalty; unanimously that there had been no violation of Article 3 of the Convention as regards the complaint relating to the implementation of the death penalty; by six votes to one that there had been a violation of Article 3 of the Convention on account of the imposition of the death penalty following an unfair trial; unanimously that there had been no violation of Article 3 of the Convention either as regards the conditions in which the applicant had been transferred from Kenya to Turkey or the conditions of his detention on the island of İmralı; unanimously that no separate examination was necessary of the applicant's remaining complaints under Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken individually or in conjunction with the aforementioned provisions of the Convention; and unanimously that there had been no violation of Article 34 *in fine* of the Convention. The partly dissenting opinion of Mr Türmen was annexed to the judgment.

9. On 9 June 2003 the applicant, and on 11 June 2003 the Government, requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73.

On 9 July 2003 a panel of the Grand Chamber decided to refer the case to the Grand Chamber.

10. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. In accordance with Article 23 § 7 of the Convention and Rule 24 § 4, Mrs Palm continued to sit in the case following the expiry of her term of office.

11. The applicant and the Government each filed observations on the merits and comments on each other's observations.

12. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 June 2004 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr Ş. ALPASLAN,
Mr M. ÖZMEN, *Co-Agents*;
Mr E. İŞCAN,
Ms İ. ALTıNTAŞ,
Ms B. ARı,
Ms B. ÖZAYDıN,
Mr A. ÇIÇEK,
Mr M. TIRE,
Mr K. TAMBAŞAR,
Mr N. ÜSTÜNER,
Mr B. ÇALIŞKAN,
Mr O. NALCıOĞLU,
Ms N. ERDIM, *Counsel*;

(b) *for the applicant*

Sir Sydney KENTRIDGE QC,
Mr M. MULLER,
Mr T. OTTY,
Ms A. TUĞLUK, *Counsel*,
Mr K.YILDıZ,
Mr M. SAKHAR,
Mr İ. DÜNDAR
Mr F. AYDıNKAYA,
Mr L. CHRALAMBOUS,
Ms A. STOCK, *Advisers*.

The Court heard addresses by Sir Sydney Kentridge, Mr Muller, Mr Otty, Ms Tuğluk and Mr Alpaslan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

13. The applicant was born in 1949 and is currently being held in İmralı Prison (Mudanya, Bursa, Turkey). Prior to his arrest, he was the leader of the PKK (Workers' Party of Kurdistan).

The facts of the case, as submitted by the parties, may be summarised as follows.

A. The applicant's arrest and transfer to Turkey

14. On 9 October 1998 the applicant was expelled from Syria, where he had been living for many years. He arrived the same day in Greece, where the Greek authorities asked him to leave Greek territory within two hours and refused his application for political asylum. On 10 October 1998 the applicant travelled to Moscow in an aircraft that had been chartered by the Greek secret services. His application for political asylum in Russia was accepted by the Duma, but the Russian Prime Minister did not implement that decision.

15. On 12 November 1998 the applicant went to Rome, where he made an application for political asylum. The Italian authorities initially detained him but subsequently placed him under house arrest. Although they refused to extradite him to Turkey, they also rejected his application for refugee status and the applicant had to bow to pressure for him to leave Italy. After spending either one or two days in Russia, he returned to Greece, probably on 1 February 1999. The following day (2 February 1999), the applicant was taken to Kenya. He was met at Nairobi Airport by officials from the Greek embassy and accommodated at the ambassador's residence. He lodged an application with the Greek ambassador for political asylum in Greece, but never received a reply.

16. On 15 February 1999 the Kenyan Ministry of Foreign Affairs announced that Mr Öcalan had been on board an aircraft that had landed in Nairobi on 2 February 1999 and had entered Kenyan territory accompanied by Greek officials without declaring his identity or going through passport control. It added that the Kenyan Minister for Foreign Affairs had summoned the Greek ambassador in Nairobi in order to elicit information about the applicant's identity. After initially stating that the person concerned was not Mr Öcalan, on being pressed by the Kenyan authorities the Greek ambassador had gone on to acknowledge that it was in fact him. The Kenyan Minister for Foreign Affairs had been informed by the Greek ambassador that the authorities in Athens had agreed to arrange for Mr Öcalan's departure from Kenya.

The Kenyan Minister for Foreign Affairs also stated that Kenyan diplomatic missions abroad had been the target of terrorist attacks and that the applicant's presence in Kenya constituted a major security risk. In those circumstances, the Kenyan government was surprised that Greece, a State with which it enjoyed friendly relations, could knowingly have put Kenya in such a difficult position, exposing it to suspicion and the risk of attacks. Referring to the Greek ambassador's role in the events, the Kenyan

government indicated that it had serious reservations about his credibility and requested his immediate recall.

The Kenyan Minister for Foreign Affairs added that the Kenyan authorities had played no part in the applicant's arrest and had had no say in the choice of his final destination. The Minister had not been informed of any operations by Turkish forces at the time of the applicant's departure and there had been no consultations between the Kenyan and Turkish governments on the subject.

17. On the final day of his stay in Nairobi, the applicant was informed by the Greek ambassador after the latter had returned from a meeting with the Kenyan Minister for Foreign Affairs that he was free to leave for the destination of his choice and that the Netherlands were prepared to accept him.

On 15 February 1999 Kenyan officials went to the Greek embassy to take Mr Öcalan to the airport. The Greek ambassador said that he wished to accompany the applicant to the airport in person and a discussion between the ambassador and the Kenyan officials ensued. In the end, the applicant got into a car driven by a Kenyan official. On the way to the airport, this car left the convoy and, taking a route reserved for security personnel in the international transit area of Nairobi Airport, took him to an aircraft in which Turkish officials were waiting for him. The applicant was then arrested after boarding the aircraft at approximately 8 p.m.

18. The Turkish courts had issued seven warrants for Mr Öcalan's arrest and a wanted notice (Red Notice) had been circulated by Interpol. In each of those documents, the applicant was accused of founding an armed gang in order to destroy the territorial integrity of the Turkish State and of instigating various terrorist acts that had resulted in loss of life.

On the flight from Kenya to Turkey, the applicant was accompanied by an army doctor from the moment of his arrest. A video recording and photographs taken of Mr Öcalan in the aircraft for use by the police were leaked to the press and published. In the meantime, the inmates of İmralı Prison were transferred to other prisons.

19. The applicant was kept blindfolded throughout the flight except when the Turkish officials wore masks. The blindfold was removed as soon as the officials put their masks on. According to the Government, the blindfold was removed as soon as the aircraft entered Turkish airspace.

The applicant was taken into custody at İmralı Prison on 16 February 1999. On the journey from the airport in Turkey to İmralı Prison, he wore a hood. In photographs that were taken on the island of İmralı in Turkey, the applicant appears without a hood or blindfold. He later said that he had been given tranquillisers, probably at the Greek embassy in Nairobi.

B. Police custody on the island of İmralı

20. From 16 February 1999 onwards, the applicant was interrogated by members of the security forces. On 20 February 1999 a judge ruled on the basis of information in the case file that he should remain in police custody for a further three days as the interrogation had not been completed.

21. Judges and prosecutors from the Ankara National Security Court arrived on the island of İmralı on 21 February 1999.

22. According to the applicant, on 22 February 1999 sixteen lawyers instructed by his family applied to the National Security Court for permission to see him. They were informed verbally that only one lawyer would be allowed access. Lawyers who went to Mudanya (the embarkation point for the island of İmralı) on 23 February 1999 were told by the administrative authorities that they could not visit the applicant. The applicant also alleges that his lawyers were harassed by a crowd at the instigation of plain-clothes police officers or at least with their tacit approval.

23. As soon as the applicant's detention began, the island of İmralı was decreed a prohibited military zone. According to the applicant, the security arrangements in his case were managed by a "crisis desk" set up at Mudanya. It was the crisis desk that was responsible for granting lawyers and other visitors access to the applicant. According to the Government, special measures were taken to ensure the applicant's safety. He had many enemies who might have been tempted to make an attempt on his life, and it was for security reasons that lawyers were searched.

24. On 22 February 1999 the public prosecutor at the Ankara National Security Court questioned the applicant and took a statement from him as an accused. The applicant told the prosecutor that he was the founder of the PKK and its current leader. Initially, his and the PKK's aim had been to found an independent Kurdish State, but with the passage of time they had changed their objective and sought to secure a share of power for the Kurds as a free people who had played an important role in the founding of the Republic. The applicant confessed that village guards were a prime target for the PKK. He also confirmed that the PKK had used violent methods against civilians, in particular from 1987 onwards, but that he was personally opposed to such methods and had tried in vain to prevent their being used. He told the prosecutor that the warlords who wanted to seize power within the PKK had exerted part of their pressure on the Kurdish population; some of these warlords had been tried and found guilty by the PKK and had been executed with his personal approval. He acknowledged that the Turkish government's estimate of the number of those killed or wounded as a result of the PKK's activities was fairly accurate, that the actual number might even be higher, and that he had ordered the attacks as part of the armed struggle being waged by the PKK. He added that he had

decided in 1993 to declare a ceasefire, acting on a request by the Turkish President, Mr Özal, which had been conveyed to him by the Kurdish leader Celal Talabani. The applicant also told the prosecutor that after leaving Syria on 9 October 1998 he had gone first to Greece and then to Russia and Italy. When the latter two countries refused to grant him the status of political refugee, he had been taken to Kenya by the Greek secret services.

C. Appearance before a judge and pre-trial detention

25. On 23 February 1999 the applicant appeared before a judge of the Ankara National Security Court, who ordered that he should be detained pending trial. The applicant did not apply to the National Security Court to have that decision set aside. Before the judge he repeated the statement he had made to the prosecutor. He said that decisions taken within the PKK were submitted to him as founder and leader of the organisation for final approval. In the period from 1973 to 1978, the PKK's activities had been political. In 1977 and 1978, the PKK had organised armed attacks on the *ağalar* (major landowners). In 1979, following a visit by the applicant to Lebanon, the PKK had begun its paramilitary preparations. Since 1984, the PKK had carried on an armed struggle within Turkey. The regional leaders decided on armed actions and the applicant confirmed the general plan for such actions. He had taken the strategic and tactical decisions for the organisation as a whole. The units had carried out the decisions.

D. Contact with the outside world during the judicial investigation and conditions at İmralı Prison

26. On the day after the applicant's arrival in Turkey, his Turkish lawyer, Mr Feridun Çelik, asked to visit him. He was prevented by members of the security forces from leaving the premises of the Diyarbakır Human Rights Association and was subsequently arrested together with seven other lawyers.

27. At Istanbul Airport on 17 February 1999, Ms Böhler, Ms Prakken and their partner Mr Koppen were refused leave to enter Turkey to visit the applicant, on the grounds that they could not represent him in Turkey and that Ms Böhler's past history (she was suspected of having campaigned against Turkey's interests and of having taken part in meetings organised by the PKK) created a risk of prejudice to public order in Turkey.

28. On 25 February 1999 the applicant was able to talk to two of the sixteen lawyers who had asked to see him, Mr Z. Okçuoğlu and Mr H. Korkut. The first conversation took place in the presence of a judge and of members of the security forces wearing masks. The latter decided that it should not last longer than twenty minutes. The record of that conversation was handed over to the National Security Court. The

applicant's other representatives were given leave to have their authority to act before the Court signed and to see their client later.

29. During the preliminary investigation between 15 February 1999, when the applicant was arrested, and 24 April 1999, when the trial began, the applicant had twelve meetings in private with his lawyers. The dates and duration of the meetings were as follows: 11 March (45 minutes), 16 March (1 hour), 19 March (1 hour), 23 March (57 minutes), 26 March (1 hour 27 minutes), 2 April (1 hour), 6 April (1 hour), 8 April (61 minutes), 12 April (59 minutes), 15 April (1 hour), 19 April (1 hour) and 22 April (1 hour).

30. According to the applicant, his conversations with his lawyers were monitored from behind glass panels and filmed with a video camera. After the first two short visits, the applicant's contact with his lawyers was restricted to two visits per week, lasting an hour each. On each visit, the lawyers were searched five times and required to fill in a very detailed questionnaire. He and his advisers were not allowed to exchange documents or take notes at their meetings. The applicant's representatives were unable to give him either a copy of his case file (other than the bill of indictment, which was served by the prosecution) or any other material that would allow him to prepare his defence.

31. According to the Government, no restrictions were placed on the applicant as regards either the number of visits by his lawyers or their duration. Apart from the first visit, which took place under the supervision of a judge and members of the security forces, the meetings were held subject to the restrictions provided for in the Code of Criminal Procedure. In order to ensure their safety, the lawyers were taken to the island of İmralı by boat after embarking at a private quay. Hotel rooms were booked for them near the embarkation point. According to the Government, no restrictions were placed on the applicant's correspondence.

32. In the meantime, on 2 March 1999, delegates of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited İmralı Prison. In a letter of 22 March 1999 to the representatives of the Government, they indicated that the applicant was physically in good health and his cell was comfortable. The CPT drew the Government's attention to the fact that the applicant's solitary confinement and his limited access to the open air could affect him psychologically.

33. The CPT delegates next visited İmralı Prison, where the applicant is the sole inmate, as part of their mission to Turkey from 2 to 14 September 2001. The delegates found that the cell occupied by the applicant was large enough to accommodate a prisoner and equipped with a bed, table, armchair and bookshelves. It also had an air-conditioning system, washing and toilet facilities and a window overlooking an inner courtyard. The applicant had access to books, newspapers and a radio, but not to television programmes

or a telephone. However, he received twice daily medical checks by doctors and, in principle, was visited by his lawyers once a week.

34. On its visit of 16-17 February 2003, the CPT noted that visits to the applicant by his lawyers and members of his family were often cancelled owing to adverse weather conditions and inadequate means of transport.

E. The trial at the National Security Court

35. In a bill of indictment preferred on 24 April 1999 (and joined to several others that had been drawn up in the applicant's absence by various public prosecutors' offices between 1989 and 1998), the public prosecutor at the Ankara National Security Court accused the applicant of activities carried out for the purpose of bringing about the secession of part of the national territory. He sought the death penalty under Article 125 of the Criminal Code.

36. The case file ran to 17,000 pages and had been prepared by joining the files in seven sets of proceedings that were pending against the applicant in various national security courts. The applicant's lawyers were given access to the case file and the bill of indictment on 7 May 1999. Since the judicial authorities had not been able to supply a copy of the file, the applicant's lawyers had brought their own photocopier and finished copying the file on 15 May 1999. The prosecution had omitted to include certain documents in it, such as those concerning the applicant's arrest in Kenya and his transfer to Turkey.

37. The first two hearings, held in Ankara on 24 and 30 March 1999 in the applicant's absence, were taken up with procedural matters, such as third-party applications to intervene in the proceedings or the measures to be taken in readiness for the hearings on the island of İmralı and to enable the parties to take part in and members of the public to attend the trial. According to the Government, allegations that the lawyers were harassed by the police when they emerged from the first hearing in Ankara on 24 March 1999 have been the subject of a criminal investigation.

38. From 31 May to 29 June 1999, the National Security Court held eight hearings attended by the applicant on the island of İmralı. The applicant told the court, among other things, that he stood by his statements to the prosecutor and the judge. He confirmed that he was the most senior PKK agent and leader of the organisation and that he had instructed the members of the organisation to carry out certain acts. He said that he had not been ill-treated or verbally abused since his arrest. The applicant's representatives argued that the National Security Court could not be regarded as an independent and impartial tribunal within the meaning of Article 6 of the Convention. The applicant stated that, for his part, he accepted the court's jurisdiction.

39. The applicant said that he was willing to cooperate with the Turkish State in order to bring to an end the acts of violence associated with the Kurdish question and promised to halt the PKK's armed struggle. He indicated that he wished to "work for peace and fraternity and achieve that aim within the Republic of Turkey". He observed that, while he had initially envisaged an armed struggle for the independence of the population of Kurdish origin, that had been in reaction to the political pressure the government had exerted on the Kurdish population. When circumstances changed, he had decided on a different approach and limited his demands to autonomy or to a recognition of the Kurds' cultural rights within a democratic society. He accepted political responsibility for the PKK's general strategy, but disclaimed criminal liability for acts of violence which went beyond the PKK's stated policy. In order to highlight the rapprochement between the PKK and the government, he applied to have the government officials who had conducted negotiations with the PKK examined as witnesses for the defence. That application was refused by the National Security Court.

40. The applicant's lawyers' applications for the communication of additional documents or for further investigations in order to collect more evidence were refused by the National Security Court on the ground that they were delaying tactics.

41. The applicant's lawyers complained to the National Security Court about the restrictions and the difficulties they were having in conferring with their client. Their request to be permitted to confer with him during lunch breaks was accepted by the National Security Court at a hearing on 1 June 1999.

The lawyers did not appear at the hearing on 3 June 1999. At their request, transcripts of that hearing and copies of the documents placed in the file were given to them and the applicant on 4 June 1999. One of the applicant's counsel thanked the National Security Court for having established a dispassionate atmosphere.

42. On 8 June 1999 the prosecution made their final submissions. They sought the death penalty for the applicant under Article 125 of the Criminal Code.

The applicant's advisers requested a one-month adjournment to enable them to prepare their final submissions. The National Security Court granted them fifteen days, the statutory maximum allowed.

43. On 18 June 1999 Turkey's Grand National Assembly amended Article 143 of the Constitution to exclude both military judges and military prosecutors from national security courts. Similar amendments were made on 22 June 1999 to the law on national security courts.

44. At the hearing on 23 June 1999, the judge who had been appointed to replace the military judge sat as a member of the trial court for the first time. The National Security Court noted that the new judge had already read

the file and the transcripts, in accordance with Article 381 § 2 of the Code of Criminal Procedure, and had followed the proceedings from the outset and attended the hearings.

Counsel for the applicant opposed the appointment of the civilian judge owing to his previous involvement in the case. Their application for an order requiring him to stand down was dismissed by the National Security Court.

45. At the same hearing, counsel for the applicant set out the applicant's substantive defence to the charges.

46. On 29 June 1999, after hearing the applicant's final representations, the Ankara National Security Court found the applicant guilty of carrying out acts designed to bring about the secession of part of Turkey's territory and of training and leading a gang of armed terrorists for that purpose. It sentenced him to death under Article 125 of the Criminal Code. It found that the applicant was the founder and principal leader of the organisation, whose aim was to detach a part of the territory of the Republic of Turkey so as to form a Kurdish State with a political regime based on Marxist-Leninist ideology. The National Security Court found that it had been established that, following decisions taken by the applicant and on his orders and instructions, the PKK had carried out several armed attacks, bomb attacks, acts of sabotage and armed robberies, and that in the course of those acts of violence thousands of civilians, soldiers, police officers, village guards and public servants had been killed. The court did not accept that there were mitigating circumstances allowing the death penalty to be commuted to life imprisonment, having regard, among other things, to the very large number and the seriousness of the acts of violence, the thousands of deaths caused by them, including those of children, women and old people, and the major, pressing threat to the country that those acts posed.

F. The appeal on points of law

47. The applicant appealed on points of law against the above judgment, which, on account of the severity of the sentence, was in any event automatically subject to review by the Court of Cassation.

48. In a judgment adopted on 22 November 1999 and delivered on 25 November, the Court of Cassation upheld the judgment of 29 June 1999 in every respect. It held that the replacement of the military judge by a civilian judge during the trial did not require the earlier procedural steps to be taken again given that the new judge had followed the proceedings from the beginning and that the law itself required that the proceedings should continue from the stage they had reached at the time of the replacement. The Court of Cassation also pointed out that the Ankara National Security Court was empowered by law to hold its hearings outside the area of its territorial jurisdiction on security grounds, among other reasons.

49. As to the merits, the Court of Cassation had regard to the fact that the applicant was the founder and president of the PKK. It referred to the latter's aim and activities, namely that it sought the foundation of a Kurdish State on a territory that Turkey should be made to cede after an armed struggle and to that end carried out armed attacks and sabotage against the armed forces, industrial premises and tourist facilities in the hope of weakening the authority of the State. The PKK also had a political front (the ERNK) and a military wing (the ARNK), which operated under its control. Its income was derived mainly from "taxes", "fines", donations, subscriptions, and the proceeds of armed robberies, gun-running and drug trafficking. According to the Court of Cassation, the applicant led all three of these groups. In his speeches at party conferences, in his radio and television appearances and in the orders he had given to his activists, the applicant had instructed his supporters to resort to violence, indicated combat tactics, imposed penalties on those who did not obey his instructions and incited the civilian population to put words into action. As a result of the acts of violence carried out by the PKK from 1978 until the applicant's arrest (in all, 6,036 armed attacks, 3,071 bomb attacks, 388 armed robberies and 1,046 kidnappings), 4,472 civilians, 3,874 soldiers, 247 police officers and 1,225 village guards had died.

50. The Court of Cassation held that the PKK, founded and led by the applicant, represented a substantial, serious and pressing threat to the country's integrity. It ruled that the acts of which the applicant was accused constituted the offence laid down in Article 125 of the Criminal Code and that it was not necessary, in order for that provision to apply, for the applicant – the founder and president of the PKK and the instigator of the acts of violence committed by that organisation – personally to have used a weapon.

G. Commutation of the death penalty to life imprisonment

51. In October 2001, Article 38 of the Constitution was amended so that the death penalty could no longer be ordered or implemented other than in time of war or of imminent threat of war, or for acts of terrorism.

By Law no. 4771, which was published on 9 August 2002, the Turkish Grand National Assembly resolved, *inter alia*, to abolish the death penalty in peacetime (that is to say except in time of war or of imminent threat of war) and to make the necessary amendments to the relevant legislation, including the Criminal Code. As a result of the amendments, a prisoner whose death sentence for an act of terrorism has been commuted to life imprisonment must spend the rest of his life in prison.

By a judgment of 3 October 2002, the Ankara National Security Court commuted the applicant's death sentence to life imprisonment. It ruled that the offences under Article 125 of the Criminal Code of which the applicant

had been accused had been committed in peacetime and constituted terrorist acts.

The Nationalist Action Party (MHP – *Milliyetçi Hareket Partisi*), a political party with representatives in Parliament, applied to the Constitutional Court for an order setting aside certain provisions of Law no. 4771, including the provision abolishing the death penalty in peacetime for persons found guilty of terrorist offences. The Constitutional Court dismissed that application in a judgment of 27 December 2002.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Provisions on National Security Courts

52. Before the Constitution was amended on 18 June 1999, Article 143 provided that national security courts were to be composed of a president, two other full members and two substitute members. The president of the national security court, one of the full members and one of the substitute members were to be civilian judges, and the other full member and substitute member were to be military judges.

53. As amended by Law no. 4388 of 18 June 1999, Article 143 of the Constitution provides:

> "... National security courts shall be composed of a president, two other full members, a substitute member, a public prosecutor and a sufficient number of assistant prosecutors.
>
> The president, two full members, a substitute member and the public prosecutor shall be appointed from among judges and public prosecutors of the first rank and assistant prosecutors from among public prosecutors of other ranks. Appointments shall be made for four years by the Council of the National Legal Service, in accordance with procedures laid down in special legislation. Their terms of office shall be renewable ..."

54. The necessary amendments concerning the appointment of the judges and public prosecutors were made to Law no. 2845 on national security courts by Law no. 4390 of 22 June 1999. By the terms of provisional section 1 of Law no. 4390, the terms of office of the military judges and military prosecutors in service in the national security courts were to end on the date of publication of that Law (22 June 1999). By provisional section 3 of the same Law, proceedings pending in the national security courts on the date of publication of the Law were to continue from the stage they had reached by that date.

B. Article 125 of the Turkish Criminal Code

> "Anyone committing an act designed to subject the State or a part of the State to the domination of a foreign State, to diminish its independence or to impair its unity, or which is designed to remove from the administration of the State a part of the territory under its control shall be liable to the death penalty."

C. Review of the lawfulness of detention

55. The fourth paragraph of Article 128 of the Code of Criminal Procedure (as amended by Law no. 3842 of 18 November 1992) provides that any person who has been arrested and/or in respect of whom a prosecutor has made an order for his continued detention may challenge that measure before the appropriate district judge and, if successful, be released.

56. Section 1 of Law no. 466 on the payment of compensation to persons unlawfully arrested or detained provides:

> "Compensation shall be paid by the State in respect of all damage sustained by persons:
>
> (1) who have been arrested or detained under conditions or in circumstances incompatible with the Constitution or statute;
>
> (2) who have not been immediately informed of the reasons for their arrest or detention;
>
> (3) who have not been brought before a judicial officer after being arrested or detained within the time allowed by statute for that purpose;
>
> (4) who have been deprived of their liberty without a court order after the statutory time allowed for being brought before a judicial officer has expired;
>
> (5) whose close family have not been immediately informed of their arrest or detention;
>
> (6) who, after being arrested or detained in accordance with the law, are not subsequently committed for trial ..., or are acquitted or discharged after standing trial;
>
> (7) who have been sentenced to a term of imprisonment shorter than the period spent in detention or ordered to pay a pecuniary penalty only ..."

57. Article 144 of the Code of Criminal Procedure provides that, in principle, anyone arrested or detained pending trial may speak with his legal representative in private, whether or not the latter has an authority to act. The version of Article 144 that applied to proceedings in the national security courts at the material time was the version as worded prior to the amendments of 18 November 1992. It provided that members of the

national legal service were entitled to be present at meetings between the accused and their lawyers before the commencement of the criminal proceedings.

D. The Council of Europe and the death penalty

58. Protocol No. 6 to the Convention provides (Article 1): "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Article 2 of Protocol No. 6 provides:

> "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law."

Protocol No. 6 has been ratified by forty-four member States of the Council of Europe and signed by two others (Monaco and Russia).

Protocol No. 13 to the Convention, which provides for the abolition of the death penalty in all circumstances, was opened for signature on 3 May 2002. The Preamble to Protocol No. 13 reads:

> "The member States of the Council of Europe signatory hereto,
>
> Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;
>
> Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention');
>
> Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;
>
> Being resolved to take the final step in order to abolish the death penalty in all circumstances,
>
> Have agreed as follows:
>
> ..."

Article 1 of Protocol No. 13 states:

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

Protocol No. 13 has been signed by forty-three member States of the Council of Europe and ratified by twenty-nine. It came into force on 1 July 2003 after the tenth ratification. Three member States of the Council of Europe (Armenia, Azerbaijan and Russia) have not yet signed it.

In its Opinion No. 233 (2002) on the Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, the Parliamentary Assembly of the Council of Europe referred to:

> "2. ... its most recent resolutions on the subject, Resolution 1187 (1999) on Europe: a death-penalty free continent, and Resolution 1253 (2001) on the abolition of the death penalty in Council of Europe Observer states, in which it reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment and a violation of the most fundamental right, that to life itself, and that capital punishment has no place in civilised, democratic societies governed by the rule of law."

It further noted:

> "5. The second sentence of Article 2 of the European Convention on Human Rights still provides for the death penalty. It has long been in the interest of the Assembly to delete this sentence, thus matching theory with reality. This interest is strengthened by the fact that more modern national constitutional documents and international treaties no longer include such provisions."

59. Article X § 2 of the "Guidelines on human rights and the fight against terrorism", issued by the Committee of Ministers of the Council of Europe on 11 July 2002, reads:

> "Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out."

E. Other international developments concerning the death penalty

60. In a number of cases involving the application of the death penalty, the United Nations Human Rights Committee has observed that if the due process guarantees in Article 14 of the International Covenant on Civil and Political Rights were violated, a sentence of death which was carried out would not be in conformity with Article 6 § 2 of the Covenant, that sets out the circumstances in which it is permissible to give effect to the death penalty.

In *Reid v. Jamaica* (no. 250/1987), the Committee stated as follows:

> "[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes ... a violation of Article 6 of the Covenant. As the Committee noted in its general comment 6(7), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal'."

Similar observations were made by the Committee in *Daniel Mbenge v. Zaire* (Communication no. 16/1977, 8 September 1977, UN Doc. Supp.

no. 40, [A/38/40], at 134 [1983]) and *Wright v. Jamaica* (Communication no. 349/1989, UN Doc. CCPR/C/45/D/349/1989 [1992]).

In an advisory opinion on the right to information on consular assistance in the framework of the guarantees of due process of law (Advisory Opinion OC-16/99 of 1 October 1999), the Inter-American Court of Human Rights examined the implication of the guarantees of a fair procedure for Article 4 of the American Convention on Human Rights, which permitted the death penalty in certain circumstances. It stated:

> "134. It might be useful to recall that in a previous examination of Article 4 of the American Convention (Restrictions to the Death Penalty, Advisory Opinion OC-3/83 of 8 September, 1983, Series A No. 3) the Court observed that the application and imposition of capital punishment are governed by the principle that '[n]o one shall be arbitrarily deprived of his life'. Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to 'the most serious crimes'. In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it.
>
> 135. This tendency, evident in other inter-American and universal instruments, translates into the internationally recognised principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive. If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognises and protects is at stake: human life.
>
> 136. Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result."

In *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (judgment of 21 June 2002), the Inter-American Court stated:

> "Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake." (paragraph 148)

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

61. The applicant complained of violations of Article 5 §§ 1, 3 and 4 of the Convention, the relevant provisions of which read as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government pleaded a failure to exhaust domestic remedies with regard to the complaints under Article 5 §§ 1, 3 and 4. The Grand Chamber considers this preliminary objection to be closely linked to the merits of the complaint under Article 5 § 4 and will therefore examine it with that complaint, which – like the Chamber – it will deal with first.

A. Article 5 § 4 of the Convention

62. The applicant complained that, contrary to Article 5 § 4 of the Convention, he had not had an opportunity to take proceedings by which the lawfulness of his detention in police custody could be decided.

1. The applicant's submissions

63. The applicant asked the Grand Chamber to uphold the Chamber's finding that he had not had an effective remedy by which to have the lawfulness of his detention in police custody decided. He said that during the first ten days of his detention he had been held incommunicado and had been unable to contact his lawyers. He did not have the legal training that would have enabled him to lodge an appeal without the assistance of his lawyers. Nor had he been given access to the documents concerning his arrest that he needed to enable him to prepare such an appeal. The applicant maintained that in his case an application to a district judge or a judge of the National Security Court would have been an inadequate and illusory remedy that was bound to fail.

2. The Government's submissions

64. On this point, the Government contested the Chamber's reasons for finding that there had been a violation of Article 5 § 4. As they had done in the Chamber proceedings, they also raised a preliminary objection of failure to exhaust domestic remedies with regard to all the Article 5 complaints. Neither the applicant's lawyers nor his close relatives had lodged an application with the Mudanya Court of First Instance or a judge of the Ankara National Security Court to challenge his arrest or detention by the police, the length of such detention, or the order requiring his detention pending trial. The Government referred to Article 128 § 4 of the Code of Criminal Procedure, which entitled suspects to apply to the district judge to have the lawfulness of their detention decided or to challenge an order by the public prosecutor's office that they should remain in custody. If the district judge considered the application well-founded, he could order the police not to question the suspect further and to bring him or her before the public prosecutor forthwith. The Government added that by virtue of Article 144 of the Code of Criminal Procedure the applicant's representatives did not require a written authority to make such an application.

65. The Government provided the Grand Chamber with examples of decisions in which the courts had examined applications from persons in police custody for a decision on the lawfulness of their detention and, in the absence of an order from the public prosecutor authorising their continued detention, had made an order for the prisoners to be brought before the judge responsible for pre-trial detention at the end of the statutory period for which they could be held in police custody. Each of the applications referred to by the Government was decided on the papers, in the absence of the prisoner.

3. The Court's assessment

66. The remedy required by Article 5 § 4 must be of a judicial nature, which implies that "the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty" (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 24, § 60). Furthermore, Article 5 § 4 requires that the court invited to rule on the lawfulness of the detention should have jurisdiction to order release if the detention is unlawful (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 30, § 61).

67. In addition, in accordance with the generally recognised rules of international law, there may be special grounds for releasing the applicant from the obligation to exhaust the available domestic remedies (see *Van*

Oosterwijck v. Belgium, judgment of 6 November 1980, Series A no. 40, pp. 18-19, §§ 36-40).

68. Having examined the examples of judicial decisions produced by the Government, the Court finds that the domestic courts' review of the lawfulness of the detention in these cases (which concerned the arrest, the police custody or the length of such custody) did not comply with the requirements of Article 5 § 4 in two respects. Firstly, in none of the decisions did the domestic courts order the prisoner's release, not even when they found that the statutory period had expired or the public prosecutor had failed to order the prisoner's continued detention. They merely referred the persons concerned to the judge responsible for pre-trial detention.

Secondly, in none of the proceedings that resulted in the decisions cited by the Government did the person detained appear before the court. The judge's review was carried out solely on the papers following an application by the lawyer concerned.

69. The judicial decisions on which the Government relied in seeking to demonstrate the effectiveness of this remedy were delivered in 2001 and 2003, that is to say at least two years after the applicant's arrest and detention in the present case.

70. As regards the special circumstances in which the applicant found himself while in police custody, the Court sees no reason to disagree with the Chamber's finding that the circumstances of the case made it impossible for the applicant to have effective recourse to the remedy referred to by the Government. In its judgment, the Chamber reasoned as follows (see the judgment of 12 March 2003, §§ 72-74):

> "... Firstly, the conditions in which the applicant was held and notably the fact that he was kept in total isolation prevented him using the remedy personally. He possessed no legal training and had no possibility of consulting a lawyer while in police custody. Yet, as the Court has noted above ..., the proceedings referred to in Article 5 § 4 must be judicial in nature. The applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer.
>
> ... Secondly, as regards the suggestion that the lawyers instructed by the applicant or by his close relatives could have challenged his detention without consulting him, the Court observes that the movements of the sole member of the applicant's legal team to possess an authority to represent him were obstructed by the police ... The other lawyers, who had been retained by the applicant's family, found it impossible to contact him while he was in police custody. Moreover, in view of the unusual circumstances of his arrest, the applicant was the principal source of direct information on events in Nairobi that would have been relevant, at that point in the proceedings, for the purposes of challenging the lawfulness of his arrest.
>
> ... Lastly, solely with regard to the length of time the applicant was held in police custody, the Court takes into account the seriousness of the charges against him and the fact that the period spent in police custody did not exceed that permitted by the

domestic legislation. It considers that, in those circumstances, an application on that issue to a district judge would have had little prospect of success."

71. As to the Government's assertion before the Chamber that the applicant could have claimed compensation under Law no. 466, the Grand Chamber also considers that such a claim cannot constitute proceedings of the type required by Article 5 § 4 for the reasons set out in paragraph 75 of the Chamber judgment, namely the court's lack of jurisdiction to order release if the detention is unlawful or to award reparation for a breach of the Convention if the detention complies with domestic law.

72. For the aforementioned reasons, the Court dismisses the preliminary objection in respect of the complaints under Article 5 §§ 1, 3 and 4 of the Convention. It further holds for the same reasons that there has been a violation of Article 5 § 4.

B. Article 5 § 1 of the Convention

73. The applicant complained that he had been deprived of his liberty unlawfully, without the applicable extradition procedure being followed. He alleged a violation of Article 5 § 1 of the Convention on that account.

1. The applicant's submissions

74. The applicant contested the Chamber's findings that his detention by Turkish officials was lawful and that his interception by Kenyan officials and transfer to the Turkish aircraft where Turkish officials were waiting for him could not be regarded as a violation of Kenyan sovereignty or international law.

In that connection, he maintained that there was prima facie evidence that he had been abducted by the Turkish authorities operating abroad, beyond their jurisdiction, and that it was for the Government to prove that the arrest was not unlawful. The fact that arrest warrants had been issued by the Turkish authorities and a Red Notice circulated by Interpol did not give officials of the Turkish State jurisdiction to operate abroad. On that point, the applicant denied that he was a terrorist and affirmed that his activities were part of the Kurds' struggle to assert their rights.

75. The applicant pointed out that no proceedings had been brought to extradite him from Kenya and that the Kenyan authorities had denied all responsibility for his transfer to Turkey. Mere collusion between Kenyan officials operating without authority and the Turkish government could not constitute inter-State cooperation. The Kenyan Minister for Foreign Affairs had stated on 15 February 1999 that the Kenyan authorities had played no role in the applicant's departure and that there had been no Turkish troops in Kenyan territory. The applicant submitted that the Chamber should have attached greater importance to that ministerial announcement, which, in his

submission, showed there had been no cooperation between the two governments.

The applicant further suggested that the Kenyan officials involved in his arrest had been bribed by Turkish agents and had acted without the authority of the Kenyan government.

76. The applicant referred to the case-law of the Convention institutions in *Cyprus v. Turkey* (no. 8007/77, Commission decision of 10 July 1978, Decisions and Reports (DR) 13, p. 85) and *Drozd and Janousek v. France and Spain* (judgment of 26 June 1992, Series A no. 240, p. 29, § 91), and submitted that Turkey was responsible for acts performed by its officials beyond its borders. He maintained that he had been arrested as a result of an operation that had been planned in Turkey, Italy, Greece and other States.

77. Referring to *Bozano v. France* (judgment of 18 December 1986, Series A no. 111, p. 23, § 54), the applicant stressed the need to protect individuals' liberty and security from arbitrariness. He said that in the instant case his forced expulsion had amounted to extradition in disguise and had deprived him of all procedural and substantive protection. He pointed out in that connection that the requirement of lawfulness under Article 5 § 1 applied to both international and domestic law. Contracting States were under an obligation not just to apply their laws in a non-arbitrary manner, but also to ensure that their laws complied with public international law. The applicant added that the guarantees against wrongful deprivation of liberty to which everyone was entitled could not be extinguished by certainty as to the defendant's guilt.

78. In his submission, the Commission's decision in *Sánchez Ramirez v. France* (no. 28780/95, Commission decision of 24 June 1996, DR 86-B, p. 155) was not relevant to the present case. Whereas in the aforementioned case there had been cooperation between France and Sudan, the Kenyan authorities had not cooperated with the Turkish authorities in the instant case. In the former case, the Commission had taken the view that the applicant was indisputably a terrorist, whereas Mr Öcalan and the PKK had had recourse to force in order to assert the right of the population of Kurdish origin to self-determination.

79. Relying on the case-law of various national courts (the House of Lord's decision in *R. v. Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 Appeal Cases 42; the decision of the Court of Appeal of New Zealand in *Reg. v. Hartley* [1978] 2 New Zealand Law Reports 199; the decision of the United States Court of Appeals (2nd Circuit, 1974) in *United States v. Toscanino* 555 Federal Reporter (Second Series) 267-68; the decision of 28 May 2001 of the Constitutional Court of South Africa in *Mohamed and Dalvie v. President of the Republic of South Africa and Others* 2001 (3) South African Law Reports 893 (CC)), the applicant maintained that the arrest procedures that had been followed did not comply with Kenyan law or the rules established by international law, that his arrest

amounted to an abduction, and that his detention and trial, which were based on that unlawful arrest, had to be regarded as null and void.

80. The applicant also submitted that, contrary to what the Chamber had found, he could not be expected to prove "beyond reasonable doubt" that the operation by Turkish officials on Kenyan territory in the instant case had violated Kenyan sovereignty. He was merely required to adduce prima facie evidence that it had in order for the burden of proof to shift to the respondent Government to show that there had been no violation of Kenyan sovereignty.

2. The Government's submissions

81. The Government agreed with and supported the Chamber's view that in this type of case cooperation between States confronted with terrorism was normal and did not infringe the Convention.

On that point, they maintained that the applicant had been arrested and detained in accordance with a procedure prescribed by law, following cooperation between two States, Turkey and Kenya. They noted that the applicant had entered Kenya not as an asylum-seeker, but by using false identity papers, and added that since Kenya was a sovereign State, Turkey had no means of exercising its authority there. They also pointed out that there was no extradition treaty between Kenya and Turkey.

The applicant had been apprehended by the Kenyan authorities and handed over to the Turkish authorities by way of cooperation between the two States. On his arrival in Turkey, he had been taken into custody under arrest warrants issued by the proper and lawful judicial authorities in Turkey, in order to be brought before a judge (the Turkish courts had issued seven warrants for the applicant's arrest before his capture and Interpol had circulated a Red Notice with regard to him).

There had been no extradition in disguise: Turkey had accepted the Kenyan authorities' offer to hand over the applicant, who was in any event an illegal immigrant in Kenya.

82. The applicant had thus been brought before a Turkish judicial authority at the end of a lawful procedure, in conformity with customary international law and the policy of cooperation between sovereign States in the prevention of terrorism.

3. The Court's assessment

(a) General principles

83. The Court will consider the complaint in the light of the following principles.

On the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law", the Convention refers back

essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. What is at stake here is not only the "right to liberty" but also the "right to security of person" (see, among other authorities, *Bozano*, cited above, p. 23, § 54, and *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24).

84. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention, it follows that the Court can and should exercise a certain power to review whether this law has been complied with (see *Benham v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 753, § 41, and *Bouamar v. Belgium*, judgment of 29 February 1988, Series A no. 129, p. 21, § 49).

85. An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's individual rights to security under Article 5 § 1 (see, to the same effect, *Stocké v. Germany*, judgment of 19 March 1991, Series A no. 199, opinion of the Commission, p. 24, § 167).

86. The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (ibid., pp. 24-25, § 169).

87. As regards extradition arrangements between States when one is a party to the Convention and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5 (see *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; *Altmann (Barbie) v. France*, no. 10689/83, Commission decision of 4 July 1984, DR 37, p. 225; and *Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189).

88. Inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice.

Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person, but also tend to undermine the foundations of extradition (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, § 89).

89. The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention (see *Sánchez Ramirez*, cited above).

90. Irrespective of whether the arrest amounts to a violation of the law of the State in which the fugitive has taken refuge – a question that only falls to be examined by the Court if the host State is a party to the Convention – the Court requires proof in the form of concordant inferences that the authorities of the State to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law (see, *mutatis mutandis*, *Stocké*, cited above, p. 19, § 54). Only then will the burden of proving that the sovereignty of the host State and international law have been complied with shift to the respondent Government. However, the applicant is not required to adduce proof "beyond all reasonable doubt" on this point, as was suggested by the Chamber (see paragraph 92 of the Chamber judgment).

(b) Application of the principles to the present case

(i) Whether the arrest complied with Turkish law

91. The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport.

It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in *Sánchez Ramirez* and *Freda*, and, by converse implication, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII).

92. As to whether the arrest complied with Turkish domestic law, the Court notes that the Turkish criminal courts had issued seven warrants for

the applicant's arrest while Interpol had put out a Red Notice. In each of these documents, the applicant was accused of criminal offences under the Turkish Criminal Code, namely founding an armed gang with a view to undermining the territorial integrity of the State and instigating a series of terrorist acts that had resulted in the loss of life. Following his arrest and on the expiry of the statutory period for which he could be held in police custody the applicant was brought before a court. Subsequently, he was charged, tried and convicted of offences under Article 125 of the Criminal Code. It follows that his arrest and detention complied with orders that had been issued by the Turkish courts "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence".

(ii) Interception by Kenyan agents

93. The Court must decide in the light of the parties' arguments whether the applicant's interception in Kenya immediately before he was handed over to Turkish officials on board the aircraft at Nairobi Airport was the result of acts by Turkish officials that violated Kenyan sovereignty and international law (as the applicant submitted), or of cooperation between the Turkish and Kenyan authorities in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure (as the Government submitted).

94. The Court will begin by examining the evidence on the actual role played by the Kenyan authorities in the present case. The applicant entered Kenya without declaring his identity to the immigration officers. However, once they had been informed of the applicant's presence at the Greek embassy in Nairobi, the Kenyan authorities invited the Greek ambassador, with whom the applicant was staying in Nairobi, to arrange for the applicant to leave Kenyan territory. Shortly before the applicant was due to leave Kenya, more precisely as he was being transferred from the Greek embassy to the airport, Kenyan officials intervened and separated the applicant from the Greek ambassador. The car in which the applicant was travelling was driven by a Kenyan official, who took him to the aircraft in which Turkish officials were waiting to arrest him.

95. The Kenyan authorities did not perceive the applicant's arrest by the Turkish officials on board an aircraft at Nairobi Airport as being in any way a violation of Kenyan sovereignty. In sum, neither aspect of the applicant's detention – whether his interception by the Kenyan authorities before his transfer to the airport, or his arrest by the Turkish officials in the aircraft – led to an international dispute between Kenya and Turkey or to any deterioration in their diplomatic relations. The Kenyan authorities did not lodge any protest with the Turkish government on these points or claim any redress from Turkey, such as the applicant's return or compensation.

96. The Kenyan authorities did, however, issue a formal protest to the Greek government, accompanied by a demand for the Greek ambassador's immediate recall, on the grounds that the applicant had entered Kenya illegally with the help of Greek officials and was unlawfully staying there. The applicant was not welcome in Kenya and the Kenyan authorities were anxious for him to leave.

97. These aspects of the case lead the Court to accept the Government's version of events: it considers that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover.

98. The applicant has not adduced evidence enabling concordant inferences (see paragraph 90 above) to be drawn that Turkey failed to respect Kenyan sovereignty or to comply with international law in the present case. The Grand Chamber agrees with the Chamber's finding that:

> "... The Court is not persuaded by the statement by the Kenyan Minister for Foreign Affairs on 16 February 1999 that, contrary to what the applicant maintained, the Kenyan authorities had had no involvement in the applicant's arrest or transfer ... While it is true that the applicant was not arrested by the Kenyan authorities, the evidence before the Court indicates that Kenyan officials had played a role in separating the applicant from the Greek ambassador and in transporting him to the airport immediately preceding his arrest on board the aircraft." (see paragraph 100 of the Chamber judgment)

99. Consequently, the applicant's arrest on 15 February 1999 and his detention were in accordance with "a procedure prescribed by law" for the purposes of Article 5 § 1 of the Convention. There has, therefore, been no violation of that provision.

C. Article 5 § 3 of the Convention

100. The applicant alleged that, contrary to Article 5 § 3 of the Convention, he had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

1. The applicant's submissions

101. The applicant asked the Grand Chamber to uphold the Chamber's finding of a violation under this provision as there had been no need for him to be detained for seven days before being brought before a judge. He said that he had been arrested before 11 p.m. on 15 February 1999 and brought before a judge on 23 February 1999. The weather report produced by the Government which spoke of bad weather conditions concerned only the afternoon of 23 February 1999.

2. The Government's submissions

102. The Government contested the Chamber's finding of a violation in respect of this complaint. They pointed out that at the material time the Turkish rules of criminal procedure permitted police custody to be extended to seven days when the person detained was suspected of terrorist-related offences. In the instant case, the applicant had been arrested on 16 February 1999 and taken into police custody for an initial period of four days ending on 20 February 1999. On the latter date, a court order had been made extending the period to be spent in police custody by three days, that is to say until 23 February 1999. Owing to adverse weather conditions (there was a storm in the region), the representatives of the public prosecutor's office and judge of the National Security Court did not reach the island of İmralı until 22 February 1999. The public prosecutor had questioned the applicant that same day. The applicant had appeared before the judge the following day (23 February 1999) and the judge had ordered his detention pending trial after hearing his representations.

3. The Court's assessment

103. The Grand Chamber notes at the outset the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial authority promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see, among other authorities, *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, p. 55, §§ 62-63; *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III; *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, pp. 31-32, § 58; and *Dikme v. Turkey*, no. 20869/92, § 66, ECHR 2000-VIII).

104. Having examined the parties' arguments, the Grand Chamber sees no good reason to disagree with the Chamber's findings, which were as follows:

> "106. The Court has already noted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, p. 33, § 61; *Murray v. the United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, p. 27, § 58; and *Aksoy v. Turkey*, [judgment of 18 December 1996, *Reports* 1996-VI], p. 2282, § 78). This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see *Sakık and Others v. Turkey*, [judgment of 26 November 1997, *Reports* 1997-VII], pp. 2623-24, § 44).

107. The Court notes that the police custody in issue commenced with the applicant's arrest either very late on 15 February 1999 or very early on 16 February 1999. The applicant was held in police custody for four days until 20 February 1999. On that date a judicial order was made extending the period by three days, that is to say until 23 February 1999. The public prosecutor questioned the applicant on 22 February 1999. The applicant appeared before a judge for the first time on 23 February 1999 and the judge, who was without any doubt an 'officer' within the meaning of Article 5 § 3 (see, among other authorities, *Sakık and Others*, cited above, p. 2615, § 12, and p. 2624, § 45), ordered his detention pending trial. The total period thus spent by the applicant in police custody before being brought before a judge came to a minimum of seven days.

108. The Court notes that in *Brogan and Others* it held that a period of four days and six hours in police custody without judicial supervision fell outside the strict constraints as to time permitted by Article 5 § 3, even when the aim was to protect the community as a whole from terrorism (see *Brogan and Others*, cited above, p. 33, § 62).

109. The Court cannot accept the Government's argument that adverse weather conditions were largely responsible for the period of seven days it took for the applicant to be brought before a judge. No evidence has been adduced before the Court that establishes that the judge attempted to reach the island on which the applicant was being held so that the latter could be brought before him within the total statutory period of seven days allowed for police custody. The Court observes in that connection that the police custody ran its ordinary course under the domestic rules. In addition to the four days ordered by the public prosecutor's office itself, the judge granted an additional period of three days after examining the case on the basis of the file. It seems unlikely that the judge would have granted the additional time had he intended to have the applicant brought before him before it expired.

110. The Court cannot, therefore, accept that it was necessary for the applicant to be detained for seven days without being brought before a judge."

105. In the light of all the foregoing considerations, the Court holds that there has been a violation of Article 5 § 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Whether the Ankara National Security Court, which convicted the applicant, was independent and impartial

106. The applicant alleged that he had not been tried by an independent and impartial tribunal, since a military judge had sat on the bench during part of the proceedings in the National Security Court. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

"In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal ..."

1. The applicant's submissions

107. The applicant asked the Grand Chamber to uphold the Chamber's finding of a violation on this issue. He said that a judge holding the rank of colonel in the army had sat on the bench of the National Security Court during most of the proceedings. The military judge had been replaced by a civilian judge just one week before the applicant's conviction and two months after the hearings before the National Security Court had started. In the meantime, in a case that concerned a conflict between the organisation led by the applicant and the army in which the military judge was an officer, the military judge had taken part in important interlocutory rulings and discussed the case with the other judges, thereby potentially influencing the conduct and outcome of the proceedings.

2. The Government's submissions

108. The Government contested the Chamber's finding that the last-minute replacement of the military judge was incapable of curing the defect in the composition of the court or of remedying the resulting violation of Article 6.

They pointed out that the military judge had left the National Security Court following legislative amendments. All the members of the court that had convicted the applicant were civilian judges. As regards the period prior to the military judge's replacement, the Government noted that a civilian substitute judge had been following the proceedings from the start and had attended the hearings. In addition, the military judge had been replaced by the substitute judge before the stage in the proceedings in which evidence was gathered had ended. Had the substitute judge considered that the National Security Court needed to make further investigations, he could have voted against making an order to close that stage of the proceedings.

109. The Government invited the Grand Chamber to follow the Court's decision in *İmrek v. Turkey* ((dec.), no. 57175/00, 28 January 2003), in which it held that the replacement of a military judge by a civilian judge in the course of criminal proceedings had solved the problem regarding the independence and impartiality of the national security court concerned.

110. They objected in particular to the Chamber's use of the "last minute" criterion in its judgment in the present case. That criterion would have been valid had the new judge not been given sufficient time to examine the interlocutory decisions taken up to that point or been precluded from issuing new ones. However, in the Government's submission, the replacement judge had been given both the time and the means necessary to play an active role in the decision-making process.

111. The Government further maintained that the applicant himself had had no doubts about the independence and impartiality of the National Security Court. He had in fact expressed his confidence in that court at a hearing at which the military judge had been present. It mattered little that the applicant's lawyers had subsequently contradicted Mr Öcalan's remark in their submissions. The most important point was that that remark – which had been made of the applicant's own free will and expressed his confidence in the court – had been sincere.

3. The Court's assessment

112. The Court has consistently held that certain aspects of the status of military judges sitting as members of the national security courts made their independence from the executive questionable (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1572, § 68, and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, p. 3073, § 39).

113. It is understandable that the applicant – prosecuted in a national security court for serious offences relating to national security – should have been apprehensive about being tried by a bench that included a regular army officer belonging to the military legal service. On that account he could legitimately fear that the National Security Court might allow itself to be unduly influenced by considerations that had nothing to do with the nature of the case (see, among other authorities, *Iprahim Ülger v. Turkey*, no. 57250/00, 29 July 2004).

114. As to whether the military judge's replacement by a civilian judge in the course of the proceedings before the verdict was delivered remedied the situation, the Court considers, firstly, that the question whether a court is seen to be independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of Article 6 regarding independence, the court concerned must be seen to be independent of the executive and the legislature at each of the three stages of the proceedings, namely the investigation, the trial and the verdict (those being the three stages in Turkish criminal proceedings according to the Government).

115. Secondly, when a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings, unless it is established that the procedure subsequently followed in the national security court sufficiently dispelled that concern. More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.

116. In its previous judgments, the Court attached importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see, among other authorities, *Incal*, cited above, p. 1573, § 72). Such a situation seriously affects the confidence the courts must inspire in a democratic society (see, *mutatis mutandis*, *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, pp. 14-15, § 30).

117. In the instant case, the Court notes that before his replacement on 23 June 1999 the military judge was present at two preliminary hearings and six hearings on the merits, when interlocutory decisions were taken. It further notes that none of the decisions were renewed after the replacement of the military judge and that all were validated by the replacement judge.

118. In these circumstances, the Court cannot accept that the replacement of the military judge before the end of the proceedings dispelled the applicant's reasonably held concern about the trial court's independence and impartiality. In so far as the decision or reasoning in *İmrek*, cited above, may be regarded as inconsistent with this conclusion, the Grand Chamber will not follow the decision and the reasoning in that case.

Consequently, there has been a violation of Article 6 § 1 of the Convention on this point.

B. Whether the proceedings in the National Security Court were fair

119. The applicant complained that the provisions of Article 6 §§ 1, 2 and 3 of the Convention had been infringed owing to the restrictions and difficulties he had encountered in securing assistance from his lawyers, gaining access – for both himself and his lawyers – to the case file, calling defence witnesses and securing access for his lawyers to all the information held by the prosecution. He also alleged that the media had influenced the judges to his detriment.

120. The relevant part of Article 6 of the Convention reads as follows:

> "1. ... everyone is entitled to a fair ... hearing within a reasonable time ...
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

..."

1. The applicant's submissions

121. The applicant asked the Grand Chamber to uphold the Chamber's finding that he had not had a fair trial. He set out the principal reasons why he considered that his trial failed to satisfy the requirements of Article 6.

He observed that unfettered, confidential and prompt access to legal assistance of one's choosing at all stages of the proceedings from the instant a person is detained was one of the fundamental requirements of a fair hearing in a democratic society. In the present case, however, he had had difficulty contacting his lawyers and that had affected his defence rights. In that connection, he explained that his lawyers had not been allowed to visit him until ten days after his arrest, by which time he had already made statements to the judicial authorities. He had also encountered difficulties in appointing lawyers of his choice, and that process had taken some time. His first meeting with his lawyers had taken place in the presence of members of the security forces. The other visits by his lawyers had been overseen and listened in to by the authorities and filmed with a video camera. Ultimately, the applicant considered that he had not been able to confer in private with his lawyers, in breach of the mandatory provisions of the Code of Criminal Procedure. After two short initial visits, contact with his lawyers had been limited to two weekly visits of an hour each. In proceedings that had been conducted extremely quickly and had produced an enormous case file, the total duration of the visits had been manifestly insufficient for him to prepare his defence. In any event, the applicant's lawyers had not enjoyed the same facilities as the members of the prosecution for travelling to the place of detention and the trial centre.

122. The applicant stressed that for the purposes of preparing the defence it had been vital for him and his lawyers to be given full, effective access to all the documents in the case file, including documents whose relevance to the issues of guilt and sentencing was only potential. However, his lawyers had not been permitted to provide him with a copy of the trial papers or any other material that would assist him in the preparation of his defence. He had been obliged to write out his defence by hand, without having access to any of the documents in the case file other than the bill of indictment, with which he had already been provided.

123. Furthermore, because of the speed with which the proceedings had been conducted, his lawyers had had difficulty in consulting all the documents in the file. They were given access to the case file, which ran to 17,000 pages, just sixteen days before the hearings started. The defence's

ability to analyse the documents had been further hampered by, *inter alia*, the restrictions imposed throughout the investigation on communications between the applicant and his lawyers. The National Security Court had nonetheless dismissed an application by the applicant's lawyers for additional evidence to be taken. The applicant added that, while before the National Security Court he had accepted political responsibility for the PKK's general policy, he had denied criminal liability for acts of violence that went beyond the PKK's stated policy. It had been with a view to highlighting the rapprochement between the PKK and the government that the applicant had made a request for the members of the government team that had led the negotiations with the PKK to be heard as defence witnesses.

124. In conclusion, the applicant said that he had not enjoyed equality of arms with the prosecution in preparing his defence, in particular as a result of the difficulties that had prevented him and his lawyers from having sufficient time to confer in private, obtaining effective access to the case file and putting forward his defence in a secure environment.

2. The Government's submissions

125. The Government disagreed with the Chamber's findings regarding the fairness of the applicant's trial; in their submission, it had been fair. In that connection, they observed firstly that the applicant had been convicted under Article 125 of the Criminal Code, the aim of which was to protect the democratic values of the Republic. The Criminal Divisions of the Turkish Court of Cassation, sitting in plenary session, had held that the PKK was an organisation that resorted to force and acts of violence with a view to bringing about the secession of part of Turkish territory to form a Kurdish State with a political regime based on Marxist-Leninist ideology. The acts of violence perpetrated by the PKK and acknowledged by the applicant at his trial had involved some 6,036 armed attacks on civilians, 8,257 armed confrontations with the security forces, 3,071 bomb attacks, 388 armed robberies and 1,046 kidnappings. Those acts came within the list of terrorist acts set out in Articles 1 and 2 of the European Convention on the Suppression of Terrorism. The Government noted that the applicant had admitted before the courts that he had played a role in the creation and organisation of the PKK and in the planning and perpetration of acts of violence committed by members of that organisation.

126. As regards the rights of the defence, the Government noted that the applicant had had a public hearing, had been able to participate fully in the hearings with the help of the special measures taken to ensure his safety, had addressed the court without being interrupted, and had said everything he wished to say in his defence. They said that the applicant had been provided with every facility for the preparation of his defence: he had been able to consult the lawyers of his choice during both the preliminary investigation and the trial and, with the exception of the first visit, the only

restrictions to which his lawyers' visits had been subject were those set out in the Code of Criminal Procedure. Furthermore, the applicant's lawyers had made no request to see their client at more frequent intervals. There had been no restrictions on the applicant's correspondence and he had been able to lodge with the National Security Court eighty pages of defence submissions he had drafted himself.

127. As regards the applicant's access to the case file, the Government maintained that even before the hearings on the island of İmralı the applicant's lawyers had been given an opportunity to photocopy all the documents in the case file. The 17,000-page case file had, in fact, been compiled from the case files in seven sets of criminal proceedings that had already been instituted in various national security courts several years before the applicant's arrest, and the applicant was already familiar with the papers. In any event, very few new documents had been added to the case file. The Government asserted that the National Security Court had communicated all the relevant documents to the applicant and allowed him to study the case file and any annexes he wished to see under the supervision of two officials. It had also informed the applicant that it would provide him with a copy of any document he thought might assist him with his defence. The applicant had in fact had sufficient time (twenty days) in which to acquaint himself with the relevant material in the case file.

128. On this point, the Government also argued that, contrary to what the Chamber had found, the Court's case-law in *Kremzow v. Austria* (judgment of 21 September 1993, Series A no. 268-B, p. 42, § 52) and *Kamasinski v. Austria* (judgment of 19 December 1989, Series A no. 168, pp. 39-40, § 88) was applicable in the instant case. There was no requirement under that case-law for the accused to be given direct access to the case file. It was sufficient for him to be apprised of its content by his representatives. Requiring such access to be afforded in the prosecution of organised crime would discriminate against those accused of ordinary offences.

Furthermore, the applicant had acknowledged his responsibility for the acts of the PKK, the organisation he had led before his arrest. Even if he had examined the acts of the other PKK members in greater detail, he would not have found any evidence to assist him in his defence.

129. Among the other facilities that had been made available to assist the applicant with his defence, a photocopier had been installed in the hearing room for the use of the lawyers, on the instructions of the President of the National Security Court. Furthermore, the lawyers had been taken to the island of İmralı by boat, embarking at a private quay for security reasons. Hotel rooms had been reserved for them near the embarkation point. If the lawyers were not present at a hearing, transcripts of the hearing and copies of any fresh documentary evidence had been delivered to them

the next day. Counsel for the applicant had thanked the President of the National Security Court for establishing a dispassionate atmosphere.

3. The Court's assessment

130. The Court considers that in order to determine whether the rights of the defence were respected in the criminal proceedings against the applicant, it is necessary to examine the legal assistance available to him and the access he and his lawyers were given to the case file.

(a) Legal assistance

(i) The applicant's lack of access to a lawyer while in police custody

131. The Grand Chamber sees no reason to disagree with the Chamber's finding that the applicant's lack of access to a lawyer while in police custody adversely affected his defence rights. The Grand Chamber agrees with the reasoning of the Chamber, which was as follows:

> "... The Court reiterates that Article 6 may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with it (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). The manner in which Article 6 §§ 1 and 3 (c) are applied during the investigation depends on the special features of the proceedings and the facts of the case. Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer from the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, pp. 54-55, § 63).
>
> ... In the present case, the applicant was questioned by the security forces, a public prosecutor and a judge of the National Security Court while being held in police custody in Turkey for almost seven days, from 16 February 1999 to 23 February 1999. He received no legal assistance during that period and made several self-incriminating statements that were subsequently to become crucial elements of the indictment and the public prosecutor's submissions and a major contributing factor in his conviction.
>
> ... As to whether the applicant had waived his right to consult a lawyer, the Court notes that on the day after his arrest, his lawyer in Turkey, Mr Feridun Çelik (who already possessed a valid authority), sought permission to visit him. However, Mr Çelik was prevented from travelling by members of the security forces. In addition, on 22 February 1999 sixteen lawyers who had been retained by the applicant's family sought permission from the National Security Court to visit the applicant, but their request was turned down by the authorities on 23 February 1999.
>
> ... In these circumstances, the Court is of the view that to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence to which the accused

is entitled by virtue of Article 6 (see, *mutatis mutandis*, *Magee* [*v. the United Kingdom*, no. 28135/95], §§ 44-45[, ECHR 2000-VI]).”

(ii) Consultation with his lawyers out of the hearing of third parties

132. In the absence of any specific observations by the parties on this point in the proceedings before it, the Grand Chamber endorses the Chamber's findings:

“... the applicant's first visit from his lawyers took place under the supervision and within sight and hearing of members of the security forces and a judge, all of whom were present in the same room as the applicant and his lawyers. The security forces restricted the visit to twenty minutes. The record of the visit was sent to the National Security Court.

... As regards subsequent visits, ... the Court accepts that meetings between the applicant and his lawyers after the initial visit took place within hearing of members of the security forces, even though the security officers concerned were not in the room where the meetings took place.”

133. The Grand Chamber agrees with the Chamber's assessment of the effects of the applicant's inability to consult his lawyers out of the hearing of third parties:

“... an accused's right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 § 3 (c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *S. v. Switzerland*, judgment of 28 November 1991, Series A no. 220, pp. 15-16, § 48). The importance to the rights of the defence of ensuring confidentiality in meetings between the accused and his lawyers has been affirmed in various international instruments, including European instruments (see *Brennan v. the United Kingdom*, no. 39846/98, §§ 38-40, ECHR 2001-X). However, as stated above ... restrictions may be imposed on an accused's access to his lawyer if good cause exists. The relevant issue is whether, in the light of the proceedings taken as a whole, the restriction has deprived the accused of a fair hearing.

... In the present case, the Court accepts ... that the applicant and his lawyers were unable to consult out of the hearing of the authorities at any stage. It considers that the inevitable consequence of that restriction, which was imposed during both the preliminary investigation and the trial, was to prevent the applicant from conversing openly with his lawyers and asking them questions that might prove important to the preparation of his defence. The rights of the defence were thus significantly affected.

... The Court observes in that connection that the applicant had already made statements by the time he conferred with his lawyers and made further statements at hearings before the National Security Court after consulting them. If his defence to the serious charges he was required to answer was to be effective, it was essential that those statements be consistent. Accordingly, the Court considers that it was necessary for the applicant to be able to speak with his lawyers out of the hearing of third parties.

> ... As to the Government's contention that the supervision of the meetings between the applicant and his lawyers was necessary to ensure the applicant's security, the Court observes that the lawyers had been retained by the applicant himself and that there was no reason to suspect that they threatened their client's life. They were not permitted to see the applicant until they had undergone a series of searches. Mere visual surveillance by the prison officials, accompanied by other measures, would have sufficed to ensure the applicant's security."

Consequently, the Court holds that the fact that it was impossible for the applicant to confer with his lawyers out of the hearing of members of the security forces infringed the rights of the defence.

(iii) Number and length of the visits by the applicant's lawyers

134. After the first two visits by his lawyers, which were approximately two weeks apart, contact between the applicant and his lawyers was restricted to two one-hour visits per week.

135. Having examined the parties' arguments, the Grand Chamber sees no good reason to disagree with the following findings of the Chamber:

> "... while Article 6 § 3 (c) confers on everyone charged with a criminal offence the right to 'defend himself in person or through legal assistance ...', it does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, judgment of 24 May 1991, Series A no. 205, p. 16, § 30). In this respect, it must be remembered that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33). The Court also points out that the manner in which Article 6 §§ 1 and 3 (c) are to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case; in order to determine whether the aim of Article 6 – a fair trial – has been achieved, regard must be had to the entirety of the domestic proceedings conducted in the case (see *Imbrioscia*, cited above, pp. 13-14, § 38).
>
> ... The Court observes that, in the instant case, the charges against the applicant included numerous acts of violence perpetrated by an illegal armed organisation and that he was alleged to be the leader of that organisation and the principal instigator of its acts. The Court further notes that the presentation of those highly complex charges generated an exceptionally voluminous case file ... It considers that in order to prepare his defence to those charges the applicant required skilled legal assistance equal to the complex nature of the case. It finds that the special circumstances of the case did not justify restricting the applicant to a rhythm of two one-hour meetings per week with his lawyers in order to prepare for a trial of that magnitude.
>
> ... With respect to the Government's argument that visits took place in accordance with the frequency and departure times of the ferries between the island of İmralı and the coast, the Court considers that, while the Government's decision to hold the applicant in an island prison far from the coast is understandable in view of the exceptional security considerations in the case, restricting visits to two one-hour visits

a week is less easily justified. It notes that the Government have not explained why the authorities did not permit the lawyers to visit their client more often or why they failed to provide more adequate means of transport, thereby increasing the length of each individual visit, when such measures were called for as part of the 'diligence' the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see *Colozza* [*v. Italy*, judgment of 12 February 1985, Series A no. 89], pp. 14-15, § 28).

... As to the Government's argument that the applicant's lawyers organised press conferences after each visit and acted as spokespersons for the PKK, the Court holds that any such conduct on their part could not justify the restrictions in issue, since restrictions cannot be placed on the rights of the defence for reasons that are not directly related to the trial. In addition, there is no evidence before the Court that any complaint was lodged in Turkey against the applicant's lawyers for acting as spokespersons for the PKK."

136. The Government's argument before the Grand Chamber that the applicant's lawyers had not asked to see him at more frequent intervals must also be rejected. The Court reiterates that waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see, *mutatis mutandis*, *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227, pp. 16-17, § 37). It notes that there was in fact a complaint by the applicant's lawyers to the National Security Court about the difficulties they had encountered in communicating with their client.

137. Consequently, the Court considers that the restriction on the number and length of the applicant's meetings with his lawyers was one of the factors that made the preparation of his defence difficult.

(b) The applicant's access to the case file

138. The Court must next examine whether the fact that the applicant was prevented from obtaining communication of the documents in the case file (apart from the bill of indictment) until 4 June 1999 violated the rights of the defence, as guaranteed by Article 6 § 1, taken together with the rights guaranteed by Article 6 § 3, as it was not until the hearing on that date that the National Security Court gave the applicant permission to consult the case file under the supervision of two registrars and gave his lawyers permission to provide him with copies of certain documents.

139. The Court will first examine the submission made by the Government before the Grand Chamber that the decisions in *Kremzow* and *Kamasinski*, both cited above, are applicable in the instant case. These authorities establish that an accused does not have to be given direct access to the case file, it being sufficient for him to be informed of the material in the file by his representatives. The Court also notes that, relying on those same authorities, the Government have already argued before the Chamber that restricting the right to inspect the court file to an accused's lawyer is not incompatible with the rights of the defence.

140. When examining these issues, the Court will have regard to its case-law to the effect that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice (see, among other authorities, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 359, § 47). The Court further considers that respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence being made available to the accused before the trial and the accused being given an opportunity to comment on it through his lawyer in oral submissions (see, *mutatis mutandis*, *Kremzow*, cited above, p. 44, § 63).

141. As regards the relevant facts in the present case, the Grand Chamber agrees with the following findings of the Chamber:

> "... in the instant case, the applicant was not permitted to inspect the evidence produced by the prosecution personally before the hearings. When the applicant's lawyers made their comments on that evidence, they had yet to obtain the applicant's observations following a direct inspection of the documentation. The fact that the applicant was given permission on 2 June 1999 to consult the case file under the supervision of two registrars did little to remedy that situation, in view of the considerable volume of documents concerned and the short time available to the applicant."

142. The Grand Chamber therefore considers that the present case is distinguishable from *Kremzow*, in which the applicant had twenty-one days in which to examine forty-nine pages, in contrast to Mr Öcalan, who had twenty days in which to examine a case file containing some 17,000 pages. The present case is also distinguishable from *Kamasinski*, in which the applicant's lawyer was able to pass on to his client copies of all the documents he considered relevant. Mr Öcalan's lawyers were not able to provide him with any documents before submitting their comments on the prosecution evidence.

143. The Government's argument that a more detailed examination by the applicant of the material relating to the acts of the other members of the PKK would not have permitted him to find evidence to assist him in his defence as he had already acknowledged responsibility for the acts of the PKK also warrants examination by the Court. It should be noted that while the applicant admitted before the National Security Court that he was the leader of the PKK, an armed separatist organisation, and responsible for the general policy of that organisation, he did not specifically comment on each act of violence committed by PKK members. He did say in his defence, however, that certain acts of violence had been committed against his will or beyond his control.

It is thus reasonable to assume that, had he been permitted to study the prosecution evidence directly for a sufficient period, the applicant would have been able to identify arguments relevant to his defence other than those his lawyers advanced without the benefit of his instructions.

144. The Court therefore holds that the fact that the applicant was not given proper access to any documents in the case file other than the bill of indictment also served to compound the difficulties encountered in the preparation of his defence.

(c) Access by the applicant's lawyers to the court file

145. Together with the issue of the applicant's access to his case file, the Court must also determine whether, in the instant case, the lawyers' access to the documents in the case file was restricted, either formally or in practice, and, if so, whether the restrictions affected the fairness of the proceedings.

146. The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment on them (see *Brandstetter v. Austria*, judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 66-67).

147. In the present case, the bill of indictment was served on the applicant and his lawyers on 24 April 1999. The court file was placed at the disposal of the applicant's lawyers on 7 May 1999, but they were not provided with a copy. The applicant's lawyers finished photocopying the documents on 15 May 1999. They were in possession of the full file in the case from that date onwards. Two weeks later, on 31 May 1999, the hearings before the National Security Court began. The applicant's lawyers were invited to make their final submissions – in reply to the prosecution's submissions – at the eighth substantive hearing, which was held on 23 June 1999.

In these circumstances, the Grand Chamber agrees with the Chamber's findings regarding the difficulties the applicant's lawyers encountered in gaining access to the court file, which were exacerbated by the same kinds of problem the applicant had experienced:

> "... the applicant's lawyers received a 17,000-page file approximately two weeks before the beginning of the trial in the National Security Court. Since the restrictions imposed on the number and length of their visits made it impossible for the applicant's lawyers to communicate the documents in the file to their client before 2 June 1999 or

to involve him in its examination and analysis, they found themselves in a situation that made the preparation of the defence case particularly difficult. Subsequent developments in the proceedings did not permit them to overcome those difficulties: the trial proceeded apace; the hearings continued without interruption until 8 June 1999; and on 23 June 1999 the applicant's lawyers were invited to present their submissions on all the evidence in the file, including that taken at the hearings."

(d) The Court's conclusion regarding the fairness of the trial

148. Accordingly, the applicant's trial was unfair for the following reasons: he had no assistance from his lawyers during questioning in police custody; he was unable to communicate with his lawyers out of the hearing of third parties; he was unable to gain direct access to the case file until a very late stage in the proceedings; restrictions were imposed on the number and length of his lawyers' visits; and, lastly, his lawyers were given proper access to the case file belatedly. The Court finds that the overall effect of these difficulties taken as a whole so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, was contravened. There has therefore been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b) and (c).

149. As regards the other complaints under Article 6 of the Convention, the Court considers that it has already dealt with the applicant's main grievances arising out of the proceedings against him in the domestic courts. It therefore holds that it is unnecessary to examine the other complaints under Article 6 relating to the fairness of the proceedings.

III. DEATH PENALTY: ALLEGED VIOLATION OF ARTICLES 2, 3 AND 14 OF THE CONVENTION

150. The applicant maintained that the imposition and/or execution of the death penalty constituted a violation of Article 2 of the Convention – which should be interpreted as no longer permitting capital punishment – as well as an inhuman and degrading punishment in violation of Article 3. He also claimed that his execution would be discriminatory and, therefore, in breach of Article 14. The relevant parts of these provisions provide:

Article 2

"1. 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.

..."

Article 3

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

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Implementation of the death penalty

151. In his initial application, the applicant complained that any recourse to the death penalty would violate both Articles 2 and 3 of the Convention.

152. In its judgment, the Chamber said that it considered that the threat of implementation of the death sentence had been effectively removed (see paragraphs 184-85 of the Chamber judgment).

153. The parties did not comment on this issue in the subsequent proceedings.

154. In this connection, the Court notes that the death penalty has been abolished in Turkey and the applicant's sentence has been commuted to life imprisonment. Furthermore, on 12 November 2003 Turkey ratified Protocol No. 6 to the Convention concerning the abolition of the death penalty.

155. In these circumstances, the complaints the applicant made in his initial application of violations of Articles 2, 3 and 14 on account of the implementation of the death penalty must be dismissed. Accordingly, there has been no violation of those provisions on that account.

B. Imposition of the death penalty

156. The Grand Chamber agrees with the Chamber that no separate issue arises under Article 2 with respect to the imposition of the death penalty. It will therefore examine this point under Article 3.

1. The parties' submissions

(a) The applicant

157. The applicant asked the Grand Chamber to pursue the reasoning of the Chamber as regards the abolitionist trend established by the practice of the Contracting States and to take it a stage further by concluding that the States had, by their practice, abrogated the exception set out in the second sentence of Article 2 § 1 of the Convention and that the death penalty

constituted inhuman and degrading treatment within the meaning of Article 3. In that connection, he repeated the observations he had submitted to the Chamber (see paragraphs 175-79 of the Chamber judgment).

When the Convention was signed in 1950, the death penalty was not perceived as a degrading and inhuman punishment in Europe and was provided for in the legislation of a number of States. Since that time there had been *de facto* abolition throughout Europe. Such developments should be seen as an agreement by Contracting States to amend Article 2 § 1.

158. No construction of Article 2 should permit a State to inflict inhuman and degrading treatment since the death penalty *per se* constituted such treatment in breach of Article 3 of the Convention. In that latter respect, the following submissions were made.

159. Developments in international and comparative law showed that the death penalty could also be seen to be contrary to international law. In that respect, reference was made, *inter alia*, to a judgment of the South African Constitutional Court in which it was held that the death penalty was contrary to the South African Constitution's prohibition of cruel, inhuman or degrading treatment (see *S. v. Makwanyane* (1995) (6) Butterworths Constitutional Law Reports 665), and to the judgment of the Canadian Supreme Court in *United States v. Burns* [2001] Supreme Court Reports 283, where that court, in a case concerning the extradition of a fugitive to the United States of America, considered capital punishment to amount to cruel and unusual punishment. The United Nations Human Rights Committee had also held that execution of a death sentence constituted cruel and inhuman treatment contrary to Article 6 of the International Covenant on Civil and Political Rights (see paragraph 60 above). Reference was also made to similar statements by the Hungarian Constitutional Court and the Constitutional Courts of Ukraine, Albania, Lithuania and *Republika Srpska* (within Bosnia and Herzegovina).

160. Finally, the applicant maintained that the imposition of the death penalty by a court that failed to satisfy the requisite standards of the Convention and permitted violations of the applicant's rights under Article 6 also violated Articles 2 and 3.

(b) The Government

161. The Government disagreed with the Chamber's finding that the imposition of the death penalty following an unfair trial constituted a violation of Article 3.

They observed, firstly, that neither the applicant nor his lawyers had presented any argument on this point. Secondly, even assuming that the Court had decided of its own motion to examine the case under Article 3, it would be difficult if not impossible to do so in view of the nature of Article 3. Inhuman treatment within the meaning of Article 3 was based on a subjective concept, that is to say fear and anguish felt by the applicant that

reached the level proscribed by Article 3. In the absence of such a complaint, it was not possible for the Court to put itself in the applicant's position.

In the Government's submission, the conclusion reached by the Chamber was contrary to an earlier admissibility decision of the Commission in *Çınar v. Turkey* (no. 17864/91, Commission decision of 5 September 1994, DR 79-A, p. 5) and to *Sertkaya v. Turkey* ((dec.), no. 77113/01, 11 December 2003). In those decisions, the Convention institutions found that the applicants had not felt fear or anguish as the moratorium on the implementation of the death penalty had eliminated any risk of their being executed.

The applicant's situation was identical to that of Mr Çınar and Mr Sertkaya, and the guarantees that the death penalty would not be carried out were, if anything, firmer in his case: as the applicant's case file had never been sent to Parliament, the procedure allowing the death penalty to be implemented was never set in motion. In addition, the Turkish government's moratorium on the implementation of the death penalty was unconditional and no offences or individuals were excluded from its scope. The Government had complied with the interim measure ordered by the Court under Rule 39 requiring them to stay the applicant's execution. There was a broad consensus in Parliament in Turkey that the applicant should not be executed, the composition of Parliament at the material time being the same as when it abolished the death penalty.

The Government submitted that there was no evidential basis for the Chamber's finding, nor could it be justified by the Court's request for a stay of execution of the death penalty.

Lastly, the Turkish government's decision to comply with the European norms on capital punishment had eliminated all risk that the applicant would be executed.

2. The Court's assessment

(a) Legal significance of the practice of the Contracting States as regards the death penalty

162. The Court must first address the applicant's submission that the practice of the Contracting States in this area can be taken as establishing an agreement to abrogate the exception provided for in the second sentence of Article 2 § 1, which explicitly permits capital punishment under certain conditions. In practice, if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 § 1 (see *Soering*, cited above, pp. 40-41, § 103).

163. The Grand Chamber agrees with the following conclusions of the Chamber on this point (see paragraphs 190-96 of the Chamber judgment):

"... The Court reiterates that it must be mindful of the Convention's special character as a human rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention that arise in the present case.

... It is recalled that the Court accepted in *Soering* that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (ibid., pp. 40-41, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (ibid., pp. 40-41, §§ 103-04).

... The applicant takes issue with the Court's approach in *Soering*. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the States may be measured and that the evidence shows that all member States of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.

... The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

... It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Soering*, cited above, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since the Court's judgment in *Soering* in 1989.

... Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided. The *de facto* abolition

noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia[1]. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.

... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2."

164. The Court notes that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

165. For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

1. At the date of the Chamber's judgment of 12 March 2003. Protocol No. 6 has now been ratified by forty-four member States of the Council of Europe (including Turkey) and signed by two others, Monaco and Russia (see paragraph 58 above).

(b) Unfair proceedings and the death penalty

(i) Under Article 2

166. As regards the reference in Article 2 of the Convention to "the execution of a sentence of a court", the Grand Chamber agrees with the Chamber's reasoning (see paragraphs 201-04 of the Chamber judgment):

> "... Since the right to life in Article 2 of the Convention ranks as one of the most fundamental provisions of the Convention – one from which there can be no derogation in peacetime under Article 15 – and enshrines one of the basic values of the democratic societies making up the Council of Europe, its provisions must be strictly construed (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), *a fortiori* the second sentence of Article 2 § 1.
>
> ... Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that '[e]veryone's right to life shall be protected by law'. An arbitrary act cannot be lawful under the Convention (see *Bozano*, cited above, p. 23, § 54, and pp. 25-26, § 59).
>
> ... It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the 'execution of a sentence of a court', that the 'court' which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law (see *Incal*, cited above; *Çıraklar*, cited above; *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I; and *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154), and that the most rigorous standards of fairness be observed in the criminal proceedings both at first instance and on appeal. Since the execution of the death penalty is irreversible, it can only be through the application of such standards that an arbitrary and unlawful taking of life can be avoided (see, in this connection, Article 5 of ECOSOC Resolution 1984/50 and the decisions of the United Nations Human Rights Committee ...; also Advisory Opinion OC-16/99 of 1 October 1999 of the Inter-American Court of Human Rights on 'The right to information on consular assistance in the framework of the guarantee of due process of law', §§ 135-36, and *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, § 148 ...). Lastly, the requirement in Article 2 § 1 that the penalty be 'provided by law' means not only that there must exist a basis for the penalty in domestic law but that the requirement of the quality of the law be fully respected, namely that the legal basis be 'accessible' and 'foreseeable' as those terms are understood in the case-law of the Court (see *Amann v. Switzerland* [GC], no. 27798/95, § 56, ECHR 2000-II, and *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).
>
> ... It follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible."

(ii) Under Article 3

167. The above conclusion concerning the interpretation of Article 2 where there has been an unfair trial must inform the opinion of the Court when it considers under Article 3 the question of the imposition of the death penalty in such circumstances.

168. As the Court has previously noted in connection with Article 3, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (see *Soering*, cited above, p. 41, § 104).

169. In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.

(iii) Application of these principles to the present case

170. The Court notes that there has been a moratorium on the implementation of the death penalty in Turkey since 1984 and that in the present case the Government complied with the Court's interim measure indicated pursuant to Rule 39 to stay the execution. It is further noted that the applicant's file was not sent to Parliament for approval of the death sentence, as was then required by the Turkish Constitution.

171. The Court has also had regard, in this context, to *Çınar* (cited above) in which the Commission rejected a claim that Article 3 had been violated in the case of an applicant who had been sentenced to death in Turkey. In its reasoning, the Commission took into account the long-standing moratorium on the death penalty and concluded in the circumstances of that case that the risk of the penalty being implemented was illusory.

172. The Grand Chamber agrees with the Chamber that the special circumstances of the instant case prevent it from reaching the same conclusion as that reached in *Çınar*. The applicant's background as the founder and leader of the PKK, an organisation that had been engaged in a sustained campaign of violence causing many thousands of casualties, had made him Turkey's most wanted person. In view of the fact that the applicant had been convicted of the most serious crimes existing in the Turkish Criminal Code and of the general political controversy in Turkey – prior to the decision to abolish the death penalty – surrounding the question

of whether he should be executed, it is not possible to rule out the possibility that the risk that the sentence would be implemented was a real one. In practical terms, the risk remained for more than three years of the applicant's detention in İmralı, from the date of the Court of Cassation's judgment of 25 November 1999 affirming the applicant's conviction until the Ankara National Security Court's judgment of 3 October 2002 commuting the death penalty to which the applicant had been sentenced to imprisonment.

173. As to the nature of the applicant's trial, the Court refers to its conclusions on the applicant's complaints under Article 6 of the Convention. It has found that the applicant was not tried by an independent and impartial tribunal within the meaning of Article 6 § 1 and that there has been a breach of the rights of the defence under Article 6 § 1 taken in conjunction with Article 6 § 3 (b) and (c), as the applicant had no access to a lawyer while in police custody and was unable to communicate with his lawyers out of the hearing of officials, restrictions had been imposed on the number and length of his lawyers' visits to him, he was unable to consult the case file until an advanced stage of the proceedings, and his lawyers did not have sufficient time to consult the file properly.

174. The death penalty has thus been imposed on the applicant following an unfair procedure which cannot be considered to conform to the strict standards of fairness required in cases involving a capital sentence. Moreover, he had to suffer the consequences of the imposition of that sentence for nearly three years.

175. Consequently, the Court concludes that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION: CONDITIONS OF DETENTION

176. The applicant further complained that the conditions in which he had been transferred from Kenya to Turkey and detained on the island of İmralı amounted to treatment contrary to Article 3 of the Convention, which provides:

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

A. Conditions in which the applicant was transferred from Kenya to Turkey

1. The applicant's submissions

177. The applicant said that he had been "abducted" in Kenya by Turkish officials and that his abduction necessarily constituted a violation of his right to respect for his physical integrity. He added that the circumstances in which the arrest had been effected also amounted to degrading and inhuman treatment. In his submission, the fact that he had been abducted for political reasons was in itself capable of constituting a breach of Article 3.

2. The Government's submissions

178. The Government asked the Grand Chamber to uphold the Chamber's finding that the conditions in which the applicant was transferred from Kenya to Turkey did not infringe Article 3.

3. The Court's assessment

(a) General principles

179. Article 3 of the Convention enshrines one of the fundamental values of democratic societies (see *Soering*, cited above, pp. 34-35, § 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their populations from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Article 3 makes no provision for exceptions and no derogation from it is permissible even under Article 15 of the Convention in time of war or other national emergency (see *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, p. 1855, § 79).

180. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 65, § 162). In assessing the evidence on which to base the decision whether there has been a violation of Article 3, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties

when evidence is being obtained has to be taken into account (ibid., pp. 64-65, § 161).

181. Treatment will be considered to be "inhuman" within the meaning of Article 3 where, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 92, ECHR 2000-XI). Furthermore, in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3 (see *Albert and Le Compte v. Belgium*, judgment of 10 February 1983, Series A no. 58, p. 13, § 22). In order for an arrest or detention in connection with court proceedings to be degrading within the meaning of Article 3, the humiliation or debasement to which it gives rise must be of a special level and in any event different from the usual degree of humiliation inherent in arrest or detention (see, *mutatis mutandis*, *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII, pp. 2821-22, § 55).

182. Handcuffing, one of the forms of treatment complained of in the present case, does not normally give rise to an issue under Article 3 of the Convention where it has been imposed in connection with lawful arrest or detention and does not entail the use of force, or public exposure, exceeding what is reasonably considered necessary in the circumstances. In this regard, it is of importance for instance whether there is reason to believe that the person concerned would resist arrest or try to abscond or cause injury or damage. In addition, the public nature of the treatment or the mere fact that the victim is humiliated in his own eyes may be a relevant consideration (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, p. 16, § 32, and *Raninen*, cited above, p. 2822, § 56).

183. Artificially depriving prisoners of their sight by blindfolding them for lengthy periods spread over several days may, when combined with other ill-treatment, subject them to strong psychological and physical pressure. The Court must examine the effect of such treatment in the special circumstances of each case (see, *mutatis mutandis*, *Salman v. Turkey* [GC], no. 21986/93, § 132, ECHR 2000-VII).

(b) Application of the above principles to the instant case

184. The Grand Chamber has examined the Chamber's findings and, in the absence of any additional arguments by the parties in support of their views, adopts them:

> "... the applicant was forced to wear handcuffs from the moment of his arrest by the Turkish security forces on the aircraft until his arrival at the prison on the island of İmralı. [The Court] also notes that he was suspected of being the leader of an armed separatist movement that was engaged in an armed struggle against the Turkish

security forces and that he was considered dangerous. The Court accepts the Government's submission that the sole purpose of requiring the applicant to wear handcuffs as one of the security measures taken during the arrest phase was to prevent him from attempting to abscond or causing injury or damage to himself or others.

... As regards the blindfolding of the applicant during his journey from Kenya to Turkey, the Court observes that that was a measure taken by the members of the security forces in order to avoid being recognised by the applicant. They also considered that it was a means of preventing the applicant from attempting to escape or injuring himself or others. The applicant was not questioned by the security forces when he was blindfolded. The Court accepts the Government's explanation that the purpose of that precaution was not to humiliate or debase the applicant but to ensure that the transfer proceeded smoothly and it acknowledges that, in view of the applicant's character and the reaction to his arrest, considerable care and proper precautions were necessary if the operation was to be a success.

... The Court's view on this point is not altered by the fact that the applicant was photographed wearing a blindfold in the aircraft that took him back to Turkey. It points out that there had been fears for the applicant's life following his arrest and the photographs, which the Government say were intended for use by the police, served to reassure those concerned about his welfare. The Court notes, lastly, that the applicant was not wearing a blindfold when he was photographed in Turkey shortly before his transfer to the prison.

... The applicant said that he was under sedation when he was transferred from Kenya to Turkey, the drugs having been administered to him either at the Greek embassy in Nairobi before he boarded the plane or in the aircraft that had taken him to Turkey. The Government rejected the latter suggestion. The Court notes that there is no evidence in the case file to substantiate the allegation that the Turkish security forces administered drugs to the applicant. Since the applicant also seems to think that the most probable explanation is that he was drugged before he was put on board the flight from Nairobi to Turkey, the Court considers that this allegation against the Turkish officials has not been established.

... Furthermore, at the hearing on 31 May 1999 the applicant stated in the National Security Court: 'Since my arrest I have not up to now been subjected to torture, ill-treatment or verbal abuse.' While the applicant's vulnerability at the time as a result of his being on trial for a capital offence means that that statement does not by itself conclusively establish the facts, it does support the Government's submissions.

... Lastly, since the applicant's arrest was lawful under Turkish law, the Court cannot accept the applicant's submission that his 'abduction' abroad on account of his political opinions constituted inhuman or degrading treatment within the meaning of Article 3.

... That being so, the Court considers that it has not been established 'beyond all reasonable doubt' that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that is inherent in every arrest and detention or attained the minimum level of severity required for Article 3 of the Convention to apply."

185. Consequently, there has been no violation of Article 3 on that account.

B. Conditions of detention on the island of İmralı

1. The applicant's submissions

186. The applicant disagreed with the Chamber's finding that the conditions of his detention on the island of İmralı did not infringe Article 3. He submitted that the conditions were inhuman within the meaning of Article 3 or at the very least entailed disproportionate interference with the exercise of his rights under Article 8. He had been the sole inmate in the prison for more than five years and his social isolation was made worse by the ban on his having a television set or communicating by telephone, and by the practical obstacle inadequate sea transport facilities posed to visits by his lawyers and members of his family. The applicant pointed out that the CPT's recommendations for reduced social isolation had not been followed by the prison authorities. His prison conditions were, in his submission, harsher than those of other prisoners.

The applicant said that his health had deteriorated as a result of the particular weather conditions that prevailed on the island of İmralı and that the Government's insistence on keeping him in that prison had more to do with their repressive attitude than security. There was no justification for the Government's refusal to transfer him to an ordinary prison or to allow visitors to travel to the island by helicopter.

2. The Government's submissions

187. The Government invited the Grand Chamber to endorse the Chamber's finding that the conditions of the applicant's detention on the island of İmralı did not infringe Article 3. They pointed out that the applicant had at no stage been held in cellular confinement. He received visits from his lawyers and members of his family every week. The adverse maritime weather conditions in the winter of 2002-03 that had been responsible for the cancellation of some visits were highly unusual.

188. The Government produced photographs which in their submission showed that the applicant's cell was suitably furnished. They pointed out that the applicant had been tried and convicted of being the head of a major armed separatist organisation that continued to regard him as its leader. All the restrictions imposed on his telephone communications were intended to prevent the applicant from continuing to run the organisation from his prison cell, and that was a national security issue. However, he was able to read books and daily newspapers of his choice and to listen to the radio. No restrictions had been placed on his written communications with the outside world. As to the applicant's health, he was examined frequently by doctors and psychologists, whose daily medical reports were sent to the Court on a regular basis.

189. The Government asserted that the applicant was treated in strict conformity with European standards governing conditions of detention. In the cases in which the Court had found a violation of Article 3, the conditions of detention were far worse than in Mr Öcalan's case (for instance, *Poltoratskiy v. Ukraine*, no. 38812/97, ECHR 2003-V, and *Kuznetsov v. Ukraine*, no. 39042/97, 29 April 2003).

3. The Court's assessment

190. The Court must first determine the period of the applicant's detention to be taken into consideration when examining his complaints under Article 3. It points out that the "case" referred to the Grand Chamber embraces in principle all aspects of the application previously examined by the Chamber in its judgment, the scope of its jurisdiction in the "case" being limited only by the Chamber's decision on admissibility (see, *mutatis mutandis*, *K. and T. v. Finland* [GC], no. 25702/94, §§ 139-41, ECHR 2001-VII; *Kingsley v. the United Kingdom* [GC], no. 35605/97, § 34, ECHR 2002-IV; *Göç v. Turkey* [GC], no. 36590/97, §§ 35-37, ECHR 2002-V; and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 56, ECHR 2003-II). More specifically, within the compass delimited by the decision on the admissibility of the application, the Court may deal with any issue of fact or law that arises during the proceedings before it (see, among many other authorities, *Guerra and Others v. Italy*, judgment of 19 February 1998, *Reports* 1998-I, p. 223, § 44; *Chahal*, cited above, p. 1856, § 86; and *Ahmed v. Austria*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2207, § 43). There is no justification for excluding from the scope of that general jurisdiction events that took place up to the date of the Grand Chamber's judgment, provided that they are directly related to the complaints declared admissible.

Furthermore, in the instant case, the applicant has already made submissions in the proceedings before the Chamber outlining his arguments on the effects his prolonged social isolation while in custody were likely to have.

The Court will therefore take into consideration the conditions of the applicant's detention between 16 February 1999 and the date this judgment is adopted. The fact that the applicant has in the interim lodged a new application concerning the latter part of his detention does not alter the position.

191. Complete sensory isolation coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment that cannot be justified by the requirements of security or any other reason. On the other hand, the prohibition of contact with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman

treatment or punishment (see, among other authorities, *Messina v. Italy (no. 2)* (dec.), no. 25498/94, ECHR 1999-V).

192. In the present case, it is true that the applicant's detention posed exceptional difficulties for the Turkish authorities. The applicant, as the leader of a large, armed separatist movement, is considered in Turkey to be the most dangerous terrorist in the country. Reactions to his arrest and differences of opinion that have come to light within his own movement show that his life is genuinely at risk. It is also a reasonable presumption that his supporters will seek to help him escape from prison. In those circumstances, it is understandable that the Turkish authorities should have found it necessary to take extraordinary security measures to detain the applicant.

193. The applicant's prison cell is indisputably furnished to a standard that is beyond reproach. From the photographs in its possession and the findings of the delegates of the CPT, who inspected the applicant's prison during their visit to Turkey from 2 to 14 September 2001, the Court notes that the cell the applicant occupies alone is large enough to accommodate a prisoner and furnished with a bed, table, armchair and bookshelves. It is also air-conditioned, has washing and toilet facilities and a window overlooking an inner courtyard. The applicant appears to be under medical supervision that is both strict and regular. The Court considers that these conditions do not give rise to any issue under Article 3 of the Convention.

194. Further, the Court considers that the applicant cannot be regarded as being kept in sensory isolation or cellular confinement. It is true that, as the sole inmate, his only contact is with prison staff. He has books, newspapers and a radio at his disposal. He does not have access to television programmes or a telephone. He does, however, communicate with the outside world by letter. He sees a doctor every day and his lawyers and members of his family once a week (his lawyers were allowed to see him twice a week during the trial). The difficulties in gaining access to İmralı Prison in adverse weather conditions appear to have been resolved, as the prison authorities were provided with a suitable craft at the end of 2004.

195. The Court notes the CPT's recommendations that the applicant's relative social isolation should not be allowed to continue for too long and that its effects should be attenuated by giving him access to a television and to telephone communications with his lawyers and close relatives. However, like the Chamber, the Grand Chamber is also mindful of the Government's concerns that the applicant may seek to take advantage of communications with the outside world to renew contact with members of the armed separatist movement of which he was leader. These concerns cannot be said to be unfounded. An added consideration is the Government's fear that it would be difficult to protect the applicant's life in an ordinary prison.

196. While concurring with the CPT's recommendations that the long-term effects of the applicant's relative social isolation should be

attenuated by giving him access to the same facilities as other high security prisoners in Turkey, such as television and telephone contact with his family, the Grand Chamber agrees with the Chamber that the general conditions in which he is being detained at İmralı Prison have not thus far reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3 of the Convention. Consequently, there has been no violation of that provision on that account.

V. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

197. The applicant complained that he had been hindered in the exercise of his right of individual application in that his lawyers in Amsterdam had not been permitted to contact him after his arrest and that the Government had delayed in replying to the Court's request for information. He alleged a violation of Article 34 of the Convention, which reads as follows:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

198. The Government asked the Court to dismiss those complaints.

199. The Court is called upon to decide whether the two matters raised by the applicant genuinely hindered him in the effective exercise of his right of application.

200. As regards his inability to communicate with his lawyers in Amsterdam following his arrest, the Court notes that a group of representatives composed of lawyers chosen by the applicant, including the lawyers in Amsterdam, subsequently applied to the Court and put forward all the applicant's allegations concerning the period in which he had had no contact with his lawyers. There is therefore nothing to indicate that the applicant was hindered in the exercise of his right of individual application to any significant degree.

201. As to the Government's delay in replying to the Chamber's second request for information, the Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34 of the Convention (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 128, ECHR 2005-I). However, though regrettable, the Government's failure to supply the information requested by the Court earlier did not, in the special circumstances of the case, prevent the

applicant from setting out his complaints about the criminal proceedings that had been brought against him. Accordingly, the applicant has not been obstructed in the exercise of his right of individual application.

202. In conclusion, there has been no violation of Article 34 *in fine* of the Convention.

VI. OTHER COMPLAINTS

203. Relying on the same facts, the applicant also alleged a violation of Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken individually or in conjunction with the aforementioned provisions of the Convention.

204. Repeating the arguments set out above with regard to the other complaints, the Government submitted that those complaints too were ill-founded and had to be dismissed.

205. The applicant wished to pursue his complaints.

206. Having examined the complaints, which, incidentally, are not set out in any detail in the applicant's submissions, the Court notes that they have virtually the same factual basis as the complaints it has examined in previous sections of this judgment.

Consequently, it considers that no separate examination of the complaints under Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken individually or in conjunction with Articles 2, 3, 5 and 6, is necessary.

VII. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

207. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

208. In the event of the Court finding a violation of Article 6, the applicant requested a retrial by an independent and impartial court in which he would enjoy full defence rights. In the event of the Court finding a violation of Article 3 on account of the conditions of his detention, he requested a transfer to a prison on the mainland, and the facilitation of contact with other prisoners, members of his family and his lawyers.

209. While reaffirming their view that there had been no violation of the Convention provisions relied on by the applicant, the Government

submitted, in the alternative, that a finding of a violation could constitute in itself sufficient just satisfaction for the applicant.

210. As to the specific measures requested by the applicant, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention (see, among other authorities, *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I).

However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a systemic situation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V).

In other exceptional cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see *Assanidze*, cited above, § 202).

In the specific context of cases against Turkey concerning the independence and impartiality of the national security courts, Chambers of the Court have indicated in certain judgments that were delivered after the Chamber judgment in the present case that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she so requests (see, among other authorities, *Gençel v. Turkey,* no. 53431/99, § 27, 23 October 2003). It is also to be noted that a Chamber of the Court has adopted a similar stance in a case against Italy where the finding of a breach of the fairness guarantees contained in Article 6 was not related to the lack of independence or impartiality of the domestic courts (see *Somogyi v. Italy*, no. 67972/01, § 86, ECHR 2004-IV).

The Grand Chamber endorses the general approach adopted in the above-mentioned case-law. It considers that where an individual, as in the instant case, has been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under Article 46 of the Convention must depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case, and with due regard to the above case-law of the Court.

B. Article 41 of the Convention

211. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

212. The Court notes that the applicant has not put forward any claim in respect of pecuniary or non-pecuniary damage and concludes that any damage the applicant may have sustained has been sufficiently compensated for by its findings of a violation of Articles 3 (as regards the imposition of the death penalty following an unfair trial), 5 and 6 of the Convention.

2. Costs and expenses

213. During the proceedings before the Chamber, the applicant had claimed compensation of 1,123,933.96 euros (EUR) for the costs and expenses he had incurred for the seven lawyers and three trainee lawyers who had acted for him outside Turkey and the costs and expenses of six of his lawyers in Turkey.

The Chamber awarded him EUR 100,000 under that head.

The applicant claimed an additional EUR 75,559.32 in respect of the proceedings under Article 43 of the Convention. He explained that that sum was broken down into EUR 65,978.60 for the fees of his lawyers and their assistants and EUR 9,580.72 for sundry expenses, such as translation costs and travel expenses.

214. The Government submitted that those claims were manifestly unreasonable, in particular as regards the amount of the lawyers' fees.

215. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and are also reasonable as to quantum (see The Sunday Times *v. the United Kingdom* (Article 50), judgment of 6 November 1980, Series A no. 38, p. 13, § 23). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002).

216. In the present case, the Court notes that it has upheld only some of the applicant's complaints under the Convention. It therefore notes that not all the time or all the meetings for which the applicant's main lawyers claimed remuneration were spent solely on the complaints in respect of which a violation has been found.

217. The Court considers that the applicant should only be reimbursed part of his costs incurred before the Court. Having regard to the circumstances of the case, the fee scales applicable in the United Kingdom and in Turkey and the complexity of certain issues raised by the application, and ruling on an equitable basis, it considers it reasonable to award the applicant EUR 120,000 in respect of the complaints put forward by all his legal representatives. That sum is to be paid into bank accounts nominated by his Turkish and United Kingdom representatives.

3. Default interest

218. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection concerning Article 5 §§ 1, 3 and 4 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention on account of the lack of a remedy by which the applicant could have the lawfulness of his detention in police custody decided;

3. *Holds* unanimously that there has been no violation of Article 5 § 1 of the Convention on account of the applicant's arrest;

4. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention on account of the failure to bring the applicant before a judge promptly after his arrest;
5. *Holds* by eleven votes to six that there has been a violation of Article 6 § 1 of the Convention in that the applicant was not tried by an independent and impartial tribunal;

6. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention, taken in conjunction with Article 6 § 3 (b) and (c), in that the applicant did not have a fair trial;

7. *Holds* unanimously that there has been no violation of Article 2 of the Convention;

8. *Holds* unanimously that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 2, as regards the implementation of the death penalty;

9. *Holds* unanimously that there has been no violation of Article 3 of the Convention as regards the complaint concerning the implementation of the death penalty;

10. *Holds* by thirteen votes to four that there has been a violation of Article 3 of the Convention as regards the imposition of the death penalty following an unfair trial;

11. *Holds* unanimously that there has been no violation of Article 3 of the Convention as regards the conditions in which the applicant was transferred from Kenya to Turkey;

12. *Holds* unanimously that there has been no violation of Article 3 of the Convention, as regards the conditions of the applicant's detention on the island of İmralı;

13. *Holds* unanimously that no separate examination is necessary of the applicant's remaining complaints under Articles 7, 8, 9, 10, 13, 14 and 18 of the Convention, taken individually or in conjunction with the aforementioned provisions of the Convention;

14. *Holds* unanimously that there has been no violation of Article 34 *in fine* of the Convention;

15. *Holds* unanimously that its findings of a violation of Articles 3, 5 and 6 of the Convention constitute in themselves sufficient just satisfaction for any damage sustained by the applicant;

16. *Holds* unanimously
(a) that the respondent State is to pay the applicant's lawyers in the manner set out in paragraph 217 of the present judgment, within three months, for costs and expenses, the sum of EUR 120,000 (one hundred and twenty thousand euros) to be converted into new Turkish liras or pounds sterling, depending on where payment is made, at the rate applicable at the date of settlement, plus any value-added tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

17. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 May 2005.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring, partly dissenting opinion of Mr Garlicki;

(b) joint partly dissenting opinion of Mr Wildhaber, Mr Costa, Mr Caflisch, Mr Türmen, Mr Garlicki and Mr Borrego Borrego;

(c) joint partly dissenting opinion of Mr Costa, Mr Caflisch, Mr Türmen and Mr Borrego Borrego.

L.W.
P.J.M.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE GARLICKI

I. Article 3

1. I am writing this separate opinion because I feel that, in this case, the Court should have decided, in the operative provisions of its judgment, that Article 3 had been violated because any imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the Convention. Thus, while correct, the majority's conclusion that the imposition of the death penalty following an unfair trial represents a violation of Article 3 seems to me to stop short of addressing the real problem.

2. It is true that the majority's conclusion was sufficient to establish a violation in the instant case and that it was not absolutely necessary to produce any firm conclusion on the – more general – point of whether the implementation of the death penalty should now be regarded as inhuman and degrading treatment contrary to Article 3 in all circumstances. I accept that there are many virtues in judicial self-restraint, but am not persuaded that this was the best occasion to exercise it.

I am fully aware that the original text of the Convention allowed capital punishment provided the guarantees referred to in Article 2 § 1 were in place. I am also aware that in *Soering v. the United Kingdom* (judgment of 7 July 1989, Series A no. 161) this Court declined to hold that the new international context permitted it to conclude that the exception provided for in the second sentence of Article 2 § 1 had been abrogated. Today the Court, while agreeing that "it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment which is no longer permissible under Article 2" (see paragraph 163 of the judgment), seems to be convinced that there is no room for the death penalty even within the original text of the Convention. But, at the same time, it has chosen not to express that position in a universally binding manner. In my opinion, there are some arguments suggesting that the Court could and should have gone further in this case.

3. First of all, there seems to be no dispute over the substance of the problem. The Court was clearly right in observing that, over the past fifteen years, the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment and that such a development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1. It is not necessary to recapitulate here all the relevant developments in Europe; it seems sufficient to quote the 2002 opinion of the Parliamentary Assembly of the Council of Europe in which it

recalled that in its most recent resolutions "it reaffirmed its beliefs that the application of the death penalty constitutes inhuman and degrading punishment and a violation of the most fundamental right, that to life itself, and that capital punishment has no place in civilised, democratic societies governed by the rule of law". Thus, today, in 2005, condemnation of the death penalty has become absolute and even fairness of the highest order at trial cannot legitimate the imposition of such a penalty. In other words, it is possible to conclude that the member States have agreed through their practice to modify the second sentence of Article 2 § 1. The only problem is: who shall have the power to declare, in a binding manner, that such modification has taken place? So, this is a problem not of substance, but of jurisdiction (competence). In consequence, the only question that remains is whether the Court has the power to state the obvious truth, namely that capital punishment has now become an inhuman and degrading punishment *per se*.

4. In answering this question, it is necessary to bear in mind that the Convention, as an international treaty, should be applied and interpreted in accordance with general rules of international law, in particular Article 39 of the Vienna Convention. This suggests that the only way to modify the Convention is to follow the "normal procedure of amendment" (see paragraphs 103-04 of *Soering*, cited above, and paragraphs 164-65 of the present judgment).

But the Convention represents a very distinct form of international instrument and – in many respects – its substance and process of application are more akin to those of national constitutions than to those of "typical" international treaties. The Court has always accepted that the Convention is a living instrument and must be interpreted in the light of present-day conditions. This may result (and, in fact, has on numerous occasions resulted) in judicial modifications of the original meaning of the Convention. From this perspective, the role of our Court is not very different from the role of national Constitutional Courts, whose mandate is not only to defend constitutional provisions on human rights, but also to develop them. The Strasbourg Court has demonstrated such a creative approach to the text of the Convention many times, holding that the Convention rights and freedoms are applicable to situations which were not envisaged by the original drafters. Thus, it is legitimate to assume that, as long as the member States have not clearly rejected a particular judicial interpretation of the Convention (as occurred in relation to the expulsion of aliens, which became the subject of regulation by Protocols Nos. 4 and 7), the Court has the power to determine the actual meaning of words and phrases which were inserted into the text of the Convention more than fifty years ago. In any event, and this seems to be the situation with regard to the death penalty, the Court may so proceed when its interpretation remains in

harmony with the values and standards that have been endorsed by the member States.

5. This Court has never denied that the "living-instrument approach" may lead to a judicial imposition of new, higher standards of human rights protection. However, with respect to capital punishment, it adopted – in *Soering* – "a doctrine of pre-emption". As I have mentioned above, the Court found that, since the member States had decided to address the problem of capital punishment by way of formal amendments to the Convention, this matter became the "preserve" of the States and the Court was prevented from applying its living-instrument doctrine.

I am not sure whether such an interpretation was correct in *Soering* or applicable to the present judgment.

The judgment in *Soering* was based on the fact that, although Protocol No. 6 had provided for the abolition of the death penalty, several member States had yet to ratify it in 1989. Thus, it would have been premature for the Court to take any general position as to the compatibility of capital punishment with the Convention. Now, the majority raises basically the same argument with respect to Protocol No. 13, which, it is true, remains in the process of ratification.

But this may only demonstrate a hesitation on the part of certain member States over the best moment to irrevocably abolish the death penalty. At the same time, it can no longer be disputed that – on the European level – there is a consensus as to the inhuman nature of the death penalty. Therefore, the fact that governments and politicians are preparing a formal amendment to the Convention may be understood more as a signal that capital punishment should no longer exist than as a decision pre-empting the Court from acting on its own initiative.

That is why I am not convinced by the majority's replication of the *Soering* approach. I do not think that there are any legal obstacles to this Court taking a decision with respect to the nature of capital punishment.

6. Such a decision would have universal applicability; in particular, it would prohibit any imposition of the death penalty, not only in times of peace but also in wartime or other warlike situations. But it should not stop the Court from taking this decision today. It may be true that the history of Europe demonstrates that there have been wars, like the Second World War, during which (or after which) there was justification for capital punishment. I do not think, however, that the present interpretation of the Convention should provide for such exceptions: it would be rather naïve to believe that, if a war of a similar magnitude were to break out again, the Convention as a whole would be able to survive, even if concessions were made with regard to the interpretation of capital punishment. On the other hand, if there is a war or armed conflict of a local dimension only – and this has been the experience of the last five decades in Europe – the international community could and should insist on respect for basic values of humanity, *inter alia*,

on the prohibition of capital punishment. The same reasoning should apply to other "wars", like – in particular – the "war on terror", in which there is today no place for capital punishment (see Article X § 2 of the Committee of Ministers of the Council of Europe's "Guidelines on human rights and the fight against terrorism" issued on 11 July 2002).

Furthermore, it is notable that, as the Statute of the recently established International Criminal Court shows, the international community is of the opinion that even the most dreadful crimes can be dealt with without resorting to capital punishment.

7. In the last fifteen years, several Constitutional Courts in Europe have been invited to take a position on capital punishment. The courts of Hungary, Lithuania, Albania and Ukraine had no hesitation in decreeing that capital punishment was no longer permitted under the Constitutions of their respective countries, even if this was not clearly stated in the written text of those documents. The Constitutional Courts have, nevertheless, adopted the position that the inability of the political branches of government to take a clear decision on the matter should not impede the judicial branch from doing so. A similar approach was taken by the Constitutional Court of South Africa.

I am firmly convinced that the European Court of Human Rights should have followed the same path in the present judgment.

II. Article 6 § 1

To my regret, I cannot join the majority in finding a violation of Article 6 § 1 of the Convention on the ground that the applicant was not tried by an independent and impartial tribunal. In this respect, my views are set out in the joint partly dissenting opinion I have expressed with Mr Wildhaber, Mr Costa, Mr Caflisch, Mr Türmen and Mr Borrego Borrego.

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, COSTA, CAFLISCH, TÜRMEN, GARLICKI AND BORREGO BORREGO

(Translation)

1. The majority of the Court found that in the present case the Ankara National Security Court was not an independent and impartial court, owing to the presence of a military judge on the bench. We disagree with that conclusion for the following reasons.

2. It is true that since *Incal v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV) the principle followed by the Court in this type of case is that an applicant has legitimate cause to doubt the independence and impartiality of a national security court when a military judge sits alongside two civilian judges. The Court was divided in *Incal* and decided the point by a majority of twelve to eight (see, for the opposite view, the opinion of the judges in the minority, pp. 1578-79).

3. It is equally true that the *Incal* precedent has since been followed in a number of judgments (including *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, ECHR 1999-IV – see Mr Wildhaber's declaration and the dissenting opinion of Mr Gölçüklü).

4. However, things have changed. Within a very short space of time, Turkey took remedial action following the judgment in *Incal* and did not hesitate to amend its Constitution (and subsequently its legislation) so that only civilian judges would sit in the national security courts (which have since been abolished). By 18 June 1999, the Constitution had already been amended and the legislative amendments followed just four days later, with immediate effect (see paragraphs 53 and 54 of the present judgment). It would be desirable for all States Parties to the Convention to comply with the Court's judgments within such a reasonable period.

5. The amended legislation was immediately applied to the applicant's trial, with the third civilian judge replacing the military judge the day after it came into force. It should be noted that the replacement judge had been present throughout the proceedings and had attended all the hearings of the National Security Court from the start of the trial, that the National Security Court noted that he had read the file and the transcripts (see paragraph 44 of the judgment) and, lastly, that he was at liberty to request additional evidence or investigations.

6. Thus the National Security Court's verdict and sentence were handed down by a court composed entirely of civilian judges, all three of whom had taken part in the entire trial. To say that the presence of a military judge, who was replaced under new rules (that were introduced to comply with the case-law of the European Court of Human Rights) made the National Security Court appear not to be independent and impartial is to take the

"theory" of appearances very far. That, in our opinion at least, is neither realistic, nor even fair.

7. For this reason we consider that the Court's approach in *İmrek v. Turkey* ((dec.), no. 57175/00, 28 January 2003) was wiser. In that case, against the same background and in view of the Turkish authorities' positive response to the *Incal* line of authority, it held that the complaint was manifestly ill-founded, as the problem had been solved by the military judge's replacement by a civilian judge during the course of the trial.

8. In addition, in Mr Öcalan's case, and without departing from the principles established in *Incal* itself, it is hard to agree with what is said in paragraph 116 of the judgment. The applicant is there described as a civilian (or equated to a civilian). However, he was accused of instigating serious terrorist crimes leading to thousands of deaths, charges which he admitted at least in part. He could equally well be described as a warlord, which goes a long way to putting into perspective the fact that at the start of his trial one of the three members of the court before which he appeared was himself from the military.

9. Inherent in a system based on the principle of subsidiarity is loyal cooperation between a supranational judicial body, such as this Court, and the States which have adhered to the system. Imposing standards that are too high does not appear to us to be the best way of encouraging such cooperation or of expressing satisfaction to the States that provide it.

JOINT PARTLY DISSENTING OPINION OF JUDGES COSTA, CAFLISCH, TÜRMEN AND BORREGO BORREGO

In paragraph 175 of the judgment, the majority expresses the opinion that "the imposition of the death sentence ... following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment ...".

First of all, we do not agree with the majority that the Court which sentenced Mr Öcalan was not independent and impartial. However, even if it had been, we do not believe that this constitutes a breach of Article 3.

The majority accepts that Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2 (paragraph 162 of the judgment). In other words, according to the majority, while the death penalty itself does not constitute a violation of Article 3, a procedural defect in respect of impartiality and independence of the court which imposes the death penalty constitutes a violation of Article 3.

According to our case-law, fear and anguish due to the impartiality and independence of a court is a question to be examined under Article 6 of the Convention rather than under Article 3.

"... In deciding whether there is a legitimate reason to fear that a particular court lacks independence and impartiality, the standpoint of the accused is important without being decisive" (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1572-73, § 71). "... [T]he applicant could legitimately fear ... because one of the judges ... was a military judge" (ibid., p. 1573, § 72). Similar sentences are contained in *Çıraklar v. Turkey* (judgment of 28 October 1998, *Reports* 1998-VII, pp. 3072-74, §§ 38 and 40) and numerous other judgments. In all these judgments, the Court found a violation of Article 6 due to the fear created by the presence of a military judge.

Moreover, inhuman treatment within the meaning of Article 3 must attain a minimum level of severity. The applicant must show beyond reasonable doubt that he has suffered fear and anguish that reaches the threshold level required by Article 3 (see, *mutatis mutandis*, *V. v. the United Kingdom* [GC], no. 24888/94, ECHR 1999-IX). In the present case, there is no evidence that the applicant has suffered fear and anguish that reaches the necessary threshold due to a lack of impartiality and independence on the part of the national security court. As stated in paragraph 39 of the judgment, during the trial the applicant accepted the main charge against him under Article 125 of the Turkish Criminal Code, that is to say having accomplished acts aimed at separating a part of the State's territory. He also accepted political responsibility for the PKK's general strategy as its leader and admitted having envisaged the establishment of a separate State on the territory of the Turkish State. He knew what the charge against him was and

what the penalty would be (there is only one penalty provided for in Article 125 of the Turkish Criminal Code). He also stated expressly that he accepted the National Security Court's jurisdiction.

Under such circumstances, the presence of a military judge at an early stage of the trial can hardly have caused fear and anguish reaching a threshold constituting a violation of Article 3.

Furthermore, for a threat to amount to inhuman treatment there must be a "real risk". A mere possibility is not in itself sufficient (see *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215, p. 37, § 111). The threat should be "sufficiently real and immediate" (see *Campbell and Cosans v. the United Kingdom*, judgment of 25 February 1982, Series A no. 48, p. 12, § 26). "It must be shown that the risk is real" (*H.L.R. v. France*, judgment of 29 April 1997, *Reports* 1997-III, p. 758, § 40).

In the present case, there is no ground to believe that there was a real and immediate risk that the applicant would be executed, for the following reasons.

(a) In Turkey, the death penalty has not been executed since 1984.

(b) The Government, by an official communication sent to the Court, accepted the Rule 39 decision of former Section 1 and stayed Mr Öcalan's execution (see paragraph 5 of the judgment).

(c) In compliance with the Rule 39 decision, the Government did not send the applicant's file to Parliament for the death sentence to be approved (under the Turkish Constitution, the death penalty may be executed only after Parliament adopts a law approving the sentence). In other words, the process of execution never started. Under such circumstances, it is not possible to conclude that a real threat of execution existed for Mr Öcalan in the period between the Turkish court's decision and the abolition of the death penalty in Turkey.

In *Soering v. the United Kingdom* (judgment of 7 July 1989, Series A no. 161), the Court ruled, *mutatis mutandis*, that there was no inhuman treatment as long as the Government complied with the interim measure indicated by the Strasbourg institutions (ibid., pp. 44-45, § 111). The same considerations apply in the present case. Since the Government agreed to comply with the Rule 39 decision, there has never been a "sufficiently real and immediate" threat of execution for the applicant.

In *Çınar v. Turkey* (no. 17864/91, Commission decision of 5 September 1994, Decisions and Reports 79-B, p. 5), the applicant claimed that there had been a violation of Article 3 because his death sentence, which became definitive on 20 October 1987, was submitted to the Grand National Assembly for approval and the Grand National Assembly did not take any decision until 1991. He was therefore exposed to the death-row phenomenon.

The Commission rejected this claim on the ground that the death penalty had not been executed in Turkey since 1984 and the risk of the penalty being implemented was illusory.

We cannot accept that in the present case the risk of execution for the applicant was more real than that in *Çınar*.

The applicant's political background did not increase the risk of execution, as is suggested in the judgment (paragraph 172). On the contrary, it made him less vulnerable because of the political consequences his execution would have had. The fact that there has been a quasi consensus among all political parties in Parliament not to execute confirms this view. This political consensus is evident from the fact that Parliament abolished the death penalty by Law no. 4771, which was passed with a large majority and published on 9 August 2002 (see paragraph 51 of the judgment). Furthermore, on 12 November 2003 Turkey ratified Protocol No. 6.

For all these reasons, we conclude that there has been no violation of Article 3 on account of the death sentence imposed by the National Security Court.