

Trial observation report

March 2005

# Freedom of expression at risk: writers on trial in Turkey





# FREEDOM OF EXPRESSION AT RISK: WRITERS ON TRIAL IN TURKEY

TRIAL OBSERVATION REPORT

MARCH 2005

**Kurdish Human Rights Project**

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

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The report was prepared on behalf of KHRP by barristers Mary Hughes and Mark Himsworth at 10-11 Gray's Inn Square, who would like to thank Sait Çetinoğlu, Eve Naftalin, Şanar Yurdatapan and his colleagues.

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# 1. FOREWORD

Mary Hughes and Mark Himsworth, barristers at 10-11 Gray's Inn Square, represented KHRP at trial observations of Ragıp Zarakolu and Fikret Başkaya. They were part of a mission which included several PEN members, Eugene Schoulin (International PEN), Carl Iversen, Elisabeth Dyvik, Kjell Jensen, Beate Slydel and Ole-Gunner Solheim of Norwegian PEN, Franca Tiberto of Swedish Italian PEN, Jana Beranova of Holland PEN, Jean Rafferty of Scottish PEN and Richard McKane of English PEN. Alexis Krikorian of the International Publishers Association (IPA) was also present as were three members of Human Rights Watch (HRW) Rebecca Tinsley, Phyllida Earle and Susan Gibson and a representative from Amnesty International.

## İstanbul

Ragıp Zarakolu was indicted under Article 312 of the Turkish Penal Code for an article he wrote on 8 March 2003 in *Yeniden Özgür Gündem* newspaper expressing the right of Kurdish people to self determination. Although he had appeared in court in September 2004 as a witness for the newspaper's editor his first appearance in court in his own right was on 2 March 2005 at İstanbul's No 2 First Instance Criminal Court of Beyoğlu. The case was adjourned until 12 May 2005 in order for the editor to attend court although it is understood that he is in exile in Switzerland. In the last 30 years Mr Zarakolu has, along with his late wife been before the Turkish courts on numerous occasions as a result of his work as a writer and publisher. They have both served several periods of imprisonment.

## Ankara

Dr Fikret Başkaya, a leading intellectual was indicted under Article 159 of the Turkish Penal Code for an article he first wrote on 2 July 1993 entitled, 'On Secularism, Kemalism and Religious Reaction' and another published in newspaper *Özgür Gündem* on 16 May 1993, 'Nothing New in the Inflation Front' These were republished in a book entitled, 'Writings against the current' in April 1995, a second

edition of which was printed in January 2003. He was acquitted of this charge at No 2 First Instant Court of Ankara on 2 March 2005 after two years of hearings.

These two cases represent just the tip of the iceberg in a long line of cases brought against writers, journalists, broadcasters, publishers, singers and cartoonists over the years. Despite the recent reforms and harmonisation treaties in relation to EU accession they appear to be continuing unabated. There is clear evidence of harassment and interference with the fundamental right of freedom of expression. The prosecutors and judges appear to have a heightened sense of what they consider as incitement to violence.

Press conferences were held in both İstanbul and Ankara prior to both these court hearings. There was great disappointment that no member of the Turkish media attended in İstanbul but for the observers it was salutary to hear a range of speakers describe their own situations. In İstanbul these included Abdurrahman Dilipak, journalist and writer, who has many ongoing cases; Ferhat Tunç, a Kurdish singer on trial for an article published on 19 January 2004 which it was claimed insulted the judiciary; Mehmed Uzun, a Kurdish writer; three conscientious objectors who read out statements at an anti-war demonstration in Ankara on 5 September 2004; two women, mother and daughter, the latter a lawyer campaigning for the right to wear the headscarf; Aynur Doğan a Kurdish singer who had had his song album entitled “Keçe Kurdan” confiscated; and Mehmet Desde, a Turkish worker in Germany who case was with the Supreme Court. He had apparently signed a confession under torture and for the last three years had been unable to go back to his home or job in Germany.

In İstanbul, the Mission met Şehnaz Turan of the Foundation for Social and Legal Studies (TOHAV); Eren Keskin of the İstanbul branch of the Human Rights Association and Şanar Yurdatapan, the founder of the Initiative for Freedom of Expression. In Ankara, the mission encompassed the trial hearing itself as well as interview beforehand with Mr Başkaya. In addition meetings were held with a number of individuals either closely connected to his prosecution, or whose experience or knowledge of the practicalities of exercising the freedom of expression in modern Turkey made them valuable interlocutors. They were: Yusuf Alataş, Head of the Human Rights Association; Professor Baskın Oran, Member of the Human Rights Advocacy Assembly; Mr. Aydın Erdoğan, Başkaya’s lawyer; Yavuz Önen, head of the Turkish Human Rights Foundation; and Ayhan Bilgen, Head of Mazlum-Der (Organisation of Human Rights and Solidarity for Oppressed People). A number of international observers attended, and a press conference was held shortly after the



hearing.

A meeting had been arranged between KHRP mission members and members of the Parliamentary Human Rights Commission in order to discuss their views of both cases and freedom of thought and expression generally, but the mission was told that none was available through other engagements or travel overseas.



## 2. INTRODUCTION

This report constitutes the findings of a mission to observe the trials of Ragıp Zarakolu, a writer and publisher who was charged for an article he wrote in a newspaper expressing the right of the Kurdish people for self determination and Dr Fikret Başkaya an intellectual and writer for publishing two articles which the prosecutor claimed, “insult the Republic or ... the judicial organs, military or security institutions.” The mission is concerned that the following international human rights principles may have been breached:

The right to an effective remedy

The independence and impartiality of the judiciary

The right to liberty

The right of an accused to be informed promptly of the charges

The right to a fair trial

The right to trial by an independent and impartial tribunal

The right to freedom of expression



### 3. RAGIP ZARAKOLU

Ragıp Zarakolu was born in İstanbul in 1948. His father was educated in law and was an open minded intellectual who was sent into exile in Anatolia because of his views. His mother was not politically active. Ragıp Zarakolu was the only one of four children to be politically active. He graduated from the İstanbul University Faculty of Economics. He started writing in 1968 in the weekly *Ant* and *Yeni Ufuklar* magazines which were closed down in 1971. He was active in the student protests and sit-ins at this time.

Ragıp Zarakolu was first imprisoned in 1971 for five months because of a campaign on behalf of Said Alkali, a prisoner of conscience. In the same year he set up a daily newspaper with 36 other writers and intellectuals, "Democrat". It had a circulation of 30000 but was closed down after 10 months. He was jailed again in 1972 in a military prison for an article he wrote about Ho Chi Mink and the Vietnam War. He was released under amnesty in 1974. At this stage he had little contact with organisations outside Turkey save for Amnesty International.

Ragıp Zarakolu was just beginning an academic career and studying for his PhD on Economic Crises Theories when he was first imprisoned. On his release he tried to resurrect his PhD but his professor was shot in the street by the MHP and he decided to concentrate on journalism, also writing an encyclopaedia of social science. He met his first wife, Ayşenur when they were both doing post graduate studies and Ayşe was the director of a university library.

In 1977 Ayşe along with Ragıp Zarakolu set up the Belge International Publishing House. They published books on the Turkish left, on Marxist thought, by Rosa Luxemburg, Orwell and Gramsci among others. In the 1980s they branched out into literature and gave support to writers in prison in their series called "New Voices". So many were arrested as a result of the 1980 coup and Ragıp Zarakolu described how poetry would be smuggled out sewn up on a shirt. In five years over 100,000 people, many university students, were arrested some receiving the death penalty. They were unable to publish articles on the military junta in Turkey so wrote on military regimes in the world and even published Tom Paine's 'Rights of Man'. This initiative continued for six years. People used to come to the publishing house to buy books hidden away under the counter. Many publishing houses and

bookshops were closed down or even sometimes burnt by their owners because they were afraid. In 1982 Ayse was acquitted for her book on the Turkish left wing but received prison sentences in the same year and in 1984 when she was also tortured. On that occasion she had given a job to a student wanted by the police but could not disclose his whereabouts to the military as he was staying with her mother.

Both Ragıp Zarakolu and his wife were active in the human rights movements from the formation in 1986 of IHD (Human Rights Association). It was from this time that they built up their connections abroad.

In 1994 they lost their editorial office in a bomb attack by a group supported by the state which resulted in the destruction of all their equipment and archives. Ragıp Zarakolu said that they won the case but received no compensation because they could not prove that they had lost the things. At this time they decided not to reopen their offices but to concentrate on distribution as no other distribution agencies were left.

From the 1990s the pair turned their attention to literature in a series called 'Mare Nostrum' because of the isolation of Turkey. They distributed Armenian, Jewish, Greek, Kurdish and Italian literature. They also distributed reports by Amnesty International against the death sentence and torture. At this stage they also began to focus on Kurdish issues.

Ragıp Zarakolu said that it had been hard to keep going financially but their families supported them and ensured that their two sons received a good education. One son is now an architect the other studying for a PhD. He said neither son was political until 1996, by which time his wife had been tried for 33 cases. They were arrested in that year after campaigning for student democracy and starting a university students' union. They were imprisoned for 15 days. Ayse died in January 2002 and one of her sons was arrested after the period of 40 days mourning for a speech he made about the Kurdish situation at the funeral. Ragıp Zarakolu indicated that this showed the cruelty of oppression. Friendly settlements were made in the European Court in 4 of his wife's cases after her death which he continued on her behalf. (Application 32455/96 27 May 2003, Application 37059/97 2 October 2003, Application 3706/97 2 October 2003, Application 37062/97 2 October 2003) on 13 July 2004 on applications 26971/95 and 37933/97<sup>1</sup> the ECHR ruled that Article 6/1 and 10 had been violated and ordered Turkey to pay 5,000euros in compensation and 2500 court expenses. Ayse had been fined for "disseminating separatist propaganda" for publishing a book about the murder of journalist Ferhat Tepe and other human rights violations in

South East Turkey, “Our Ferhat, the Anatomy of a Homicide”. We were also told that the state had brought further proceedings against Ayse after her death because they had not been given formal proof of the death.

Ragıp Zarakolu himself has been arrested on many occasions. Whilst being tried for publishing “Trying the September 12 Regime” he heard that a suit had been filed against him for an article he wrote on 8 March 2003 entitled “That’s not of your business”<sup>2</sup> in a newspaper, *Yeniden Özgür Gündem*<sup>3</sup> (Free Agenda Again). This article was about the Kurdish Federation in Northern Iraq and critical of Turkish foreign policy. On 10 September 2004 he was included in a case against the newspaper’s manager, Meme Çolak at İstanbul’s 6<sup>th</sup> State Security Court. I understand this was as a witness and not a defendant. The owner, Ali Çelik Kasımoğulları and the manager had previously received fines of 7 billion Turkish liras (USD 4700) because of other articles<sup>4</sup>. I was told there were over 300 previous charges. When this court no longer had jurisdiction the case was transferred to the İstanbul No 2 First Instance Criminal Court of Beyoğlu and was the case monitored by the mission on 2 March 2005. He is accused of “incitement to racial violence” under the Turkish Penal Code 312.

In December 2004 an additional case was initiated against him for the publication of George Jerjian’s book, “The truth will set us free/Armenians and Turks reconciled” which is said to be insulting to the state and to the memory of the state’s founder, Atatürk. The first hearing on this case is due on 16 March 2005. An investigation has also been opened into his publication of Zülküf Kışanak’s “Lost Villages”.

Lars Grahn, Chairman of the International Publishers Association (IPA) declared:

“Both Fikret Başkaya and Ragıp Zarakolu have been subjected to a series of long, time consuming and expensive court hearings. Whatever the outcome of these trials, this is in itself a form of harassment and punishment for daring to produce works, which touch on sensitive issues”<sup>5</sup>.

Ragıp Zarakolu, a dignified, impressive and gentle man said he regarded his work as a kind of mission which had achieved its purpose on many occasions of changing political opinion. The position on the Kurds had changed since 1990 when he had first written on this topic. It was also now possible to discuss the Armenian genocide. He was ambivalent about Turkey’s desire to join the EU referring back to the reforms made in the Ottoman period to make it more attractive.

In an interview in the *Daily News Special* 12 February 2004 he said:

“Actually, the Kurdish problem was legally recognised in 1991 when the prime minister went to Diyarbakir and said, ‘we recognised the Kurdish reality’. So why don’t we make this recognised fact a reality? Why don’t we make the effort to solve problems? There are some conservative sections in our society but I don’t perceive conservatism just as a religious thought- there is also political conservatism in our society. Some conservatives are against Turkey becoming a multi-cultural liberal society. They see this as a danger. I explain this with the fact that they could not overcome the Ottoman syndrome. We should stop this. The Ottoman Empire is history.

In the same interview he stated:

“A society where a bureaucratic ideology is dominant, thoughts and the rights of people are always under inspection. This mentality needs to be changed. But since there is no mentality change, even if an article of the law is lifted, another article is put into effect in the place of it”.

This seems to be exactly what is happening.



## 4. TRIAL OF RAGIP ZARAKOLU

9.30am, 2 March 2005

No. 2 First Instant Criminal Court of Beyoğlu, İstanbul

### Indictment<sup>6</sup>

Accused of violating Turkish Penal Code Article No 312 by writing an article “That’s not of your business” in *Yeniden Özgür Gündem* (Free Agenda Again) Number 188, page 4, 8 March 2003.

The indictment reads:

“...in this article, by expressing that Kurdish people have a right to determine their own fate, the crime of instigating hatred among people against others on the grounds of social class, race, religion, sect or region in a way dangerous for the public security is committed”.

On conviction this charge carries a prison sentence of between 6 months and 2 years.

This case had been before the İstanbul DGM on 12 September 2004. At that stage no charge had been laid against Ragıp Zarakolu. He indicated that he had been a witness there in relation to the case against Mehmet Çolak, the managing editor of *Yeniden Özgür Gündem*. No longer in the state security courts these prosecutions of publishers and writers were held alongside prosecutions of ordinary criminals.

The court complex consisted of five or six blocks called predictably A, B, C etc. They looked surprisingly cheerful, the walls painted as they were in bright yellow. My initial impression was that it looked like a school. There were more supporters at the court. A representative from the British Consulate arrived, albeit after the hearing

had ended. He indicated that the Minister was particularly concerned about the freedom of expression cases.

We walked purposively towards Block D and past, with no difficulty, through the security check. Our bags were not searched and cameras and mobile phones remained with us. Immediately behind me was a German film crew with a large video camera and a huge boom. They also had no difficulty getting their equipment into the court building.

We hung about for a few minutes taking photographs and talking. It appeared that no judge wished to hear the case. Eventually, a small court room was opened and about 12 of us were able to push ourselves into the court and sit down on the wooden benches placed around the two sides. Several members of the mission were unable to gain entry to the courtroom. The woman judge and the prosecutor were already sat in court side by side on a raised pedestal. It was hard to ascertain any material differences between them as both wore gowns with red trimmings. Ragıp Zarakolu stood in the small dock in the centre of the court. His lawyer, who walked into court with the crowd, sat at a small table in the well of the court at the right. His gown was largely black with mainly green trimming and a small amount of red. A stenographer sat immediately below the judge. Occasionally officials walked in and out of the court.

The judge was irritated at the number of people piling into her court. She began by asking Mr Zarakolu his personal details including his criminal records. He said he had no criminal record although the judge referred to a prison sentence of ten months in 1994. Ragıp Zarakolu accepted this. He did not appear to have a copy of the indictment and was handed one. The Judge read from the article and Ragıp Zarakolu accepted that it was critical. He read out a handwritten statement and handed a copy to the judge<sup>7</sup>. The judge showed no interest in this and did not look at Ragıp Zarakolu throughout his delivery.

The defence lawyer spoke for the first time after Ragıp Zarakolu had spoken, He said that under EU law there was no guilt and additionally as the people written about were outside of Turkey there could be no guilt. The prosecutor spoke only once throughout the hearing which lasted about 20 minutes. This was to say, “I have nothing to add” when the judge turned briefly to him. He gave the appearance of a complete cipher<sup>8</sup>.

The case was adjourned until 12 May 2005 because it seems of the non-attendance of

the other defendant, the editor. I subsequently heard that he had sought asylum in Switzerland having had over 300 cases . It was unclear whether the judge was aware of this and uncertain what would happen at the next hearing.

We all walked out of court and all again made our way back to the hotel. It had been a very low key affair. One got the sense that there was a lot of positioning but no major sense of urgency. It was confirmed that cases drag on for months and even years. Ragıp Zarakolu was resigned and dignified the judge irritated and rigid.



## 5. FIKRET BAŞKAYA

Fikret Başkaya was born in Denizli in the southwest of Turkey in 1940 and educated to Bachelor's degree level, studying within the Faculty of Politics at Ankara University. His PhD in development economics was awarded by the Universities of Sorbonne and Poitiers in France and his return to Turkey was closely followed by his conscription into military service. There he was expelled from officer training and assigned to a unit designed to accommodate 'troublemakers' and, on leaving the army, he began working for a trades union confederation. His professional academic career began at Abant University, where he authored a number of works on colonialism, imperialism, development issues and the Turkish economy.

Başkaya was first prosecuted, for producing 'communist propaganda', in 1965 whilst a student and active member of the Labour Party of Turkey<sup>9</sup>. More recently, an investigation and prosecution began only two weeks after the publication in 1991 of his work "The Bankruptcy of Paradigm – Introduction to the Critique of the Official Ideology"<sup>10</sup>. On 5<sup>th</sup> August 1993 Başkaya was convicted by the İstanbul State Security Court of propounding separatist propaganda, contrary to the infamous (and now repealed<sup>11</sup>) Article 8 of Turkey's Anti-Terror Law, and sentenced to serve 20 months in Haymana prison and pay a large fine. In July 1999 the European Court of Human Rights held that Turkey was in violation of its obligations under the ECHR to secure the freedom of expression for its citizens and awarded compensation be paid<sup>12</sup>.

Because of the 1993 conviction<sup>13</sup>, Başkaya was removed from the post he occupied as a lecturer at the University of Ankara. He may not teach in a state university and so established his own private "Free University", ultimately and somewhat ironically funded in part by the Turkish state through the damages it has had to pay him at the order of the Strasbourg court.

On 29/06/01, Mr Başkaya was imprisoned for 16 months in Kalecik prison and fined under the same legal provision, this time for criticising Turkey's treatment of Abdullah Öcalan in his work "Historical Trial?"<sup>14</sup>

Whilst in prison following this latest conviction, Başkaya was yet again indicted under Article 8 of the Anti-Terror Law, this time for a purported veiled reference to Abdullah Öcalan in a newspaper interview he gave shortly before commencing his

sentence. His error on that occasion had been to censure non-profit groups for being 'apolitical', the first three letters of which word, 'Apo', are a nickname for Öcalan.

## 6. TRIAL OF FIKRET BAŞKAYA

### Background to the instant prosecution

The KHRP has supported Fikret Başkaya by sending a number of observation missions to his earlier trials. <sup>16</sup>

On 16<sup>th</sup> May 1993 an article was published in the Turkish daily *Gündem* in which Başkaya critically analysed Turkey's financial performance, particularly regarding inflation. Ten days after the 2<sup>nd</sup> July 1993 massacre of 37 Alevi intellectuals in Sivas in the east of the country, a further article was published in the same newspaper placing responsibility for the deaths at the door of the Turkish state<sup>17</sup>. In 1997 a compendium of Başkaya's works entitled "Writings against the Stream" was published, reproducing to the last punctuation mark the text of the two articles. In 2003 a reprint of the 1997 work was issued, and it was only at this stage that the Turkish state began an investigation into its content.

Initiated on 22<sup>nd</sup> April 2003, the prosecution against Fikret Başkaya was brought under Article 159 of the Turkish Criminal Code<sup>18</sup>. After an initial hearing on 10<sup>th</sup> September 2003 at the Ankara Criminal Court of First Instance number 15, the prosecutor asked for the matter to be concluded (and sentence imposed) at the next hearing on 9<sup>th</sup> June 2004. On that date however the court decided that it did not have jurisdiction for the matter and transferred it to the Court of First Instance number 2. On 25<sup>th</sup> November 2004 that court began to consider the case, and only then was it realised that it was not in possession of a copy of the offending publication. One was provided by Mr Başkaya at a hearing on the 22<sup>nd</sup> of December 2004 and at an adjourned hearing on 30<sup>th</sup> December 2004 the prosecutor again requested a final resolution of the case. The case was further adjourned to the 2<sup>nd</sup> March 2005.

Also named on the indictment against Başkaya were Özden Bayram and İsmet Erdoğan. The former had carried out basic redaction, typesetting and editing of the volume, whilst the latter was its publisher.

## The Second March hearing

Commencing at 0900, the hearing of the case of Mr Başkaya and his two co-defendants Özden Bayram and İsmet Erdoğan took place in the main court building in Ankara and was attended by over seventy observers and onlookers.

The three defendants sat in the well of the court facing the judge, with their three counsel at the same level. As is still common practice, the prosecutor sat next to the judge (at a physically elevated position in the court), and the two men were identically dressed. The Turkish state affords public prosecutors and members of the judiciary an equivalent social status, and they are frequently accommodated in the same state accommodation compounds or apartment blocks, transported to and from the court building each day in the same buses, and lunch together<sup>19</sup>.

The first thing to occur during the hearing was that the prosecutor (the same gentleman who had drafted the indictment, and pursued the case in court for 18 months) informed the court that in his opinion the writings of Fikret Başkaya were mere criticism of the state, not insult, and that therefore he would withdraw the indictment. Although the mission was later informed that technically the judge had the power to nonetheless continue to hear the case, in practise it was inevitable from that point on that Başkaya would be acquitted. It was, the mission was told, usual for more reasoning to be given by a prosecutor withdrawing an indictment<sup>20</sup>.

Each of the defendants' lawyers spoke briefly and each of the defendants were also afforded an opportunity to address the court. Başkaya did so<sup>21</sup> at some length and with no little ferocity, lambasting the Turkish state for its 'comic accusations' against him, criticising the 'fascist ideology' which is reflected by the continued presence of Article 159 or equivalent on Turkey's statute books and asserting that 'torturers are protected by the state and rather than being punished are promoted'.

At one stage whilst delivering his judgment (accepting the submissions of the defence into the trial dossier and ultimately discharging the defendants) to the court the judge consulted the prosecutor *soto voce* before receiving a brief response and continuing.



### Apparent Turkish state criticism of the prosecution

Apparently recognising the sometime schizophrenic attitude of different organs of the Turkish state and voicing dismay, Cemil Çiçek, the Turkish Justice Minister said after the commencement of the proceedings “I just saw on the TV that Fikret Başkaya is in court again because of the book he has published... On the one hand, we are passing new laws; on the other hand there is this picture.”<sup>22</sup>

The Mission further understands that the Minister appeared on a national television broadcast on the eve of the trial saying that in his opinion the prosecution was ‘stupid’<sup>23</sup>. Whatever the declared public attitude of the Turkish Minister of Justice towards the prosecution of Başkaya, his Ministry’s consent was necessary in order for it to have been commenced.

In a number of ‘friendly settlements’ in Freedom of Expression cases at Strasbourg, the Turkish state has declared words similar to those which follow: “The Government note that the Court’s rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression show that Turkish law and practice urgently need to be brought into line with the Convention’s requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case.”<sup>24</sup>

### Comment

Whilst of course the mission welcomes the decision of the prosecutor and of the court, there are quite obvious reasons for caution. Firstly and most obviously it appears at best odd and at worst extremely suspicious that the prosecutor in this case abruptly withdrew the indictment without offering an explanation to the court. A number of commentators speculated that the real reason may have been Ministerial influence which, if true, would send a worrying signal over respect for the office of Prosecutor and political interference in the judicial process.

The lack of a conviction and prison sentence in this case will not have extinguished the ‘chilling effect’ that the *threat* of prosecution has on the country’s journalists and writers. As the European Commission’s own report put it, “Official sources stress the considerable decrease in the number of cases resulting in sanctions. However,

whether or not conviction is likely, the regularity with which cases are filed against members of the press represents a significant deterrent to freedom of expression through the media.”<sup>25</sup> Yusuf Alataş, President of the İHD<sup>26</sup>, speaking on the eve of Başkaya’s trial, thinks the same: “When a court case is brought it is not ultimately to obtain a sentence. The trial in itself is the repression”<sup>27</sup>.

International PEN estimate that as many as 50% of cases brought under the broad umbrella of crimes allegedly injurious to the reputation of the state result in acquittal, compared to much higher rates of conviction in other EU countries. At first blush that would appear to indicate that the country has an overactive investigatory and prosecutorial system and a robust judiciary, but leaves open the possibility that in fact the state uses the initial stages of the judicial process as an intimidatory mechanism.

## 7. RELEVANT INTERNATIONAL STANDARDS

### Relevant International Protection under the European Convention on Human Rights

Article 10 ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The right set out in Article 10 constitutes one of the essential foundations of a democratic society. It is extremely broad, protecting not just expression, but the conditions necessary for expression. However, Article 10(2) expressly allows certain restrictions, including the need to protect important public interests and the European Court of Human Rights has long recognised that states are entitled, with a considerable margin of appreciation, to adopt special measures and combat terrorism, which extends to media restrictions. The ‘duties and responsibilities’ clause in Article 10(2) is cited as imposing particular responsibilities on the media in situations of conflict and tension. However, even in a context of political violence,

Article 10 protects ideas and information and the locus of the Court's concern is "on the distinction between expression that may be 'offensive, shocking or disturbing' and expression that goes further and is an incitement to violence."<sup>28</sup> The Court's highest protection is reserved for criticism of governments and their policies and governments must be prepared to accept criticism without resorting to criminal sanctions<sup>29</sup> even if the criticism can be regarded as provocative or insulting.

Article 14 ECHR states:

The enjoyment of the rights and freedoms set forth in this 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.

Article 14 does assert a right to protection from discrimination, but this right is parasitic and must be used in relation to a breach of some other substantive right in the Convention. It does not provide a universal guarantee of equality.

### Other Relevant International Standards<sup>30</sup>

#### Arbitrary Detention / Right to Liberty

Article 3 of International Covenant on Civil and Political Rights (ICCPR) states: Everyone has the right to life, liberty and security of the person. Article 9(1) ICCPR states: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

Article 5(1) ECHR states:

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

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of 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;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Right to be informed immediately of reasons for arrest or detention

Article 9(2) ICCPR states:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereafter Body of Principles) states:

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11(2) of the Body of Principles states:

A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore.

Article 5(2) ECHR states:

Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

### Right to Notification of Rights

Principle 13 of the Body of Principles states:

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

### Right to Legal Counsel

Principle 5 of the Basic Principles on the Role of Lawyers states:

Governments shall ensure that all persons are immediately

informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

Principle 17(1) of the Body of Principles states:

A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

### Fair Trial

The right to a fair trial is provided for in various international and regional treaties. These standards are to be considered binding on the States who have ratified (or acceded to) them. Turkey has ratified or acceded to the following instruments:

#### International Covenant on Civil and Political Rights 1966 (ICCPR)

#### Convention against Torture 1975

European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 (ECHR) and Protocol No. 7 1984.

There is also a variety of non-binding instruments that are related to the right to fair trial. These instruments have persuasive force as they were negotiated by governments and have been adopted by political bodies, such as the UN General Assembly. In addition, in many cases, non-treaty standards are a reaffirmation of principles already established by other binding instruments. These international non-treaty standards include:

Universal Declaration of Human Rights 1948 (UDHR)

United Nations Basic Principles on the Independence of the Judiciary 1985

United Nations Basic Principles on the Role of Lawyers 1990

Guidelines on the Role of Prosecutors 1990

### Equality of Arms

Article 14(1) ICCPR states:

All persons shall be equal before the courts and tribunals.

Principle 27 Basic Principles on the Role of Lawyers states:

Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

Principle 17 Basic Principles on the Independence of the Judiciary states:

A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

### Independence and Impartiality

Article 14(1) ICCPR states:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled



to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 10 UDHR states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 6(1) ECHR states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Independence has been interpreted to mean the separation of powers based on an institutional protection of the judiciary against undue influence by, or interference from, the executive branch and to a lesser degree, from the legislative branch, is the basis criteria for independence.

Impartiality has been interpreted to mean open-mindedness, objectivity and absence of bias or ill will.

### Presumption of Innocence

Article 14(2) ICCPR states:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 11 UDHR states:

- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees

necessary for his defence.

- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 6(2) ECHR states:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

### Right to be Informed of Charge

Article 14(3) ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

Article 6(3) ECHR states:

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.

The information forming the basis of the charge needs to be promptly given as soon as the charge is first made by a competent authority. The information given must include the nature (exact legal description of the offence) and cause (the facts upon which the allegation is based) of the charge. The charge must be provided orally and in writing, in a language that the accused understands.

### Adequate Time and Facilities

Article 14(3)(b) ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality...(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Article 6(3)(b) ECHR states:

Everyone charged with a criminal offence has the following minimum rights...(b) to have adequate time and the facilities for the preparation of his defence.

Principle 21 of the Basic Principles on the Role of Lawyers states:

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

'Facilities' has been interpreted to mean accused and defence counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defence including statements made by witnesses and police memoranda which are in the possession of the police.

### The Turkish Penal Code

In 2002, EU leaders pledged that if Turkey met the Copenhagen criteria by December 2004 the EU would begin accession negotiations with Ankara 'without delay.' Immediately after its election in November 2002, the AKP (Justice and Development Party) government vowed to secure Turkey's European Union candidacy. In so doing, the government of Recep Tayyip Erdoğan has pursued a vigorous reform agenda and

has passed a series of constitutional amendments and reform packages. Many of the EU harmonisation reforms that Turkey has passed since 2001 have been specifically geared towards the protection of civil liberties, including increased minority and women's rights, broadened freedom of association and religion, stronger measures to protect against and prosecute torture, and a more democratic penal code.<sup>31</sup>

The adoption of a revised penal code on September 26<sup>th</sup> 2004 (due to take effect from April 1<sup>st</sup> 2005) was seen as a crucial element in Turkey's bid to start membership negotiations with the European Union and indeed a controversial provision to criminalise adultery was excluded after last minute negotiations in Brussels. The changes to the 78-year old penal code were widely welcomed as bringing Turkish domestic laws further into line with those of other European nations. It was seen as a victory for the promotion of gender equality, as it included more than 30 amendments that safeguard women's individual rights, sexual autonomy, and bodily integrity. It criminalises marital rape and sexual harassment; strengthens penalties for rape, sexual assault, and sexual abuse; eliminates distinctions between crimes against virgins and non-virgins or married and unmarried women; and abolishes provisions legitimising rape and abduction in cases where the perpetrator marries the victim. In other areas the new penal code bars Muslim clerics from engaging in politics and discrimination on the basis of personal characteristics is illegal.

### Fulfilling the Copenhagen criteria

In 1993, at the Copenhagen European Council, the Union took a decisive step towards enlargement, agreeing that 'the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.' The Membership criteria require that the candidate country must have achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the ability to take on the obligations of membership including adherence to the aims of political, economic & monetary union. At the 2002 Copenhagen summit, EU leaders promised opening talks 'without delay' provided Turkey was deemed to have made sufficient progress on democracy, human rights, legal reform and a functioning market economy. By 8<sup>th</sup> August 2003, Turkey had prepared no fewer than eight harmonisation packages in order to fulfil these requirements.

On October 6, 2004, the European Commission submitted its 'Regular Report on Turkey's Progress Toward Accession,' to the Council, an annual assessment of Turkey's efforts to meet the EU's 'Copenhagen criteria' for membership. It recommended accession negotiations be opened, and subsequently on 17<sup>th</sup> December 2004, formally agreed to start talks in October 2005, although Turkey is not expected to achieve full membership for another decade.

### Freedom of Expression in Turkey

The Turkish constitution establishes freedom of the media (Articles 28-31) and it is widely accepted that the situation in Turkey "has improved markedly"<sup>32</sup> in the last ten years, particularly with the introduction of the new penal code and also new Anti-Terror and Press laws. The Press law was adopted in June 2004. It replaces prison sentences with fines for a number of crimes, reduces fines, permits non-citizens to own periodicals and serve as responsible editors, protects editors and reporters from being forced to disclose sources, provide punishment for preventing the distribution of a publication, also law enforcement authorities to confiscate a maximum of three copies of a publication under investigation, generally prohibits courts from converting fines to prison sentences in press-related cases, and prohibits authorities from closing publications or preventing their distribution due to violations of the Press Law.<sup>33</sup> In May, parliament amended the Constitution so that it no longer authorise law enforcement authorities to seize printing presses or other publishing equipment.

There has been a reduction in the number of prosecutions and convictions in cases related to freedom of expression. According to official figures, as of April 2004, 2,204 persons have been acquitted as a result of the implementation of the amended provisions by the State Security Courts.<sup>34</sup> However, large areas of concern remain, which the new penal code has not addressed, such as limits to freedom of expression and freedom to publish and limitations on judicial reporting. There is concern that "the press is exposed to misuse of authority by the courts, which in practice continue to impose prison sentences and exorbitant fines that push journalists to censor themselves extensively on the most sensitive subjects such as the army and the Kurdish question."<sup>35</sup>

The main areas of concern in the new penal code as regards freedom of expression

are as follows:

Article 215 – Praising a committed crime or a person who committed the crime (punishable by 2 years imprisonment)

Article 216 (ex-Article 312) – Instigating a part of the people having different social class, race, religion, sect or region, to hatred or hostility against another part of the people in a way dangerous to public security (punishable by 3 years imprisonment, increase from 2 years)<sup>36</sup>

Article 220/8 (ex-Article 169) – Propaganda of an organisation founded for committing crime (punishable by 3 years imprisonment)

Article 300 (ex-Article 158) – Insulting the President of the Republic (punishable by 4 years imprisonment; if committed by means of media increased by one-third)

Article 301 (ex-Article 145) – Insult to the Turkish flag or to anything having the Turkish State's symbol (punishable by 3 years imprisonment); insult to the Turkish national anthem (punishable by 2 years imprisonment)

Article 302 (ex-Article 159) – Insulting the Turkish national identity, the Republic or the Grand National Assembly of Turkey (punishable by 3 years imprisonment)<sup>37</sup>

“Those who publicly insult or ridicule Turkishness, the Republic, the moral personality of Parliament, the Government, State Ministers, the military or security forces of the state, or the moral personality of the Judiciary will be punished with a penalty of no less than six months and no more than three years of maximum security imprisonment”

Article 159 prohibits “insulting the state and state institutions”. It grants a “moral personality” (*manevi şahsiyeti*) to entities such as Parliament, Government and the judiciary, as well as abstract concepts like “Turkishness.”

Imported in 1926 from the 1889 Italian criminal code, the *Diritto Penale*, the Turkish Article 159 was updated to reflect Mussolini's changes to the Italian code in 1930, though no repeals were made when Mussolini swept from power. In February 2002 the maximum sentence was lowered from 6 years' imprisonment to three, and in July 2003 the minimum sentence from 12 months' imprisonment to six. A substantive

change occurred in August 2002, when, as part of Turkey's third EU harmonisation package, the law was changed so that if the defendant's intent was to 'criticise' rather than insult or vilify, no punishment was required. That change was refined in July 2003.

The new Turkish penal code was adopted on 27th September 2004 and was due to come into force on 1st April 2005 then postponed for 2 months as a result of great opposition from press institutions because of the its containments of undemocratic articles regarding freedom of press. Many of the old provisions have been transferred verbatim from the old code to the new, and Article 302 of the new code is a virtually unchanged version of the 'old' A159.

Article 305 – Acting against fundamental national interests for directly or indirectly receiving benefits from foreign person or institutions (punishable by 10 years imprisonment)

Article 319 – Discouraging people from performing military service (punishable by 2 years imprisonment, penalty increased)

Article 324 – Spreading unfounded news or information during a war (punishable by 10 years imprisonment)

Article 331 – Unveiling, with the purpose of political or military spying, the information that should remain confidential for the sake of the State's security or its internal and external political interests (punishable by life imprisonment)

The 2004 Regular Report singles out Article 302 for criticism<sup>38</sup>, which continues to be used to prosecute those who criticise the state institutions in a way that is not in line with the approach of the European Court of Human Rights. The Report states that Articles 216 and 305 are narrower than previously, as individuals can only be convicted if their incitement to hatred constitutes a 'clear and close danger,' "however, it is of concern that in the accompanying reasoning, the examples of activities which could be considered in contravention of national interests go well beyond what would be acceptable under the ECHR."<sup>39</sup> Although the new Press Law adopted in June 2004 represents a significant step towards increasing press freedom, the majority of cases against journalists are brought under the Penal Code and Articles 6 and 7 of the Anti-Terror Law.

## General Overview of Current Situation

Human Rights Watch analyses the present situation in Turkey by explaining that events reflect the interplay of four strong forces, which consists of “pressure for reform coming from Turkish civil society, impatient with longstanding restrictions and ingrained institutional abuses; the incentive provided by the EU through Turkey’s candidacy for membership; resistances to change presented by the powerful sectors within the military, security forces and the state apparatus; and the destructive effects of political violence.”<sup>40</sup> These competing tensions produce a very mixed picture for freedom of expression.

Despite legislative progress, many major impediments remain to free expression within the print and television/radio and internet media. Media organisations are nearly all owned by giant holding companies with interests in many sectors beyond the media. According to Freedom House, “as the strength of these media groups continues to grow unchecked, they could become a bigger obstacle to press freedom than the state.”<sup>41</sup> As yet however, the biggest problem is that the government continues to limit freedom, meaning that people cannot criticise the State or government without fear of reprisal. Self-censorship by journalists and editors concerned about violating the many restrictions still in place is therefore a big problem. Furthermore, “whether or not conviction is likely, the regularity with which cases are filed against members of the press represents a significant deterrent to freedom of expression through the media.”<sup>42</sup>

The government continues to show serious contradictions between what it says and what it practices and “reform has taken one step back for every two steps forward as police, governors, prosecutors and government institutions tend to interpret legislation as restrictively as possible.”<sup>43</sup> The reforms implemented have simply not filtered down. A major problem is that there appears not to be any consensus between the government and non-governmental organisations as to what is really happening. According to the government, there were no journalists held on speech violations during 2004.<sup>44</sup> This seems to be because they class them as ‘militants’ rather than as journalists. However, according to the Human Rights Association, in the first nine months of 2004, the courts tried 416 people on charges relating to spoken or written expression.<sup>45</sup> According to Reporters Without Borders, during the last year, eight journalists are in prison, most for ‘belonging to an illegal organisation’ or for offences allegedly committed as members of them, four journalists have been freed, fourteen were arrested, and 18 were physically attacked.<sup>46</sup> In January 2005,



there were 1868 investigations and fines against freedom of thought and speech reported by the Diyarbakir branch office.<sup>47</sup> It is possible that this high figure is because the government “relaxed control” after the December agreement to open EU negotiations. This is proof that, according to the Human Rights Association, “the state has not changed its autocratic and oppressive character.”<sup>48</sup>

According to the project ‘Establishing a Countrywide Network in Turkey for Monitoring and Covering Media Freedom and Independent Journalism’ (BIA2) report<sup>49</sup>, which reports on 115 cases, media organisations were charged with violating the Turkish Penal Code on 38 occasions, the Media Law on 20 occasions, and the Anti-Terrorism Law on seven occasions.

Of a total of 13 cases based on Article 159 of the penal code, three resulted in penalties. Of the eight cases based on Article 312/2, two resulted in penalties and one resulted in an acquittal.

Courts handed a total fine of 1 trillion Turkish liras (US\$714,000) to eleven newspapers. Nine of them were local newspapers. Local television and radio stations were handed a total fine of 31 billion liras (US\$22,000).

A total of 20 journalists and two media organizations were attacked in 2004. Reporter **Hakkı Çat** of the Mersin newspaper, who was covering the ‘Free Citizens’ Movement’ demonstration; reporter **Gökçe Uygun** from the Cumhuriyet newspaper who was covering the KESK demonstration in İstanbul, and reporter **Sultan Özer** from the *Günlük Evrensel* (Daily International) newspaper, who was covering the demonstration by the Socialist Platform of the Oppressed, were attacked by the police.

Two media organisations and seven reporters were threatened by either relatives of deputies, police or figures in the private sector. The Dim Media Centre building of the Yeni Alanya newspaper was attacked by unknown assailants.

In 2004, 12 reporters were imprisoned. Eight reporters, three of whom were imprisoned, were released. **Memik Horoz**<sup>50</sup>, the manager of the *İşçi Köylü* (Workers and Peasants) newspaper, and **Yaşar Çamyar**, the former editor-in-chief of the *Alınlarımız* (Our Efforts) newspaper are still in prison. Eight other reporters are imprisoned pending the outcome of their trial. They are charged with either ‘membership in an illegal organisation,’ or ‘aiding and abetting an illegal

organisation.’

According to the Solidarity Platform for Arrested Journalists<sup>51</sup>, there are nineteen journalists in prison as of February 2005. Ten of these are in F-type (maximum security) prisons.

### European Court of Human Rights Cases and Friendly Settlements<sup>52</sup>

The European Court of Human Rights issued judgments against Turkey in more than forty cases in 2003. The cases involved the imprisonment of people for their non-violent opinions or after unfair trials, as well as unlawful killings and arbitrary house destruction by the Turkish security forces.

The Turkish cases illustrate the principles and scope of Article 10 ECHR protection for political expression. The cases are brought by newspapers owners, journalists etc who are prosecuted by the Turkish authorities. In the early 1990s, the background was the violent anti-Turkish, separatist struggle of the Kurds and the violent response of the Turkish police and military forces. The anti-terrorism laws were specifically aimed at political expression and did not require proof of an intention to incite violence. In all but three cases, the Court of Human Rights decided that there had been a violation of Article 10. The issue for the Court was focused on proportionality and the need for the prosecutions in a democratic society. The Turkish cases make clear that the duties and responsibilities (Article 10(2)) of the media can extend to owners and editors, and the Court makes clear that it is the meaning and the context of the written or spoken word which is determinative. The words in issue must be capable of being an incitement to violence, in other words, whether violence, armed resistance or insurrection is encouraged. Acerbic criticism of state policy will not be incitement, indeed the Court makes clear that “the language used can be aggressive and the judgment harsh, but the piece will still be protected by Article 10 so long as it does not glorify or encourage violence.”<sup>53</sup>

The Court criticised Turkey on 9<sup>th</sup> May 2003 for failing to properly investigate the 1993 death of *Ferhat Tepe*<sup>54</sup>, correspondent for the daily paper *Özgür Gündem*. It ruled that the EHRC had been violated because of the authorities’ failure and awarded his father 14,500 euros for moral wrong and 14,500 euros in costs. In June 2004, the Court ruled that the ban on wearing the headscarf in universities was not a breach of the right to freedom of religion. *Leyla Şahin* had been denied access to

university because she wore a headscarf. The Court echoed the Turkish government's arguments that the ban is justified in order to preserve the secular public order. This case now continues before Grand Chamber of European Court of Human Rights after request to refer from Leyla Şahin's lawyers.

The Court convicted Turkey for violating the freedom of expression in cases opened by Cemil Elden, Zübeyir Özkaya, Medeni Ayhan, Zeynel Baran, Gurbeteli Ersöz<sup>55</sup>, Mehmet Hatip Dicle, Özkan Kalın<sup>56</sup>, Eşref Odabaşı, Recep Maraşlı, Veysi Varlı, Hüseyin Bora, Mehmet Tekin, Sadık Yaşar, Hanifi Yıldırım, Zülküf Aydın, Ertuğrul Kürkçü and Ragıp Zarakolu who were all convicted because of either their books or speeches. The case brought against Turkey by Haluk Gerger was settled.

On July 27<sup>th</sup> 2004, the European Court convicted Turkey to pay 3000 euros plus 2,500 in court expenses in compensation in compensation in a case opened by the journalist-writer **Ertuğrul Kürkçü**, who translated the book 'War and People: Arms Transfers and War Law Violations in Turkey'. The Court ruled that although the book contains harsh expressions it does not have a hostile attitude. Kürkçü had been sentenced to a ten months in prison in 1997 for 'insulting the military'. **Ayşenur Zarakolu**<sup>57</sup>, the owner of Belge Publishing House, which published the book, had been handed a fine.

On July 13<sup>th</sup> 2004, the Court handed a punishment to Turkey in a case opened by the Belge Publishing House, which was convicted for publishing a book entitled, 'Our Ferhat, the anatomy of a Homicide'. The book was about the murder of journalist Ferhat Tepe and other human rights violations in South Eastern Turkey, and harshly criticised state officials. The Court ordered Turkey to pay 5,000 euros in compensation and 2,500 euros for Court expenses.<sup>58</sup>

The Court handed a fine of 15,000 euros to Turkey in the case about the murder of newspaper distributor **İrfan Ağdaş**. The court is evaluating the cases of **Doğan Doğan**, the manager of the Körfezin Sesi (The Voice of Gulf) newspaper published in Edremit who was detained, and journalist **Sinan Kara**, who was arrested.<sup>59</sup>

## Domestic Charges

### Radio

One of the most important developments in 2004 was the lifting of the army's influence on the Radio and Television Higher Board (RTÜK). However, local and regional media organisations are still unable to air programmes in different languages, although programmes in Kurdish, Arabic, Circassian, and Bosnia-Herzegovina languages started in June 2004. However, the RTÜK continues to impose disproportionate sanctions ranging from warnings to withdrawal of licence against pro-Kurdish media or media that are very critical of the government. The RTÜK penalised private radio stations for the use of offensive language, libel, obscenity, instigating separatist propaganda and broadcasting programmes in Kurdish. Previous restrictions imposed on broadcasters, including the requirement to respect the principle of the 'indivisible unity of the state' remain unchanged.

RTÜK reported that in the first nine months of 2004 it closed six radio stations for periods of thirty days each. In March 2004 the RTÜK ordered Özgür Radyo (Free Radio) to cease broadcasting for thirty days for inciting people to hatred and violence for an August 2003 broadcast when articles from the newspaper Evrensel were read on air. The radio applied to the European Court of Human Rights, which in response said that it would wait for the completion of the Turkish courts' procedure.

Özgür Radyo's chief coordinator **Fusun Erdoğan** was handed a fine of 4 billion Turkish lira (US\$2,759) in April for continuing the radio's broadcasts over the internet after RTÜK ordered the radio off the air.

In May 2004 **Yeter Cemile Gündoğdu**, an announcer at the Radyo Dünya (Radio World) was detained for repeating a sentence of Abdullah Öcalan, the imprisoned PKK leader. She was arrested but subsequently released. However, **Fatih Demir**, the head of Radyo Dünya are both now standing trial for that offence and face up to five years in prison and a fine of up to 1 billion Turkish lira for disseminating terrorist propaganda.

The manager of Anadolu'nun Sesi Radyosu (Anadolu's Voice Radio), **Selda Yeşiltepe**, was kept under detention for four days in July and released after prosecutors

questioned her.

There were no new developments in the case of **Sabri Ejder Öziç**, who appealed his December 2003 conviction for insulting and mocking Parliament in a radio broadcast.

### Internet<sup>60</sup>

The government did not restrict access to the internet, however, the law authorises RTÜK to monitor internet speech and to require internet service providers to submit advance copies of pages to be posted online. The law also allows police to search and confiscate materials from internet cafes to protect ‘national security, public order, health and decency’ or to prevent a crime. Police must obtain authorisation from a judge, or in emergencies, the highest administrative authority before taking such action.

### Detention and Arrests

Journalists in prison include include **Kemal Evcimen**, sentenced in 1998 to twelve and a half years in prison for ‘belonging to the Revolutionary Party and Front for the Liberation of the Turkish People; **Nureddin Şirin**, arrested in 1997 and sentenced to seventeen and a half years in prison for belonging to the Hezbollah and also for several media related offences; **Memik Horoz**, sentenced to fifteen years in prison in 2002 for interviewing activists of the TKP/ML TILLO (the armed wing of the Marxist-Leninist Turkish Communist Party) and publishing them in a magazine; **Sinan Kara** who was sent to prison for one year for threatening the son of the former prime minister Tansu Çiller.<sup>61</sup>

Several writers served prison sentences during 2004, for example **Hakan Albayrak** is serving a fifteen month prison sentence for ‘attacking the memory of Atatürk’ in violation of the 1951 Law on Crimes against Atatürk. **Nevin Berktaş** is serving a three and a half year sentence for writing a book critical of isolation in F-type (maximum security) prisons.

There were mass detentions of pro-Kurdish journalists by the anti-terrorist police on the eve of the NATO summit in İstanbul on 28<sup>th</sup>-29<sup>th</sup> June 2004, and nine journalists covering the dispersal of protesters against electoral fraud were badly beaten by police in Diyarbakir in March 2004.

In June 2004, police detained and released a DEHAP official, **Nedim Biçer** for using the expression “Sayın” (‘esteemed’) in reference to Abdullah Öcalan during a press conference.

### Trials and Indictments

According to the US State Department Human Rights Report, there were some indications during 2004 that some judges in speech-related cases were conforming their rulings to recent, EU-related legal reforms.<sup>62</sup> In May for example, the Turkish Courts acquitted DEHAP President **Tuncer Bakırhan** on charges of separatism and spreading terrorist propaganda in public speeches, determining that his comments did not encourage violence and were within the realm of legally protected speech. In August, a Van court acquitted **Selahattin Demirtaş**, president of the HRA Diyarbakir branch on charges of making terrorist propaganda, reportedly basing its ruling on the ECHR.

Prosecutors harassed writers, journalists and political figures by bringing dozens of cases to court, however judges dismissed many of these charges. Authorities often closed periodicals temporarily, issued fines, or confiscated periodicals for violating speech codes. In May 2004, **Mehmet Yürek**, editor of the newspaper *Değişim*, was indicted for insulting the former President Kenan Evren in an article published in April. In the same month, an Ankara court ordered three journalists to pay 551 billion Turkish liras (US\$ 408,000) to 312 generals for insulting them. In October, Genç Parti (Young Party) leader **Cem Uzan** was sentenced to eight months in prison and fined 623 million Turkish lira (US\$462) for insulting the government in a speech during which he called the Prime Minister “godless.”

Notwithstanding the reduction in convictions, journalists, writers and publishers continue to be sentenced for reasons that contravene the standards of the ECHR. In June 2004, the Turkish Press Council expressed its concern at a recent spate of excessive fines that had been imposed on journalists.

Authorities sometimes used forms of censorship against periodicals with pro-Kurdish or leftist content, particularly in the South East of the country. In October, the Government's Human Rights Consultation Board issued a report, which found that legal restrictions on the use of minority languages violated the country's commitments under the 1923 Lausanne Treaty. A number of Government officials harshly criticised the report and Ankara prosecutors opened an investigation against the report's principal authors.

According to the Turkish Publishers Association, 43 books were banned and 37 writers and 17 publishers were put on trial in 2003. At least 18 books were banned in the first six months of 2004.<sup>63</sup>

### Present Cases of Interest

#### Musa Kart

In recent days (March 2005), Prime Minister Erdogan has sued a political cartoonist, **Musa Kart** and his newspaper for portraying him as a cat entangled in a ball of wool. Kart was ordered to pay a US\$3,500 fine for 'publicly humiliating the prime minister' by printing the image, which was a comment on problems he was having pushing a bill through parliament. The court threw out the case against a small paper which reprinted the cartoon. The Judge in the case commented that a Prime Minister who has himself been in prison for reciting a poem "should show more tolerance to these kinds of criticisms."<sup>64</sup>

#### Zafer (Victory) Newspaper

**İsmet Atar**, the owner of Zafer (Victory) newspaper published in Gaziantep, the newspaper's editor-in-chief **Atilla Konukoğlu** and columnist **Halil Eyyüpoğlu** were fined US\$2,350 in damages for insulting the Prime Minister.

A Gaziantep court rejected a request by the journalists to postpone the case until the new Turkish Penal Code goes into effect in April. The court ruled that the defendants have to pay a fine of 3,000 liras in damages. The fine includes interest since April 14,

when the article in question was published.

Eyyüpoğlu, in his column called Karakalem (Charcoal Pencil) had criticised Prime Minister Erdogan for his treatment of Rauf Denktaş, the president of the Turkish Republic of Northern Cyprus.

Another lawsuit for an article entitled, 'Kürdistan after Cyprus?' is awaiting the new Turkish Penal Code. During the last hearing, the court had ruled to postpone the trial until June 10<sup>th</sup> 2005. The journalists face from three to eight years in prison if found guilty.

The Prime Minister, has previously sued *Günlük Evrensel* (Daily Evrensel) and *Cumhuriyet* (Republic) newspapers for publishing caricatures about him, and lost a case against the *Sakarya* newspaper in Eskişehir.

### Sandra Bakutz

**Sandra Bakutz** an Austrian journalist who has been involved for several years in defending Turkish political prisoners, was arrested on 10<sup>th</sup> February 2005 on her arrival at Atatürk international airport in İstanbul and has been held ever since on a charge of 'belonging to an illegal organization.' Bakutz was taken to the Pasakapisi detention centre in İstanbul on 16 February, and was subsequently transferred to the prison in Gebze, a town about 50 km south of İstanbul. She later released in early April.

### Ferhat Tunç and Mehmet Çolak

**Ferhat Tunç**, an Kurdish artist, and **Mehmet Çolak**, the editor of the daily *Özgür Gündem* stood trial on 9<sup>th</sup> March 2005 for an article entitled 'A Revolutionary Leyla and a Song' which was published in the paper on 19<sup>th</sup> January 2004. The article criticised the conviction of Leyla Zana and other former deputies of the Democracy Party (DEP) which was closed down by the government. They face up to three years in prison.



### Journalists Accused of belonging to a 'Terrorist Organisation'

46 people including 8 journalists have been accused of 'being members of a terrorist organisation' and stood trial on 11<sup>th</sup> March 2005. They were arrested at a peaceful demonstration organised to protest against the new law for criminal executions and isolation in prison.

### Prohibition against Kurdish songs

The Court of Diyarbakir has recently prohibited the distribution of Kurdish songs by famous singers, *Xero Abbas*, *Aynur Doğan*, *Ozan Kawa*, *Diyar* and *Aydın*, on the basis that they constituted 'propaganda for a terrorist organisation' under Article 7/2 and 3713.



## 8. WORLD WOMEN'S DAY DEMONSTRATIONS

Television footage showed police officers hitting demonstrators with batons and kicking women who had fallen to the ground during peaceful demonstrations on World Women's Day on 8<sup>th</sup> March 2005. "We were shocked by images of the police beating women and young people demonstrating in İstanbul," reported a statement, issued in Brussels by the EU. Turkish Justice Minister Cemil Çiçek, however, struck a defiant note, saying that the tolerance of security forces had limits. "When police in EU countries confront anti-globalization activists, surely they they do not greet them with flowers," he said.

### Hüseyin Aygün

**Hüseyin Aygün**, the owner of Munzur Haber and former President of the Tunceli Bar Association, is standing trial on March 29<sup>th</sup> 2005 for defending the right to be educated in Kurdish. He is being charged with 'insulting the republic' and 'encouraging the crowds to chant slogans' during the 2002 Newroz (Kurdish New Year) celebrations.

### Recent releases

Turkey's Supreme Court of Appeals recently overturned the conviction of writer **Selahattin Aydar** from the Milli Gazete (National Newspaper), who had stood trial for criticising the inclusion of KONGRA-GEL (the new name for the Kurdistan Workers' Party (PKK)) in the list of terrorist organisations in Europe. **Yaşar Çamyar**, the former chief editor of 'Alinterimiz' newspaper was released on February 7<sup>th</sup> 2005 after having been arrested on December 17<sup>th</sup> 2004. Writer **Cevher İlhan** of the Yeni Asya (New Asia) newspaper who was sentenced for a piece about the Marmara earthquake was released on January 15<sup>th</sup> 2005.



## 9. RECOMMENDATIONS

### Introduction

It is clear from what was observed by the trial observation mission that despite constitutional and legislative changes adopted over the last three years that there remain serious concerns regarding compliance with international human rights standards. The findings of the trial observation mission highlight the need for continued monitoring of enforcement and implementation of these changes. The mission concludes that international human rights standards appear to have been breached during the investigation and trials of Ragıp Zarakolu and Fikret Başkaya.

- i. The right to an effective remedy
- ii. The independence and impartiality of the judiciary
- iii. The right of a defendant to be informed promptly of the charges
- iv. The right to a fair trial
- v. The right to trial by an independent tribunal
- vi. The right to trial by an impartial tribunal
- vii. The right to equality of arms
- viii. The right to presumed innocent
- ix. The right to examine or have examined witnesses against the accused
- x. The right to freedom of expression

### Recommendations for the Turkish Government

- i. Comply with international fair trials standards
- ii. Comply with international human rights treaty obligations and in particular obligations under Article 10 of the European Convention on Human Rights
- iii. Implement and enforce measures to ensure independence and impartiality of the Judiciary, separation of the roles of Prosecutor from Judge, fair trials, equality of arms and due diligence so as to ensure impartial, neutral and objective determination at hearings
- iv. Implement and enforce all new laws enacted to comply with the Copenhagen Criteria and the Harmonization Packages; and
- v. Address the criticisms outlined in the EU Commission's 2004 Regular Report on Turkey's Progress towards EU accession.

### Recommendations for the UK Government:

- i. Ensure a UK Government representative attends future legal proceedings against either defendant

### Recommendations for International Organisations

- i. Monitor Turkey's Implementation of new legislation and compliance with international treaty obligations;
- ii. Initiate and maintain contacts with human rights organisations in Turkey;
- iii. Maintain dialogue with the European Union on the issues raised in this report throughout future discussions on accession.

## 10. APPENDICES

### APPENDIX 1

#### Indictment against Ragıp Zarakolu

T.R.  
Istanbul  
State Security Courts  
Public Prosecutors Office

Preliminary no. 2003/1443  
Indictment no. 2003/903

#### Indictment

Plaintiff: Public Law

Accused: Ragıp Zarakolu, registered in Tokat province, Niksar district, Cedit neighbourhood, son of Mustafa and Safiye, born in 1948, currently domiciled at Divanyolu C. Ground Floor, Belge publications, Sultanahmet.

Offence: Inciting the people to hate and animosity through racial discrimination by way of media

Date of offence: 08.03.2003

Article of law: 312/2 of Turkish Penal Code and last article.

The Preliminary Documents were examined:

It was established that a case has been opened by the Chief Prosecutor regarding accused Ali Çelik Kasımoğluları and Mehmet Çolak; and during this public trial a notification of offence has been made regarding accused Ragıp Zarakolu concerning a column entitled ALBATROS.

Accused Ragıp Zarakolu is the writer of this article. In an examination of the ALBATROS column entitled Splendid on page 4 of the first and second editions of the *Yeniden Özgür Gündem* newspaper published in Istanbul of 08.03.2003 it has been established that the offence of inciting the people to hate and animosity through racial discrimination has been committed in the following sentences: Furthermore, the de facto Kurdish administration maintains its contacts and talks with the Turkish government. So why the disaster-mongering of the media? As if there is a new development. Look, it is said that: “We must go into Iraq, otherwise the Kurds will found a state and ask for land from us. We must enter Iraqi territory to prevent a Kurdish state being established. Saddam is the pretext, crushing the Kurds is splendid!”

After following our war-mongering media is it any surprise that the Kurds in the south should fear and oppose Turkish troops going there, after all these brazen threats?

Our fear is that of the wolf. The Kurds' is that of the lamb.

The wolf says to the lamb: “You are muddying my water.” The lamb says: “How can I do that, I am below.”

The wolf replies: “Whether you muddy it or not I am going to eat you.”

That is, however much the fears of one side are hypothetical the fears of the other are real.

And another headline: General Tommy Franks, the commander of US forces in the Gulf, gave the good news: “Clashes may break out between Turkish soldiers and peshmerga. One of our duties during and after the war will be to prevent these clashes”.

The public trial and conviction of the above accused is therefore requested in accordance with article 20 of Law no. 2845. 18.08.2003

Hadi Salihoğlu – 23866  
Istanbul DGM Prosecutor



## APPENDIX 2

### Article by Ragıp Zarakolu

Ragıp Zarakolu:

What's it to you?

Last night the presidents of the bloc parties chatted with journalists from various media organisations and explained their views. Undoubtedly the subject which most interested the journalists from the large media organs was the attitude that they [the parties] would take regarding the formation of a Kurdish federal or independent state in the south.

When expounding their views the party leaders emphasised the importance of preserving peace not only abroad but also at home and of avoiding provocative behaviour. Certain members of the media asked the usual classic questions, albeit in a polite manner, but with definite prejudicial stress.

Akın Birdal, Ahmet Turan Demir, Levent Tüzel and Mehmet Abbasoğlu replied in a very sensible manner to the various questions put to them, emphasising the importance of unity between the forces of peace and democracy in Turkey as regards internal peace in addition to foreign adventures. They also drew attention to the systematic bombardment of anti-Kurdish attitudes in the media. The bloc parties are lending support to the anti-war campaign in Turkey and Iraq with various activities. But it is necessary to raise this to the level that existed during the elections. The bloc must become a more effective movement. A tight organisation based on a concrete action programme must replace the existing loose unity in order to achieve lasting results. During these debates Levent Tüzel, the president of EMEP, appropriately emphasised the right to self-determination. Of course the Kurdish community in the south will shape its society in the way it wishes. During the British period, subsequently and even in the Saddam period the region had its own "special" status. Today the right of self-determination is theirs, if they wish they will establish an

independent state or a federation. There can be only one reply to anyone who objects to this:

“What’s it to you!”

When we look at recent media attitudes we encounter an exceptionally belittling, colonialist logic, carried out in a particularly insensitive way. Functionally speaking, for more than 10 years in the Iraqi Kurdish region there has existed the concept of a Kurdish state, be it federated, autonomous or independent. All journalists who have visited the region are witness to this. Since the 1991 conflict the infrastructure of the Iraqi state has been transferred to Kurdish administrators. The courts are functioning, the schools are open, urban projects are being undertaken, inter-city transport, bridges are being built. The only thing missing is the minting of currency, but there is no reason why that should not happen one day. Following the civil war incited by regional forces the parliament is continuing its work. Furthermore, the de facto Kurdish administration maintains its contacts and talks with the Turkish government. So why the disaster-mongering of the media? As if there is a new development. Turkish citizens are being encouraged to see the founding of a Kurdish state as a catastrophe.

Look, it is said that: “We must go into Iraq, otherwise the Kurds will found a state and ask for land from us. We must enter Iraqi territory to prevent a Kurdish state being established. Saddam is the pretext, crushing the Kurds is splendid!”

After following our war-mongering media is it any surprise that the Kurds in the south should fear and oppose Turkish troops going there, after all these brazen threats?

Our fear is that of the wolf. The Kurds’ is that of the lamb.

The wolf says to the lamb: “You are muddying my water.” The lamb says: “How can I do that, I am below.”

The wolf replies: “Whether you muddy it or not I am going to eat you.”

That is, however much the fears of one side are hypothetical the fears of the other are real.

And another headline: General Tommy Franks, the commander of US forces in the

Gulf, gave the good news: “Clashes may break out between Turkish soldiers and peshmerga. One of our duties during and after the war will be to prevent these clashes!”

Another justification for the US presence in the region to be permanent, “to prevent a Turkish-Kurdish conflict!”

On the one hand our media constitutes an incredible Kurdish phobia and on the other some people burn a Turkish flag. The Americans then act as a so-called guardian of peace in the region and their presence becomes permanent.

This is how the soup is cooked, in the same way as the Cypriot question, which did not exist in the early fifties, was prepared and presented to us.



## APPENDIX 3

### Statement in Defence of Ragıp Zarakolu

Beyoglu No. 2 Court of First Instance 2.3.2004. 9.30

Esteemed members of the Court:

“I really cannot understand the motive for opening this case. I acknowledge that the article entitled “What’s it to you” contains strong critical elements, but since when has criticism been accepted as an offence? Why should opposing war, and the participation of Turkey in a war I believe to be unjust, be a crime?

Why should it be an offence to criticise the aggressive, humiliating and insulting expressions used in the media prior to the war to target a society, that is, the Kurdish society?

Why should it be an offence to stand up for the principle of “ the right to self-determination”, one of the fundamental tenets of international law and a founding principle of the United Nations?

At the time the article was penned it was being openly proclaimed in the media that the founding of an independent state in northern Iraq or even the emergence of a federation would be deemed a ‘casus belli’.

Attempts were being made to drag Turkey into a war the outcome of which was unclear. As for the article it opposed Turkey’s participation in the war as the result of anti-Kurdish incitement, taking a pro-peace stance. Who can oppose the proposition that to support peace in the region is to support peace in the country and that to support peace in the country implies support for peace in the region?

So what happened?

The Turkish Grand National Assembly did not offer sufficient support to the bill proposing Turkey join the war in Iraq, preventing it participating in a foreign

adventure. That is, my views were vindicated in a way.

I am now on trial on account of this. I cannot recall a single occasion on which the racist, denigrating and hateful pronouncements towards the communities with which we have lived for the last thousand years have been put on trial. However, while these racist, hateful attitudes are considered offences in universal human rights law and conventions to which we are endeavouring to harmonise every day, here, on the contrary, writers who oppose these attitudes and defend the rights and honour of these communities have been prosecuted on numerous occasions. People defending their identity have been tried.

While books detailing human tragedies are banned, Hitler's *Mein Kampf*, the only book banned in European countries, continues to appear in our best-seller lists. Esteemed members of the Court, I expect the charge, which I consider unjust, regarding my article, which rejects racial discrimination and calls for peace within the boundaries of criticism to be withdrawn.

Accused Ragip Zarakolu 2.3.2005

## APPENDIX 4

### Indictment against Fikret Başkaya

Republic of Turkey  
ANKARA  
Public Prosecutor's Office  
Press Bureau

Press Investigation: 2003/426

Press Principal: 2003/142

Bill of Indictment: 2003/43

### BILL OF INDICTMENT

#### ANKARA FIRST INSTANCE CRIMINAL COURT

Prosecuting: Public

Defendants:

1. Fikret BAŞKAYA, son of Halil and Ümmügülsüm. Born in 1940. Registered to the Population Office at Denizli [Province], Central [County], Kızılyer Village: Resident at Bayındır Sokak, 16/3 Kızılay Ankara.
2. Özden BAYRAM. Son of Osman and Mesude. Born in 1968. Registered to the Population Office at Kayseri province, Akkışla [County]. Gömürgen village. At present resident at Adalararası Sokak 4/4 Abidinpaşa Ankara.
3. İsmet ERDOĞAN. Son of Abdulkadir and Keziban. Born in 1972; registered to the Population Office at Kayseri [Province], Akkışla [County], Ortaköy village; at present resident at Demirlibağçe İniş Sokak 24/19 Mamak.

Charge: Breaching the Article 159 of the Turkish Penal Code

Date of Crime: January 2003

The book entitled “Swimming against the Current” written by defendant Fikret Başkaya, and prepared for publication by defendant Özden Bayram, was published by Maki Basın Yayın Sirketi [Maki Press and Publications Ltd] where defendant İsmet Erdoğan was the responsible editor, in January 2003. In the 24<sup>th</sup> page of the book it reads: ‘...The Sivas massacre ... was a massacre organised by the state as the previous ones ...’, and in the 25<sup>th</sup> page it reads: ‘...The main issue is the Torture Republic ...’; in page 97<sup>th</sup> it reads: ‘...The torturing administration of the generals who came to save the Country was also part of them. In Turkey, torture was not solely the domain of military regimes. The state in itself is a torturing state. In the literature of the political sciences there is a concept of torturing state. ...’ It was established by the contents of the case file that by including these remarks the crime defined by the article 159 of the Turkish Penal Code was committed; that although the defendants claimed that the book was published previously and already 3 editions were issued, and that their intention was not insulting and defaming the Republic and Armed Forces of the state by publication. Their crime was obvious; that the Ministry of Justice issued permission to proceed [with the prosecution] by its correspondence dated 14.04.2003; and that the defendants had committed the crime directly in joint action.

I demand that the Defendant to be tied and punished individually in accordance with the articles 64/1 and 159/1 articles of the Turkish Penal Code. 22.04.2003

Hamza Uçar – 19196  
Public Prosecutor  
Appendix 5



## APPENDIX 5

### Statement in Defence of Fikret Başkaya

Your honour

The public prosecutor, is demanding that I be sent to prison for up to 3 years, claiming that, in two articles I wrote over 12 years ago, I was guilty of “insulting and slandering the moral person of the Turkish State and the Turkish Armed Forces” and that I have thus committed the crime laid down by the 159/1 article of the Turkish Penal Code.

One of the two articles under consideration refers to the tortures carried out during the regime of the 12 September junta; the other contains a reminder of the state’s role in the Sivas massacre.

These two articles were first published in the daily newspaper “*Özgür Gündem*” (Free Agenda). They were subsequently reprinted in the book “*Akıntıya Karşı Yazılar*” (Articles Against the Stream), which was reprinted in 2003. It was only after the second printing of the book (and the third printing of the articles) that a prosecution was initiated. If these articles constitute a crime, why did the public prosecutor wait a full ten years to start the prosecution?

It is absolutely impossible for me to accept the comic accusations made against me. Further, even the initiation of such a prosecution against me is a scandal. I am accused, in one case, of exposing torturers, in the other of saying that the state was involved in the burning alive of 37 valuable citizens.

The 12 September 1980 Junta, was, in itself, a serious offence, in that, by removing an elected government, the Generals committed a constitutional crime. This, alone, should be sufficient to justify the prosecution of the organisers of the coup. The Junta turned Turkey into a 780,000 km<sup>2</sup> torture chamber and committed crimes against humanity. Why are those who committed these crimes against humanity not being prosecuted, while I am?

In this situation it is not the criminal who is being pursued, but the one who is

exposing the criminal. When hundreds of thousands were being tortured, and hundreds were dying in the torture chambers, was the “moral person” of the state being strengthened? Is it the case that the more torture public officials using the authority of the state carry out, the stronger the moral authority of the state becomes?

Anyone with an average grasp of logic and reason knows that there is not, and cannot, be such a thing as the “state’s moral person”. The state is a corporate entity. Corporate entities have no connection with the spiritual world. Moral values are the property of people with consciousness and free will. Has anyone ever seen the state cry, or laugh, or go for a picnic?

Just because some ancient law says so, does not make something true. To date, how many tyrants, murderers, bloody dictators, repressive regimes have produced how many laws that have contravened the basic principles of law and denied the most basic human rights, but they have always been condemned by the conscience of civilised people. The principles and rules of the legal system, and of the law can base themselves on universal ethical principles.

Just as the state cannot have a moral personality, the charges against me have no legal basis.

Let us come to article 159 of the Turkish Penal Code, under which I am being prosecuted. This article was transferred into the Turkish Penal Code in 1926 from the Italian Penal Code of 1889. Changes made to the article by the fascist regime in Italy in the 1930s were also reflected in the Turkish Penal Code. This article is a provision that imposes the concept of the protection of the “sacred state” against society. Thus it represents a pre-modern mind set. Modern societies have long rejected the idea of the sacred state. In fact this article reflects a fascist ideology. In the modern world, it is the citizen, not the state, who should be protected. This article is the product of long abandoned attitude that counts the individual for nothing, while making the state sacred, that talks of the “high interests of the state”. It is extremely unfortunate that this article is still in force, and it should be abolished as soon as possible. Unfortunately article 159/1 is preserved in its entirety in article 302 of the new Turkish Penal Code.

The main function of this article is by forbidding thought to eliminate the possibility of free discussion. While regulations like this remain in force, it will be impossible to talk of freedom of thought or expression in Turkey. While free discussion continues

to be forbidden the gangrene surrounding the state mechanism will continue to develop. The main reason for the corruption that affects almost everyone involved in the state's operation is the absence of freedom of expression, and therefore of free discussion.

The reason for the existence of freedom of expression (and of thought) is to be able to criticise the workings of the state, the decisions it makes and the things it does. Otherwise it is impossible to talk of freedom of expression. Without fully understanding this, changes in the law, already made or to be made, will have no real effect. In any country, if those who make the decisions affecting peoples' lives, and those who carry those decisions out, cannot be criticised, then, in that country, it is not possible to talk about freedom of expression, modernity, democracy, human rights, law or the rule of law.

In fact those what are being protected, and are sought to be protected, by these kinds of laws are the interests and privileges of certain centres of influence who are accustomed to see themselves as the "proprietors of the nation". In fact these expressions about the protection of the state and these kinds of laws are articles to protect the "robbers, looters, bank emptiers, perpetrators of massacres and monsters who have insinuated themselves into the state". Unfortunately this is an 80-year-old tradition.

Not only the generals of the 12 September Junta, but also anyone who exercised political power during that period, is responsible for the torture carried out then, has collectively committed crimes against humanity and should definitely be tried and punished. The responsibility for torture does not only lie with those who carry it out personally. The 1984 Geneva Convention of the United Nations makes this clear. The first article of this convention establishes that, along with those who actually carry out torture, those public officials who order torture and those who turn a blind eye to it, who encourage it or approve of it must also be considered guilty of torture. However, in Turkey, torturers are protected by the state and rather than being punished are promoted. Of course, for a regime in which torture is the general rule, the protection of torturers is not surprising.

In Turkey, torture is a generally applicable, systematic, form of interrogation, not restricted to the 12 September period. Between 12 September 1980 and 31 December 1980, 43 people died under torture. According to official figures the number that have died under torture between 12 September 1980 and 12 September 1995 was 460. In the 13 years before 12 September 1980 the number of deaths was 20. Do not

these figures show what the Generals were after and the dark mission that they were serving?

The Junta Generals claimed that they were overturning the elected government to “bring peace and security to the country”. These figures give an idea of how they brought “peace and security”. More than 650,000 people were arrested and the majority of these were tortured. 1,683,000 people were given a political record in government files, 210,000 prosecutions were initiated, demanding more than 7,000 death penalties. 517 people were condemned to death and 50 were executed. Of course, the achievements of the Generals were not restricted to these.

It is a stain on the honour of the whole of society that these generals who have committed crimes against humanity have not yet been brought to justice. Sooner or later they will face trial. History shows us that these kinds of bestiality are not forgotten, and, come the time, the perpetrators will be called to account.

The Sivas massacre was a shameful bestiality carried out in front of the eyes of 70 million people. If the politicians and administrators who were exercising the authority of the state had chosen, this monstrous event would not have happened and society would not have suffered this shame. There is a resemblance between the Sivas massacre and the events of 6-7 September 1955, the 1 May 1977 massacre in Taksim Square, the 1979 pogroms in Maras, Corum and Sivas. This is part of the Susurluk tradition and its roots go back as far as the 1910's. Behind all these bestialities, these massacres, murders lies the centre of force and power, which I call the “fundamental state party”. It is this “fundamental state party” that really runs Turkey. Is it possible to conceive of a parliament that would not question the existence of the temporary 15<sup>th</sup> article of the 1982 constitution, a real parliament would that behave as if this article did not exist? In such a country is it possible to talk of democracy or human rights? Is the job of parliament that of chauffeur to the Junta? For over 25 years we have had elected government after elected government, but not one has questioned the 15<sup>th</sup> article. The elected governments of Turkey are no more than the subcontractors for the “fundamental state party”. Until this duality ends, while the apparent and real power continue to be separate, the Susurluk tradition will also continue.

Those who know the history of this society know well that the people do not go in for these kinds of excesses spontaneously. There is not a single historical example of a massacre that has happened without the organisation, provocation and manipulation of the state. Many of these events have been provoked by agents of the state, while those who would have been able to intervene have not done so. To divert attention from the guilty, the innocent have been arrested and tried. Statements

made immediately after the events, subsequent declarations by persons in authority, witnesses and defence lawyers confirm what I say. The trial should be reopened and those who were “ultimately responsible” should be put on trial. However, not only the actual murderers, but also all those with administrative or political responsibility at the time should also be held to account.

The Sivas massacre is not the only massacre in Turkey’s recent history that has been the subject of a cover up. The crimes committed in the past are like a dung heap of lies, taking root in the future and sullyng the present. And the methane gas accumulating from this growing heap surely will one day explode. Those who have blackened our past and our present also blacken our future. A judges parliament, with unlimited powers of investigation, directly elected by the people, should be set up to bring out into the light of day all the massacres, murders and bestialities that have so far remained in darkness.

For the people of this society have the right to know the truth.

This is my statement

With my respects

Fikret Başkaya



## REFERENCE

<sup>1</sup> The Applicants in case numbers 26971/95 and 37933/97 were represented by the Kurdish Human Rights Project

<sup>2</sup> See appendix 2

<sup>3</sup> This paper began in 1992 and had on occasions had daily sales of 50000 but was now down to about half of that because Ragıp Zarakolu said of distribution difficulties. He indicated that these difficulties were an example of how the state can have success in repressing free speech by using economic measures

<sup>4</sup> Source: BIA2 [Network for Monitoring and Covering Media Freedom and Independent Journalism] 3<sup>rd</sup> Media Monitoring Report; [www.bianet.org](http://www.bianet.org)

<sup>5</sup> Joint Press Statement-International Publisher's Association (IPA)/International PEN 1 March 2005

<sup>6</sup> See appendix 1

<sup>7</sup> See appendix 3

<sup>8</sup> All judges and prosecutors have been to Strasbourg for training on the European Convention, according to a representative of TOHAV, 1 March 2005

<sup>9</sup> *Türkiye işçi Partisi*

<sup>10</sup> *Paradigmanın İflası – Resmi İdeolojinin Eleştirisine Giriş*

<sup>11</sup> Though replaced by Article 312 of the new penal code

<sup>12</sup> Strasbourg also held, consistent with a long line of judgments against Turkey on this topic, that the trial at the State Security Court (SSC) breached Başkaya's rights under A6 ECHR. In name, at least, the SSCs have now been abolished.

<sup>13</sup> And a successful move to expel him from office under Section 98(2) of the Civil Servants Act (Law no. 367)

<sup>14</sup> In Turkish: *Tarihi Dava mı.*

<sup>16</sup> See, in particular, "Turkey's non-implementation of European Court judgments: The Trials of Fikret Başkaya"; September 2003; Kurdish Human Rights Project and Bar Human Rights Committee; London; ISBN 1 900175 62 2

<sup>17</sup> Ibid.

<sup>18</sup> See Appendix 4

<sup>19</sup> Interview with Yavuz Önen, head of Turkish Human Rights Foundation, Ankara, 1<sup>st</sup> March 2005

<sup>20</sup> Interview with Aydın Erdoğan (Başkaya's lawyer), Ankara, 1<sup>st</sup> March 2005

<sup>21</sup> The full translated text of his speech appears at appendix 5

<sup>22</sup> Murat Yetkin; "Minister of Justice: We have problems in conforming our justice system to the EU"; *Radikal*; 14<sup>th</sup> May 2003

<sup>23</sup> Source: see footnote 16

<sup>24</sup> Zarakolu v Turkey (Friendly Settlement); Appl No. 37059/97; ECtHR 2<sup>nd</sup> October 2003

<sup>25</sup> European Commission; “2004 Regular Report on Turkey’s progress towards accession”; Brussels; 6.10.2004; SEC(2004) 1201 at 39

<sup>26</sup> Human Rights Association

<sup>27</sup> Interview with Yusuf Alataş, 1<sup>st</sup> March 2005

<sup>28</sup> H. Davis, ‘Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech’ in *European Human Rights Law Review*, Issue 1 2005, p.78.

<sup>29</sup> For example, *Başkaya and Okçuoğlu v Turkey* (2001) 31 EHRR 10, cited in Davis, ‘Lessons from Turkey’ p.78.

<sup>30</sup> See *The Trials of Ferhat Kaya*, published by KHRP, September 2004.

<sup>31</sup> Freedom House report, ‘Countries at the Crossroads 2005’ by Sarah Repucci, 2005

<sup>32</sup> Human Rights Watch report, ‘A Crossroads for Human Rights?’, 15/12/04; <http://hrw.org/english/docs/2004/12/15/turkey9865.htm>

<sup>33</sup> US Department of State Country Report on Human Rights Practices – Turkey, 28/02/05, p.10.; <http://www.state.gov/g/drl/rls/hrrpt/2004/41713.htm>

<sup>34</sup> Commission of the European Communities, *2004 Regular Report on Turkey’s Progress Towards Accession*, 06/10/04, p.37; [http://europa.eu.int/comm/enlargement/report\\_2004/pdf/rr\\_tr\\_2004\\_en.pdf](http://europa.eu.int/comm/enlargement/report_2004/pdf/rr_tr_2004_en.pdf)

<sup>35</sup> Reporters Without Borders report, ‘*Turkey still far from European standards of press freedom*’, 16/12/04; [http://www.rsf.org/article.php3?id\\_article=12096](http://www.rsf.org/article.php3?id_article=12096)

<sup>36</sup> Ragıp Zarakolu stands charged under Article 312

<sup>37</sup> Fikret Başkaya was indicted under this Article

<sup>38</sup> Commission of the European Communities, *2004 Regular Report*, 06/10/04, p.37

<sup>39</sup> *Ibid.*, p.38.

<sup>40</sup> Human Rights Watch, *Overview of Human Rights Issues in Turkey*, 2004; <http://hrw.org/english/docs/2005/01/13/turkey9882.htm>

<sup>41</sup> Freedom House report, *Countries at the Crossroads*, Repucci, p.4.

<sup>42</sup> *Ibid.*, p.39.

<sup>43</sup> Human Rights Watch, *Overview of Human Rights Issues in Turkey*, 2004

<sup>44</sup> US Department of State Turkey Report, p.11.

<sup>45</sup> US Department of State Country Report on Human Rights Practices – Turkey, 28/02/05, p.9.

<sup>46</sup> Reporters Without Borders, *Turkey 2004 Annual Report*, 03/05/04.

<sup>47</sup> Human Rights Association (IHD) Report, *Critical Report by IHD: In 2 Months 2855 Rights Violations Occurred*, March 2005.

<sup>48</sup> *Ibid.*

<sup>49</sup> BIA2 Annual Media Report, *No Jailing But*, 18/01/05; [www.bianet.org](http://www.bianet.org)

<sup>50</sup> Memik Horoz is in a maximum security prison. He has bladder cancer and has undergone three operations whilst in prison.

<sup>51</sup> Quoted in information bundle of ‘Joint Mission to Observe Freedom of Expression Cases in Turkey’, 02/03/05.

<sup>52</sup> Davis, ‘Lessons from Turkey’, *European Human Rights Law Review*, Issue 1 2005.

<sup>53</sup> *Ibid.*, p.81.

<sup>54</sup> The Belge Publishing House ran by Ragıp Zarakolu and his late wife was charged in relation



to publishing articles about Ferhat Tepe.

<sup>55</sup> The Applicants were represented by the Legal Department of the Kurdish Human Rights Project in case number (20764/92). See KHRP's publication 'Özgür Gündem v Turkey: Violation of Freedom of Expression'.

<sup>56</sup> The Applicant was represented by the Legal Department of the Kurdish Human Rights Project in case number (31236/96)

<sup>57</sup> Ayçenur Zarakolu is the late wife of Ragıp Zarakolu .

<sup>58</sup> Relevant cases include, *Affaire Zarakolu et Belge Uluslararası Yayıncılık v Turquie* (13/10/04); *Zarakolu v Turkey* (23/05/03, 02/010/03). The Applicants in these cases were represented by the KHRP Legal Team.

<sup>59</sup> BIA2 Annual Media Report, No Jailing But, 18/01/05.

<sup>60</sup> US Department of State Turkey Report, p.11.

<sup>61</sup> Reporters Without Borders, Turkey 2004 Annual Report, 03/05/04.

<sup>62</sup> US Department of State Turkey Report, p.10.

<sup>63</sup> Commission of the European Communities, 2004 Regular Report, 06/10/04, p.39.

<sup>64</sup> BBC News report, Turkish Press Under Fire, 03/03/05.











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