Effective Criminal Accountability? Extra-Judicial Killings on Trial

Trial Observation Report

May 2006

BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

Kurdish Human Rights Project
KHRP
Established 1992

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NOTE

For further reading into the circumstances of the killings of Ahmet and Uğur Kaymaz, see Kurdish Human Rights Project and Bar Human Rights Committee of England and Wales', 'Thirteen Bullets: Extra-Judicial Killings in Southeast Turkey – Fact-Finding Mission Report' (March 2005)

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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 within 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 Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial. The remit of the Bar Human Rights Committee extends to all countries of the world, apart from its own jurisdiction of England & Wales.

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Abbreviations

AKP	*Adalet ve Kalkınma Partisi* (Justice and Development Party)
CAT	Convention Against Torture
CHP	*Cumhuriyetci Halk Partisi* (Republican People's Party)
DEHAP	*Demokratik Halk Partisi* (Democratic People's Party)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FFM	Fact-Finding Mission
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
İHD	*İnsan Haklari Derneği* (Human Rights Association of Turkey)
NGO	Non-Governmental Organisation
PKK	*Partiya Karkeren Kurdistan* (Kurdistan Workers' Party)
UDHR	Universal Declaration on Human Rights

Foreword

This report presents the findings of a mission to observe the trial of four police officers accused of the extra-judicial killings of Ahmet and Uğur Kaymaz. The two males, both Kurds, were killed in November 2004 in Kızıltepe, south-eastern Turkey. KHRP and BHRC sent observers to the trial on 24 October 2005 in Eskişehir, a trial which is ongoing.

The indictment accuses the defendants of having used excessive force. It is far from the first time that Turkish security or police officers have stood accused of this. Indeed, Turkey has the worst record for violations of the right to life of any member state signatory to the European Convention on Human Rights. We are gravely concerned that today, a decade after the Strasbourg courts first condemned Turkey's human rights record, such cases are continuing. Worse still, it is apparent that the security situation in south-east Turkey is degenerating. While the killings of Ahmet and Uğur Kaymaz are tragic, they are not unique.

We remain steadfast in our commitment to ensuring that perpetrators of human rights abuse are brought to justice. This case is an important test of Turkey's commitment to that same goal.

The report outlines recommendation both for Turkey and for international observers in ensuring that perpetrators of extra-judicial killings are brought to justice, and the rule of law respected.

Kerim Yildiz
Executive Director, KHRP

Mark Muller
President, BHRC

A. Introduction

On 21 November 2004 Ahmet Kaymaz, 31, and his son Uğur, 12, were killed by undercover police officers some 40 to 50 metres from their home in Kızıltepe, south-east Turkey. The incident prompted national and international attention.

Kurdish Human Rights Project (KHRP) and the Bar Human Rights Committee of England and Wales (BHRC) investigated the killings and published their joint findings in March 2005.[1] Proceedings were commenced against four police officers on 27 December 2004, charged with using excessive force. The first hearings took place in the Mardin Heavy Penal Court. It was decided that the public reaction to the case in the local area threatened public security. As a result of this decision the trial was moved some 900km away to Eskişehir. This report comprises the findings of a joint trial observation Mission by KHRP and BHRC of the third hearing in the trial which took place in Eskişehir on 24 October 2005.

The Mission interviewed lawyers, parliamentarians and representatives of non-governmental organisations regarding the investigation and trial procedure, and more widely about effective criminal accountability for extra-judicial killings in south-east Turkey.

The Mission has a number of concerns about circumstances of the deaths of Ahmet and Uğur Kaymaz and the subsequent trial of the four police officers charged with killing them, namely:

- That the deaths of Ahmet and Uğur Kaymaz constituted violations of their rights to life under Article 2 of the European Convention on Human Rights (ECHR); that the investigation has not been full and effective; and that allegations of extra-judicial killings have increased, particularly in the context of the deteriorating security situation in south-east Turkey;

- That the proceedings were taking place in a climate of intimidation,

1 **Kurdish Human Rights Project, 'Thirteen Bullets: Extra-Judicial Killings in Southeast** Turkey' (Kurdish Human Rights Project, London), 2005

including allegations that the victims were publicly labelled as PKK operatives in advance of any independent investigation; that the victims' relatives and witnesses to the incident have been threatened and/ or assaulted; and at the intimidation and failure to protect non-governmental organisation representatives at the court hearings, including that aimed at the Mission itself;

- That the hearing was not public, and that the decision to move the trial from Mardin to Eskişehir may have been motivated by the desire to impede the victims' relatives and supporters from attendance, and that they were not consulted in advance of this decision;

- At the inequality of arms between the defence and the complainants, including the unequal imposition of public interest immunity decisions; late disclosure of evidence to the complainants that had been made available to the defence; and limitations on the introduction of key witnesses;

- That the indictment is not independent or impartial;

- That freedoms of expression, assembly and opinion have been restricted in the context surrounding this case; and

- That reports of torture and ill-treatment remain frequent in Turkey and that perpetrators still frequently enjoy impunity.

The trial is continuing with the most recent hearing having taken place on 10 May 2006. KHRP and BHRC will continue to monitor the case.

B. Witness Accounts

In the course of its investigation in March 2005, the Mission interviewed witnesses, lawyers and relatives of the deceased. Some requested that their anonymity be preserved, although their identities are known to KHRP.

1. Kaymaz Family

According to their relatives, on 21 November Ahmet and Uğur Kaymaz were taking supplies to Ahmet's truck prior to starting their evening meal. They were dressed in casual clothes and wearing slippers. Shortly after they left the house, their relatives heard gunfire outside for between five and six minutes. When they heard the gunfire Ahmet's mother Emine and his wife Makbule Kaymaz jumped over their neighbour's garden wall in fear.

2. Witness A

Witness A lives nearby and was at home when he heard between 30 and 35 bullets being fired. He opened the window to see what was happening. It was dark, but the road was illuminated for most of the time by the headlights of oncoming vehicles.

Witness A described seeing Uğur Kaymaz in front of the truck. The road became dark. The next time the road was lit by headlights again, he saw the bodies of two people on the ground. Neither of them had weapons beside them.

He filed complaints with the Public Prosecutor however she did not take a formal statement from him. Incensed by her apparent lack of interest, he visited her personally to demand an investigation into the killings. This also did not produce a response.

3. Witness B

Witness B lives nearby and was at home on 21 November 2004. He was told that there were lights in the back garden and went outside to investigate. He had taken four or five steps outside when a gun was fired over his head and he heard someone tell him to the ground. He saw lots of people dressed in civilian clothes carrying walkie-talkies. He assumed that they were undercover policemen. He was punched in the face with a gun and heard one say into his walkie-talkie, in Turkish, "We have arrested one." One of the other people said, "Bring him over here, he is dangerous. He is a member of the PKK."

These men made Witness B's entire family come out of their house. The family was told not to speak and told that if they did speak they would be forced to drink muddy rainwater from the ground. The men told Witness B that they suspected that he was a member of the PKK and accused him of being at the Kaymaz house before the incident. Witness B was taken to the back of the Kaymaz family truck. Whilst he was there he was slapped and told that if he did not talk he would be shot. He heard one of these men say, "If he does not talk, shoot him and bring him over here to the other bodies… Then we will have killed three people."

Witness B did not see the bodies of Ahmet and Uğur. He tried to tell the police his profession and where he lived. They did not believe him. They then took him to a nearby petrol station and put him in an unused store room where he was beaten until he could taste blood in his mouth. He was released from the storeroom after about ten minutes. He was taken to the shop on the forecourt of the petrol station where he was kept for an hour with various other civilians who had been passers-by at the time of the incident. Uniformed officers arrived at the petrol station. He was then allowed home. One of the uniformed officers said, "We are very sorry this has happened to you."

Witness B spoke to the Public Prosecutor about the incident and was asked if he wanted to make an official complaint. He declined, saying that he was too scared for his own safety.

4. Lawyers

The Mission spoke to the group of lawyers including lawyer Hüseyin Cangir acting on behalf of Ahmet and Uğur's family who explained that they had been denied access to many of the reports prepared by the Prosecutor and had not received the information they required despite requesting it on numerous occasions.

5. Forensics

The Mission was shown a copy of a post mortem report that was practically illegible. It appeared that Uğur had sustained thirteen bullet wounds to his body and hands, whilst his father, Ahmet, had approximately four bullet wounds. The Mission was told that there were traces of gunpowder surrounding each bullet wound which indicates that the bullets were fired at close range.

The lawyers said that the Public Prosecutor had told them that she was waiting for further forensic information to confirm whether Uğur and/or Ahmet had gunpowder on their hands as they were both alleged to have been involved in an exchange of fire with the police before they were killed. This will have particular relevance to the case involving Uğur as various weapons and bullets were apparently found by his body. The family members and local villagers believed that these items were placed beside his body after he had been shot. The family was keen to demonstrate to the Mission that there were no bullet marks on the van in front of which the killings occurred or in or around the family home or wall surrounding the property.

6. Protests

Since the deaths of Ahmet and Uğur their family, friends and fellow villagers protested in Kızıltepe every Sunday. In the days following the incident Uğur's classmates and his brother and sister protested about his death. During this protest, Uğur's sister suffered a fracture to her leg as a result of being beaten by a policeman. No action had been taken in relation to that incident.

7. Governor's Statement

The Mission was told that the Mardin Governor Temel Koçaklar had made two public statements about the incident. In the first he stated that Ahmet and Uğur Kaymaz were killed in a clash with security forces and in the second, he stated that they did not listen to calls by the security forces to stop.

C. The Charges

On 12 December 2004 the Mardin Chief Public Prosecutor lodged an indictment at the High Penal Court of Mardin against police officers Mehmet Karaca, Yasafettin Açıksöz, Seydi Ahmet Töngel and Salih Ayaz on charges of using excessive force on 21 November 2004 between 4.13pm and 4.20pm. All are charged in accordance with Articles 448, 50, 463, 31, 33 and 36 of Turkish Penal Code, with the exception of Salih Ayaz, who has not been charged under Article 33. The complainants are listed as Makbule (wife of Ahmet; mother of Uğur) and Emine (mother of Ahmet; grandmother of Uğur) and Murat Kaymaz (brother of Ahmet; uncle of Uğur). The complainants' representatives are listed as Erdal Kuzu, Hüseyin Cangir, Selahattin Demirtaş and İrfan Eser.

The indictment which is signed by the Public Prosecutor refers to receiving documents titled "The Summary and Investigation Documents" from the Kızıltepe Chief Public Prosecutor (see Appendix A).

D. The Court Hearing

The hearing in this case took place in the Heavy Penal Courts *(Ağır Ceza Mahkemeleri)*, which have jurisdiction over serious crimes carrying sentences of heavy imprisonment for ten years or more. Heavy Penal Courts are composed of three judges, one of whom is the president, and are located in the provincial capitals. These courts fall within the General Court structure of Turkey (in other words, they are not Constitutional Courts, Courts of Jurisdictional Appeal, Administrative Courts or Military Courts).

The Mission had not made any prior contact with the prosecuting authorities regarding attendance at the hearing. On 24 October 2005 the Mission arrived at the court in Eskişehir at 8.30am. There was clearly a heavy police and military presence in the city and the roads leading to the court were closed to traffic and pedestrians by the police.

The Mission was comprised of two members. They were asked to identify themselves when they arrived at the police barrier nearest to the court. One, a barrister, showed her passport and explained that she is a lawyer. Both members were then asked to stand to one side (inside the barrier) and it was established that their names were not on a list which the police were using to allow admission to the court. The barrister was then asked by the police officers who were standing guard to prove that she is a lawyer. Not ever having been asked to provide proof of her profession to gain entry to court before she was not carrying such documentation. Instead she explained the position and the fact that she had come to observe the hearing and showed her passport and business card which states that she is a barrister. The police said that they had orders to admit only lawyers (with proof) and the persons whose names were on the list. The Mission was then asked to return to the other side of the barrier.

During this time the Mission met a lawyer from Turkey who had come to observe the trial but who had forgotten her identification and was also being denied entry. She said that because of attacks on non-governmental organisation (NGO) representatives at the previous hearing she felt vulnerable to possible physical attack from hostile members of the public while waiting to go through the barrier and into

the court. She felt that the police should have allowed her and the Mission to stand inside the barrier where it would have been safer.

After some time, as a result of the intervention of Yusuf Alataş the Chairman of the Human Rights Association of Turkey (*İnsan Haklari Derneği* (*İHD)*) the Mission was permitted entry to the court by the Public Prosecutor. Before crossing the barrier the Mission was subjected to intimate body searches on the street.

On entering the court house the Mission first went to the bar mess. There were approximately fifteen lawyers who were intervening on behalf of the Kaymaz family and a similar number of defence lawyers there. When the hearing started the Mission attempted to enter the court room, however a security guard came running up to check the Mission's identity. He wanted proof that the barrister was a lawyer. It was only after the Mission persuaded him that it already had permission to enter that it was allowed into the court room. The Mission missed the beginning of the hearing.

The court room where the hearing was taking place was of average size and the Mission estimates that it could easily have accommodated 100 people. The layout was similar to other Turkish court rooms with the judge and prosecutor sitting on a raised level at the front of the room; the defendants (who appeared on bail) sitting in the middle at floor level; the defence lawyers sitting and standing on one side of the room at floor level and the complainant's representatives sitting and standing at floor level on the opposite side of the room. There was a large public gallery which was not completely full at the back of the court room.

When the Mission entered the court room the complainant's representatives were addressing the judge stating that the hearing was not open to the public and that there were a number of lawyers and NGO representatives who had wished to attend the hearing but had been stopped from entering the city by the police as a result of an order by the governor. They also complained that they had been subjected to attacks by members of the Idealists' Hearths (*Ülkü Ocakları)* group[2] following the previous hearing in Eskişehir and that the police had not intervened to protect them. They also complained that close friends and family members of the victims had not been able to attend the hearings since it had been moved to Eskişehir from Mardin. They refuted the allegations of the defence lawyers that there had been any threat to the safety of the parties in Mardin. Having asked for their complaints to be reflected in the court record the complainants' representatives left the court room in protest.

2 An ultra nationalist Turkish group which is part of Nationalist Movement Party and Grey Wolves movement.

The defence then stated that the complainants' representatives had been incorrect to state that the victims' family could not attend. They said that the family members had not attended in the past and that if they did want to attend they could take a bus from Kızıltepe to Eskişehir. The defence lawyers asserted that they had been under threat when they were in Mardin. They referred to slogans such as, "Long live the PKK"and," We support Öcalan," which they said that demonstrators had been displaying at the time of the hearing in Mardin. They stated that the decision to move the trial was an administrative one and should be challenged by the complainants' representatives in the administrative courts. The defence lawyers complained that the complainants' lawyers only wanted to get media attention and eventually bring the case to the European Court of Human Rights (ECtHR) to get compensation. The defence referred to the ECtHR decision in *McCann v UK* (Application No. 18984/91) in support of the police officers defence without elaborating how exactly it was of assistance to them.

At this stage the judge ordered a head count of the people in the public gallery. The defence indicated that a "foreigner" had attended court. The Mission's barrister was asked to identify herself and the reason for her presence. She stated that she had initially been refused access to the court. The judge had no reaction. It was also ascertained that there were eight members of the press in the public gallery. A number of people who had attended the hearing told the mission that many of the other people in the public gallery were plain clothes military or police.

The judge then went on to examine a holster (*palaska*) which was produced in court. The Mission understood that this holster was said to have been worn by Ahmet Kaymaz on the 21 November 2004. The judge remarked that there were no bullet holes in the holster. The defence requested time to look at forensic reports.

The defence then requested permission to submit the statement of a person who had confessed to the police that he was a member of the PKK and that he had gone to Kızıltepe at the relevant time to take part in guerrilla action. In addition to this the defence indicated that an operative of the People's Defence Forces (HPG) had escaped from the Kaymaz house during the raid and was captured in Mardin in March 2005.

The defence also challenged the prosecution assertion that Uğur Kaymaz was 12-years old claiming that he was at least 15- or 16-years old and asserted that he was a terrorist. It was alleged that the population register could not be relied upon to determine the child's age as there was an obvious mistake in it regarding the date that Ahmet Kaymaz, his father had been married. They stated that Uğur Kaymaz had pubic hair, was 165cm tall and weighed 45kg and that this proved that he was older than twelve. They also stated that the Kalashnikov rifle that he was said to have been holding was 3kg. The judge stated that he would not conduct an investigation

into Uğur's age.

The defence then returned to the issue of threats made against them in Mardin and said that the demonstrators had trampled on the Turkish flag and that there were 12-year-old children in the protest who were acting angrily. The defence requested the right to place the photographs that had been taken by the police of the protest before the court. It was not clear to the Mission what the judge's response to this request was.

The judge then stated that a number of police witness statements were not in the correct format and needed to be taken again. He stated that if the complainants' lawyers do not attend the subsequent hearings, a lawyer from the Eskişehir Bar Association would be assigned to represent the complainants. The judge also mentioned that he would be writing to the Governor's office to query whether the complainants' allegations are accurate.

During the hearing the Mission did not hear the prosecutor say anything. The atmosphere in the court was very tense. There was a general feeling of animosity between the parties during the hearing.

At the end of the hearing, with the judge and the prosecutor still in court, a number of the defence lawyers approached the Mission. In an aggressive tone they questioned the reason for the Mission's presence at the hearing. They asked whether the Mission was aware of the number of innocent people who had died during the conflict with the PKK. They also wanted to know how many trials of police officers the Mission had attended. One of the defence lawyers then threatened the Mission's interpreter, shouting at her saying that they knew her as a PKK supporter and that "they" (which she took to mean state agents) were watching her. Membership of the PKK amounts to a criminal offence under Turkish law and the Mission's interpreter was extremely upset by this attack. The Mission then left the court room.

E. Concerns Expressed to the Mission

The Mission met with Altan Ulutaş (Head of both the Human Rights Committee and Administrative Committee of the Eskişehir Bar Association) who said that it was clear to him that there had been a human rights violation in the Kaymaz case and that the police had used excessive force.[3] He stated that he does not assume that the police killed Ahmet and Uğur Kaymaz solely because they were Kurdish. Selahattin Demirtaş chairman of the Diyarbakir branch of *İHD* and one of the complainants representatives said that in terms of violations of legal procedure this was the worst case that he had ever seen. He also expressed the view that the whole case was a 'cover up'. Yusuf Alataş, Chairman of the İHD said that there was no objective impartiality in the investigation and that the trial was not fair. He had concerns about the collection of evidence and was of the view that the indictment had only been lodged as a result of an investigation by İHD's Human Rights Commission.

1. Intimidation

The Mission spoke to a number of individuals who complained of the atmosphere of intimidation surrounding the investigation and the trial. Mesut Değer, a parliamentarian from the opposition Republican People's Party (*Cumhuriyetci Halk Partis* (CHP)), expressed concern about the intimidation of an eyewitness to the killing. He said that following the incident the witness had been requested by the police to go to the police station to make a statement where he was kept waiting for a few hours. No statement was taken but when he returned home all of the stock in his shop had been stolen. He believed that this was an attempt to intimidate the witness into not giving evidence about what he had seen on the night in question.[4]

Murat Kaymaz, the brother of Ahmet Kaymaz, said that since the deaths of his

3 **FFM Interview with Altan Ulutaş, head of both the Human Rights Committee and Administrative Committee of the Eskişehir Bar Association, Eskişehir, 24 October 2006**

4 **FFM interview with Mesut Değer, parliamentarian from the opposition CHP, 25 October 2005.**

brother and nephew he did not feel safe in Turkey. He said that his brother Reşat was being followed by the police. The family had received a number of anonymous phone calls and had made a complaint to the Public Prosecutor. Murat described an incident where his brother had been contacted by a person who said that he was a police officer and wanted to meet him. The person stated that he wanted to tell him why Ahmet and Uğur had been shot. Murat's brother said that he would only meet this person during the day in a public place, for example in a tea house. The person said, "If you don't come and meet me we can get you anyway." Murat said that his family had tried to move house but because of the stigma attached to the family as a result of the allegations made against Ahmet and Uğur, nobody was willing to rent their houses to them.

Mesut Değer said that as far as he knew there had been no threats to the defence lawyers at the first hearing in Mardin. He did feel however that the complainants' representatives are at risk of being attacked in Eskişehir. Ayla Yıldırım from the Socialist Democracy Party and Murat Avçı from the Bursa branch of the People's Democracy Party (*Demokratik Halk Partisi* (DEHAP)) described the situation which had occurred at the last hearing where the police had allowed supporters of the *Ülkü Ocakları* group to attack the 200 or so NGO representatives who were waiting outside court. They said that the NGO representatives had been calm and peaceful prior to being attacked by these people. They estimated that about twelve NGO representatives were injured by stones and sticks that had been thrown at them. They complained that the police had stood by and allowed this attack to take place without intervening.

The Mission was told that there were twelve people detained at the local police station following the hearing on 24 October 2005. There were reports that they were being refused access to their lawyers.

2. Access to the Hearing

Selahattin Demirtaş refuted the allegation that threats had been made to the defence lawyers at the first hearing in Mardin. He is concerned that the decision to move the trial had been made without consulting the complainants or their lawyers. He believes that Eskişehir had been chosen because there is no strong civil society there. Several people said that the transfer of the hearing to Eskişehir meant that fewer of the victims' close family and friends could attend the hearing or follow the case properly. Yusuf Alataş, Chairman of the İHD, said that this is exacerbated by the fact that there is no financial assistance given to the complainants or their representatives in order to assist them with the cost of attending the trial.

Selahattin Demirtaş referred to the use of Article 11 of the Law on Procedural Administration which allows a city's governor to prevent access to a city in order to protect public order. Ayla Yıldırım and Murat Avçı stated that between eighty and a hundred members of the public had actually attended the previous hearing in Eskişehir and there had been no incidents in the court room. The only incidents referred to were when NGO representatives were attacked by members of the *Ülkü Ocakları* group. This, they felt could have been prevented by the police. Altan Ulutaş said that he was at court during the previous hearing and there had not been any problems within court. He said that there had been demonstrations outside the court house. Several people were of the view that the governor of Eskişehir had used this law simply to prevent people attending the hearing and not because of any real threat to the public order.

Ayla Yıldırım and Murat Avçı said that they had travelled to Eskişehir on 23 October 2005 in a private car and had in fact changed car on the way. They reported seeing Panzers[5], buses and riot police on the outskirts of the city. Murat Kaymaz said that some extended family and friends (described as "nears" in Turkish) had travelled from Istanbul to attend the hearing but were stopped ten kilometres from Eskişehir and were prevented from attending. A number of people said that lawyers and NGO representatives had been prevented from attending the hearing as a result of the Article 11 decision.

3. Evidential Issues

Mesut Değer said that he took part in a delegation of four people that went to Kızıltepe two days after Ahmet and Uğur Kaymaz were killed. He spoke to a neighbour of the Kaymaz family who stated that he could see the events from his window and this had been verified by the delegation. This neighbour was encouraged by the delegation to give his testimony to the public prosecutor. Değer told the Mission that he was worried that the testimony of the witness is not being given sufficient weight and instead this witness is being viewed as being involved with a terrorist organisation.

Mesut Değer understood that the autopsy report showed that there were between six and eight bullet wounds in a row between the fourth and eighth vertebrae on Uğur's back. He understood that there was also one wound to his arm and one wound to his side and that there was a bullet which had been fired from a different weapon in his right leg. He understood that the autopsy report showed that shots had been fired at close range. The spent bullet cartridges which had been retrieved from the

5 German army vehicles from World War II deployed by the Turkish army

scene showed that numerous weapons had been used. An amount of the forensic evidence had been lost as a result of the evidence bags not being sealed properly. This, he felt, would have a significant impact on the outcome of the proceedings.

Selahattin Demirtaş complained of a 'public interest immunity' decision that had been made as soon as the prosecution was initiated.[6] This had remained in place for months and as a result the complainants' representatives had not been given access to the prosecutor's file. He felt that the decision had not been enforced fairly as it was clear that the defence had been given information to which the complainants' representatives had not been privy. In this regard he referred to a press conference given by a spokesperson of the general directorate of security during the time that this decision was in force, announcing the result of a forensic report stating that it showed traces of gunpowder on the deceased's hands.

He told the Mission that once the court hearings commenced the public interest immunity decision was lifted but the court made a decision not to give photos and videos of the crime scene and the autopsy report to the complainants' lawyers. He stated that they received copies of these items in late October 2005, after police officers had been cross examined about the crime scene. During the cross examination it had become clear to him that the police officers had in fact seen this documentation. He said that this decision had an adverse affect on the fairness of the trial and his ability to effectively question the police officers. He did not think that he would be given another opportunity to cross examine the relevant police officers.

Selahattin Demirtaş also referred to the holster that was alleged to be worn by Ahmet. He stated that this was an important piece of evidence as although there were bullet wounds in Ahmet's stomach, there were no holes corresponding to those wounds in the belt.

On a more positive note Selahattin Demirtaş told the Mission that recent reforms had broadened the scope for questioning of witnesses which resulted in the police being challenged extensively in the previous hearing.

4. Impunity

Several people said that they felt the police force neither took the investigation nor the charges seriously, as evidenced by the fact that the police officers had only briefly

6 'Public interest immunity' enables a court to maintain the confidentiality of certain information if it is judged that this information may be damaging to the public interest.

been suspended from duty pending the outcome of the investigation and trial. Murat Avçı said that one of the accused policemen was transferred to Bursa, considered to be one of the better places to be posted in Turkey, prior to the beginning of the trial. When members of *DEHAP* protested at his transfer there were a number of arrests and four protesters were charged with, "affecting the prosecution process." The Mission understands that these cases are still ongoing. Mesut Değer was of the view that the transfer and implicit promotion of this police officer sent a negative message to the judiciary and would have an overall effect on the impartiality of the investigation and trial. There was an overall feeling that these police officers would not be found guilty and that even if they were, the sentences imposed would be minimal. Members of *İHD* are currently standing trial in relation to a report they prepared regarding this incident.

5. The Defence

After the hearing Erol Halka, one of the defence lawyers, agreed to speak with the Mission. He spent some time explaining his views on Abdullah Öcalan and the PKK. He told the Mission that 35,000 people had been killed in south-east Turkey in past years and a police officer had been abducted from Eskişehir by the PKK two weeks previously. When asked about the Kaymaz case he stated that he did not have much knowledge of the actual facts of the case and that he became involved when the case was transferred to Eskişehir. He said that he was acting on a pro bono basis out of a sense of loyalty to his former comrades in the army.

6. The Role and Functioning of Judges

Judges' role in the Turkish legal system is made all the more important by the absence of a jury trial system. In addition to the administration of justice, judges in Turkey play two other important roles. In exceptional cases, the judge may serve as law maker, guided by existing customary law, approved legal doctrine, and precedents, when no provisions are applicable. Judges are also entrusted (under the 1982 Constitution) with the direction and supervision of free elections in Turkey. The independence of the judiciary and safeguards to the rule of law have been codified into the Turkish Constitution. Specifically, Article 138 ensures that no governmental agency or individual may interfere with the decisions of the judicial authorities; this includes the legislature which may not debate, discuss, or make a statement in regards to a case under trial. The High Council of Judges and Public Prosecutors is the body that is entrusted with maintaining the integrity and independence of the judiciary. The High Council is presided over by the Minister of

Justice and is made up of several members chosen by the President of the Republic and nominated by the General Assembly of the Court of Cassation and the General Assembly of the Council of State. It is the responsibility of the High Council of Judges and Public Prosecutors to decide professional appointment, promotions, and transfers of judges. In the most basic terms, the High Council decides the professional fate of judges in Turkey.

The High Council does not have the ability to arbitrarily remove judges from their positions and judges are protected from dismissal under the Constitution. Unless they so desire, judges also may not be retired before the age of 65.

The fact that the Minister of Justice is the President of the High Council of Judges and Public Prosecutors, that it is dependent on civil servants from the Ministry of Justice to do much of its research and administrative work, and that the High Council does not have an independent budget, have all raised concerns that the High Council is not as independent as it should be and that it is too closely associated and influenced by political power. By extension, the judiciary itself lacks this independence and integrity.[7]

Guided by the supremacy of the Constitution, judges are responsible for the administration of justice: to adjudicate, to establish facts and to determine applicable legal provisions. During the preparatory investigation, it is the judge who is assigned the responsibility to decide whether or not to issue a warrant of arrest (a decision that is not binding and a decision that the judge must examine periodically).

The preparatory investigation is primarily the responsibility of the public prosecutor to carry out. Once this phase of the investigation is completed, the preliminary investigation commences: the documents are handed over to the judge who then decides whether the preparatory investigation was sufficient and whether a final investigation (the trial) should be initiated. At any time during the preliminary and final investigations the judge is allowed to introduce any outside evidence that has not been presented by either the public prosecutor or the other parties.

The final investigation or the trial (if it is deemed necessary) is conducted entirely by the chief judge who simultaneously conducts the trial, questions the witnesses, and hears the evidence. The trial ends with the rendition of judgment: the judge delivers the judgment together with its reasoning. The judge may decide to either acquit or convict the accused, discontinues the action, or suspend the trial.

7 Richmond, Paul. "Turkey-Presentation on the Independence of the Judiciary and the Legal Profession in Turkey." Independence of Judges and Lawyers-Network News: 26 April 2004. (http://www.icj.org/news.php3?id_article=3314&lang=en)

7. The Role and Functioning of Public Prosecutors in Turkey

Prosecutors in Turkey discharge both a judicial and an administrative function. Their judicial function comprises carrying out criminal investigations, bringing legal actions against suspects, appealing against the decisions of criminal courts and ensuring the enforcement of criminal judgments. Their administrative functions are related to the administration of courthouses and prisons, meeting the needs of these institutions and ensuring correspondence for courts with related persons or institutions.[8]

Regarding their judicial functions, public prosecutors are empowered to oversee the investigation, indictment and prosecution of any case. The law gives prosecutors far-reaching authority both to collect and present evidence and safeguard the rights of defendants, including those detained for pre-trial interrogation. They are expressly empowered to conduct the preparatory investigation, determine the jurisdiction for the case and supervise the security forces during the pre-trial investigation period.[9] The system of preliminary investigation operates as follows. The public prosecutor, upon being informed of the occurrence of an alleged offence, makes a preparatory investigation in order to ascertain the identity of the offender and to decide whether it is necessary to institute a public prosecution. If his investigation reveals no evidence upon to which to base a prosecution against an identifiable individual then the prosecutor will decide not to commence an action. However, if the investigation reveals even a single item of inculpatory evidence against an identifiable individual, then a public action, to a wide extent, seems to be deemed necessary and an indictment will be instituted before a competent court. Public prosecutors seem to act as if they have no power to evaluate the evidence obtained at the investigation stage in order to assess whether, on the balance of the evidence, criminal proceedings should or should not be instituted. Evaluation of evidence is regularly seen to be exclusively a function of the judiciary.

The public prosecutor may, for the purpose of his enquiry, demand any information from any public employee. He is authorised to make his investigation either directly or through police officers. The police are obliged to inform the public prosecutor immediately of events, detainees and measures taken and to execute orders of the prosecutor concerning legal procedures.

In cases where a private complaint is submitted to the public prosecutor and the prosecutor finds no reason for prosecution (or decides not to prosecute) after a

8 Information Note on the Turkish judicial system, Ministry of Justice, 4 July 2003, p.7.

9 By Article 154 of the Turkish Criminal Procedure Code, police officers are obliged to execute orders of the prosecutor concerning the legal procedure.

preparatory investigation, he informs the petitioner of his decision. If the petitioner is, at the same time, the aggrieved party the petitioner may, within fifteen days of notice, object to the Chief Justice of the nearest court that hears aggravated felony cases. If the court is convinced that the petition is well-founded and rightful, it will order a public prosecution; the prosecutor in charge of the case executes this decision. Otherwise, the court refuses the petition and after such action a public prosecution may be opened only upon production of newly discovered evidence.

A public prosecution will be dismissed when the perpetrator of an offence which is punishable by a fine or a maximum of three months imprisonment deposits the minimum amount of the fine prescribed for the specific offence (or, in the case of imprisonment, the sum which is the amount prescribed by the Law of Execution of Penalties for one day of imprisonment) in the appropriate office before the court hearing. If this amount is paid by the offender before a public prosecution has been initiated and within ten days of the date of the offence, the perpetrator shall not be prosecuted at all.

The preparatory investigation is, in principal, secret, performed without the presence of the parties and in written form.

The final investigation or trial begins when the indictment is sent by the public prosecutor to the court that will try the case. The final investigation has two stages: the preparation for trial and the trial itself. Its object is to examine all the evidence before the court, and to reach a judgement with respect to the guilt of the accused. During this process the public prosecutor presents the case on behalf of the Republic.

The administrative functions of public prosecutors are related to the management of courthouses and prisons. Public prosecutors have overall responsibility for all aspects of the day-to-day administration and support work of the courts and the prisons. It is their duty to ensure that the necessary services are provided to the judiciary, court users and personnel within the prisons so as to ensure the efficient functioning of the justice system. In this capacity, public prosecutors are responsible for matters such as informing witnesses that their attendance is required at court. They are also responsible for matters such as the maintenance of lighting, the provision of electricity, the cleaning of the buildings and ensuring that there is adequate stationary. Public prosecutors are also responsible for overseeing the administration of the quarters where judges and public prosecutors live. As well as having fourteen public prosecutors under his authority, the Chief Public Prosecutor of Diyarbakır is also responsible for 96 staff including an administrative director, secretaries, electricity technicians, chauffeurs, radiator technicians and sixteen general service staff.

F. Relevant International Standards and Case Law

1. Right to Life

The Universal Declaration on Human Rights (UDHR) protects the right to life stating in Article 3 that: "Everyone has the right to life, liberty and security of person."

Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

This right is also protected by Article 2 of the European Convention on Human Rights (ECHR) which states: "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

In *McCann v UK* (Application No. 18984/91) the European Court of Human Rights (ECtHR) stated that Article 2, "ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such its provisions must be strictly construed." (§ 147) The Court said that its, "approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective." (§ 146)

In relation to the exceptions delineated at paragraph 2 the Court indicated that

the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. It has reiterated that the use of force "must be no more than 'absolutely necessary' for the achievement of one of the purposes set out in sub-paragraphs (a), (b), or (c)." (§148)

Finally it held that the Court must, "subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination." (§ 150)

The Court has repeatedly ruled that the obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to, "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State.

The types of investigations required by the implied duty on States to undertake effective investigations into killings derived from the judgment in *McCann* were elaborated by the Court in *Kaya v Turkey*.[10] The Court observed, "that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances."(§ 88)

The Court requires the investigation to be conducted by an independent person exercising a critical assessment of all the relevant evidence (including that provided by State officials). Depending on the circumstances appropriate forensic tests (such as checks on clothing and bodies for traces of explosives or gunpowder) must also be undertaken. If investigations are to satisfy the requirements of Article 2 they must be genuinely rigorous and not merely ritualistic charades.

2. Torture, Cruel, Inhuman or Degrading Treatment or Punishment

Torture is universally condemned and, whatever its actual practice, no country

10 KHRP case of Kaya v Turkey, Application No. 22729/93.

publicly supports torture or opposes its eradication. The prohibition against torture is well established under customary international law as *jus cogens*; that is, it has the highest standing in customary law and is so fundamental as to supersede all other treaties and customary laws (except laws that are also *jus cogens*). Criminal acts that are *jus cogens* are subject to universal jurisdiction, meaning that any state can exercise its jurisdiction, regardless of where the crime took place, the nationality of the perpetrator or the nationality of the victim.

Article 5 UDHR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Article 7 ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 2 of the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture – CAT) states:

> "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture.
>
> An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article 3 ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Principle 1 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment[11] states: "All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person."

As was seen in *Ireland v UK* Application No. 5310/71 the subjection of detainees to physical violence by State officials can amount to inhuman treatment within Article 3. In *Tomasi v France* Application No. 12850/87 the ECtHR indicated that the infliction of significant physical violence on a detainee by State officials, even where not serious

11 Adopted by General Assembly resolution 43/173 of 9 December 1988

long-term injuries are caused, will be classified as inhuman treatment. Judge De Meyer in his concurring opinion expressed the view that : "Any use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct (for instance in the case of an escape attempt or an act carried out against himself...) violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 of the Convention."

The ECHR requires that allegations of torture, inhuman or degrading treatment be the subject of an effective investigation. The requirements of such an investigation are similar to those necessary when investigating an alleged breach of Article 2.

3. Arbitrary Detention / Right to Liberty

Article 3 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 procedure as are established by law."

Article 5(1) ECHR states: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- the lawful detention of a person after conviction by a competent court;

- 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;

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

- 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;

- the lawful arrest or detention of a person to prevent his effecting an

unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

4. 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 ICCPR, CAT, ECHR and Protocol No. 7 of 1984.

There are 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 the Universal Declaration of Human Rights of 1948 (UDHR), United Nations Basic Principles on the Independence of the Judiciary of 1985, United Nations Basic Principles on the Role of Lawyers 1990 and Guidelines on the Role of Prosecutors 1990.

5. The Right to Equality before the Law and Courts

Article 7 of the UDHR states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

Article 2(1) of the ICCPR states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 14(1) of the ICCPR states: "All persons shall be equal before the courts and tribunals." The United Nations Human Rights Committee has stated that the guarantee of equality in Article 14(1) of the ICCPR requires that states "ensure the equal rights of men and women to all civil and political rights" protected by the ICCPR.

Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 5 of the Convention on the Elimination of all forms of Racial Discrimination (CERD) states: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice."

6. The Right to Trial by a Competent, Independent and Impartial Tribunal

The primary institutional guarantee of a fair trial is that decisions will not be made by political institutions but by competent, independent and impartial tribunals established by law. The right to trial by an independent and impartial tribunal is so basic that the Human Rights Committee has stated that it "is an absolute right that may suffer no exception." (*Gonzalez del Rio v. Peru,* (263/187), 28 October 1992, Report of the HRC, vol. II, (A/48/40)).

The right to trial before a competent, independent and impartial tribunal established by law requires that "justice must not only be done, it must also be seen to be done" (*Delcourt v Belgium* Application No. 2689/65, §31).

The independence of the tribunal is essential to a fair trial. It means that decision-makers in a given case are free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise. Decisions about facts must be made solely on the evidence, and the facts must be applied to the applicable laws. There must be no interference, restriction, inducements, pressure or threats from any quarter.

The judiciary is required to ensure that proceedings are conducted fairly, and that the rights of all of the parties are respected. The Basic Principles on the Independence of the Judiciary cover some of the factors which influence the independence of the judiciary. These include the separation of powers which protect the judiciary from undue external influence or interference, and practical safeguards of independence

such as technical competence and security of tenure for judges. Principle 2 states: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

The principle of impartiality, which applies to each individual case, demands that each of the decision-makers, whether they be professional or lay judges or juries be unbiased. Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice.

The Human Rights Committee has stated that impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties." (*Karttunen v Finland*, (387/1989), 23 October 1992, Report of the HRC, vol. II (A/48/40), 1993, at 120, para. 7.2) The European Court has held that judges must not have a "pre-conceived view on the merits of a case." (*Fey v Austria,* Application No. 14396/88 §34).

Guideline 10 of the Guidelines on the Role of Prosecutors states: "The office of prosecutors shall be strictly separated from judicial functions."

7. The Right to a Public Hearing

The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the justice system. It is safeguarded by Article 10 of UDHR, Article 14(1) of the ICCPR, Article 6(1) of the ECHR and Articles 64(7) and 67(1) of the Statute for the International Criminal Court. The right extends to both the parties in the case and the general public. The public has a right to know how justice is administered, and what decisions are reached by the judicial system.

Article 9(3) of the United Nations Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote Universally Recognised Human Rights and Freedoms expressly includes the right of trial observers to "attend public hearings, proceedings and trials, and to form an opinion on their compliance with national law and applicable international obligations and commitments."

A public hearing requires oral hearings on the merits of the case held in public, which members of the public, including the press, can attend. Courts must make information about the time and venue of the oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of

interested members of the public (*Van Meurs v The Netherlands* (215/1/1986), 13 July 1990, Report of the HRCC, (A/45/40) 1990, at 60).

The public's access to hearings may be restricted in certain narrowly defined circumstances. The grounds on which the press and the public may be excluded from all or part of hearings are the same in the ICCPR and the ECHR. The grounds are: morals (for example, some hearings involving sexual offences); public order, which relates primarily to order within the courtroom; national security in a democratic society; when the interests of juveniles or the private lives of the parties so require; or to the extent strictly necessary, in the opinion of the court, in special circumstances where publicity would prejudice the interests of justice. All of these exceptions are narrowly construed. The Human Rights Committee has stated: "It should be noted that, apart from such exceptional circumstances the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons" (Human Rights Committee General Comment 13, para. 6).

8. Victims

Among the fundamental principles set out in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power are that "the responsiveness of judicial and administrative process to the needs of the victims should be facilitated by …. Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

Article 4 of the Declaration states: "Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."

Article 5 of the Declaration states: "Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."

Article 6 of the Declaration states: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

- Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

- Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

- Providing proper assistance to victims throughout the legal process;

- Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and

- Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."

9. Investigation of Offences

The ECtHR has recognised a positive obligation on the part of State Parties to investigate possible violations of Article 2. This obligation was first articulated by the Grand Chamber in *McCann v UK* Application No. 18984/91.

Article 13 of the ECHR requires that states provide effective remedies before national authorities in respect of complaints made by persons that their Convention rights have been violated. In *Kaya v Turkey* Application No. 22729/93 the Court stated: "… the nature of the right [Article 2] which the authorities are alleged to have violated in the instant case, one of the most fundamental in the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure… Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation."(§107) In *Yasa v Turkey* Application No. 22495/93 the Court stated that the requirements of an effective criminal investigation under Article 13 are

stricter than the investigatory obligation under Article 2 (§115).

In *Ergi v Turkey* Application No. 23818/94, Turkey was found to be in breach of this obligation in relation to Article 2 even though the court was not satisfied beyond reasonable doubt that the victim had been shot by government security personnel during a counter-terrorist ambush. The Court said: "…this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise, *ipso facto,* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."(§82) The Court has also held that this obligation can exist in situations where it has not been conclusively established that a person has been unlawfully killed. Thus where public authorities of member states are aware that a person has been killed, either by a public official or another private person, or they are confronted with an arguable claim that a detainee has disappeared in life-threatening circumstances they are now under a Convention- positive obligation to diligently investigate the causes and circumstances of the death/disappearance.

In the case of *Kelly and Others v UK* Application No. 30054/96 (§§95-98), the Court elaborated the fundamental institutional and procedural requirements of effective investigations into alleged unlawful killings by state agents indicating that it is generally necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard. A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. A prompt response by the authorities in investigating a use of lethal force will generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. There must also be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as theory. The degree of public scrutiny required may well vary from case to case. In all cases however, the next of kin of the

victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

The Court requires sufficient public accountability and involvement of the victims' family at some stage(s) in the investigation/prosecution process if they are to satisfy the requirements of Article 2. Subsequent criminal proceedings must be rigorous and transparent if they are to compensate for inadequate preliminary investigations.

G. Turkey's Progress Towards EU Accession

Turkey was the second country to sign a European association agreement as long ago as 1963. Turkey formally applied for membership in 1987. The European Commission (the Commission) recommended against that application in 1989 because of the need for further political and economic reform in Turkey. In 1999 the Helsinki European Council formally accepted Turkey as a candidate. The Commission monitors Turkey's progress towards accession and produces a written report annually for presentation to the European Council. In its report of 6 October 2004, the Commission found that "Turkey sufficiently fulfils the political criteria", with the recommendation that talks should begin. At its summit in Brussels on 16 and 17 December 2004, the European Council acted upon that recommendation and decided to open negotiations for Turkey's full membership of the European Union.

The legal reforms introduced to protect human rights are to be welcomed and it is right that in some areas, improvements have been made. However, the Mission notes that there still exists an alarming level of human rights violations.

Between October 2004 and September 2005, the ECtHR delivered 129 final judgments concerning Turkey. On 120 occasions the Court found that Turkey had violated at least one ECHR article and seven friendly settlements were concluded. In two cases, it was found that Turkey was not in violation of the ECHR. During this period, 1,812 new applications regarding Turkey were made to the ECtHR.[12]

Judges and prosecutors in Turkey have a considerable role to play in the implementation of reforms. The Commission found that courts have in general continued to apply the ECHR. The courts are reported to have referred to the Convention in 224 judgments since 2004. The European Commission has concluded that in general, however, it is difficult to discern a clear positive pattern, as provisions of Turkish law and even articles of the ECHR are not interpreted consistently. "On the one hand, there are signs that the judiciary is increasingly integrating the

12 **European Commission 2005 Progress Report on Turkey published on 9 November** 2005 page 19

new provisions. Several court judgments have been issued suggesting a positive development in areas such as freedom of expression, freedom of religion, and the fight against torture and ill-treatment and honour crimes. This trend also applies to the decisions of the Council of State. On the other hand, courts have issued judgments in the opposite direction in the area of freedom of expression, including against journalists. In the context of the *Eğitim Sen* case, the Court of Cessation issued a judgment ordering the closure of the largest trade union for educators unless it made changes to its statute, which contained a commitment to mother tongue education,. In so doing, the court reversed the lower court's judgments which had made explicit reference to the relevant provisions of the ECHR."[13]

According to a report released by the Diyarbakir branch of İHD, the total number of reported violations experienced in the south-eastern and eastern regions in 2004 increased from 6472 in 2003 to 7208 in 2004. Between October 2004 and September 2005 the Parliamentary Human Rights Investigation Committee continued to collect complaints on human rights violations and, in relation to some high-profile cases, requested that the relevant authorities follow up and redress the situation when necessary. It received 1307 complaints between October 2004 and June 2005. The Committee conducted an investigation into the deaths of Ahmet and Uğur Kaymaz. [14]

1. Impunity

Overall, it is clear that there remains a strong climate of impunity. Human Rights Watch has stated that the independence of the judiciary, "remains prejudiced by the continuing arrangement of the minister of justice's chairing the High Council of Judges and Prosecutors, that deals with appointments and promotions within the judiciary."[15]

The Ministry of Interior's Investigation Office, which was established in February 2004, has received 1,003 complaints of human rights abuses from the public. These complaints are assessed by inspectors, who follow them up with the relevant authorities within the Ministry at local or central level. Most complaints received have been made against the police. By November 2005 only one complaint had led to disciplinary action being taken against a public official.[16] According to official

13 *ibid.* page 17

14 *ibid.* page 21

15 Human Rights Watch Advisory Note to Journalists Covering the Release of Regular Report on Turkey and Recommendations, October 2004

16 European Commission 2005 Progress Report on Turkey published on 9 November

statistics, of the 1,239 cases that were filed against law enforcement officials in the first quarter of 2005, only 447 prosecutions were pursued. [17]

Moreover, the Commission has expressed concerns that when cases are pursued, prosecutors still do not conduct timely and effective investigations against those accused of torture. Often such investigations are limited only to an examination of the medical report, despite the necessity – as stated in the European Committee for the Prevention of Torture report on the September 2003 visit – to look beyond the medical reports in the context of such investigations. Convictions are rare and the courts appear to be unable or unwilling to impose appropriate sanctions on those committing these crimes. In 2004, of the 1,831 cases concluded, 99 led to imprisonment, 85 to fines and 1,631 to acquittals. [18]

Although the Turkish Code of Criminal Procedure has adopted trial *in absentia* as an exception, only in cases where light sentences are involved – that is, where the offence is punishable by a fine, imprisonment for up to two years and/ or confiscation – police officers charged with torture are exempt from appearing personally before the court. Further evidence of impunity can be found in other legislative provisions, such as Article 15 of the Anti-Terrorism Law and Article 154 of the Criminal Procedure Law.

Article 15 of the Anti-Terrorism Law provides that superiors and officers of the security forces who have duties in the fight against terrorism shall be defended by three lawyers for offences committed by them in connection with their duties and that the fees of these lawyers shall be paid out an appropriation to be included in the budget of the institution concerned, independently of the tariff or minimum fees for lawyers. These provisions apply also to offences committed during the execution of judicial duties. As a result, the offence of torture (the offence with the highest likelihood of being committed during the execution of judicial duties) and those who commit it benefit from legal protection.

Article 154 of the Criminal Procedure Law provides that the office of the public prosecutor shall directly prosecute civil servants who have abused their power or been negligent. However, Article 154/5 states that police superiors, guilty of the same offences, shall be subject to the trial procedure applicable to judges in connection with their duties

Notwithstanding efforts to assure the attendance of the accused at trials and recent changes to the penal code, cases against alleged perpetrators of torture and ill-

2005 page 21

17 *ibid.* page 23

18 *ibid* page 23

treatment continue to exceed the statute of limitations. Moreover, courts are often reluctant to accept evidence from sources other than the Forensic Medical Institute. Police officers facing trial for such crimes are frequently not removed from duty pending the outcome of the trial.[19]

2. Extra-Judicial Killings

The European Commission has reported that allegations of extra-judicial killings have increased, particularly in the context of the deteriorating security situation in the south-east, citing examples including that of Ahmet and Uğur Kaymaz.[20] In addition to the current case, killings which are believed to have been extra-judicial include the cases of Şiyar Perinçek, Fevzi Can and Yücel Solmaz.

Şiyar Perinçek was shot dead on 28 May 2004 at around 15.00 by a security officer outside the office of the Adana branch of the İHD. In summary, the police officers have been charged with, "Breaching their duty and killing a person by using unnecessary force." A KHRP trial observation mission which observed the hearing on 21 December 2004 noted a number of concerns about the proceedings including intimidation of witnesses, destruction of evidence and failure to follow basic investigation procedures.[21]

Fevzi Can was shot dead by a soldier on 28 November 2004, in Şemdinli, Hakkari. He was trying to take his livestock to the village when he was shot. Officials alleged that he was a PKK member and a livestock smuggler. It was also alleged that at the time of the incident, he was given a warning to stop but ignored this warning. On 3 December 2004, a soldier, Murat Şener, was arrested for the killing and sent to Van military prison. However, he was released on the first day of his trial. In addition, there are concerns as to the length of time it took for the Public Prosecutor to attend the scene of the crime and a fear that vital evidence may have been lost and/ or destroyed as a result.[22]

Yücel Solmaz (a member of the Medical Workers' Union trade union), was killed by security forces on 26 December 2004 in Van. Solmaz and four of his friends were approaching checkpoint 44 in their vehicle, when four masked soldiers indicated to them to stop. As they did so, the soldiers pointed their guns at the group in the

19 *ibid* page 23

20 *ibid* page 24

21 KHRP & BHRC, 'Relatives of Human Rights Defenders at Risk: the Extra-judicial Killing of Şiyar Perinçek', (KHRP: London) 2005.

22 *ibid*

vehicle and shot dead Solmaz. Officials allege that the soldiers asked them to stop but this was denied by the other men present, who stated that they were about to stop the vehicle but the soldiers shot Solmaz whilst he was still inside the car.[23]

3. European Commission's General Evaluation of the Human Rights Situation in Turkey as of November 2005

In its general evaluation of the human rights situation in Turkey the Commission said the following:

"Political transition is ongoing in Turkey and the country continues to sufficiently fulfil the Copenhagen political criteria. Important legislative reforms have now entered into force and should lead to structural changes in the legal system, particularly in the judiciary. However, the pace of change has slowed in 2005 and implementation of the reforms remains uneven. Although human rights violations are diminishing, they continue to occur and there is an urgent need both to implement legislation already in force and, with respect to certain areas, to take further legislative initiatives. Significant further efforts are required as regards fundamental freedoms and human rights, particularly freedom of expression, women's rights, religious freedoms, trade union rights, cultural rights and the further strengthening of the fight against torture and ill-treatment. In particular, Turkey should integrate more effectively the reform process into the work of all public authorities. Turkey's commitment to further political reforms should be translated into more concrete achievements for the benefit of all Turkish citizens, regardless of their origin.

As regards *democracy and the rule of law*, important structural reforms have been put in place, particularly in the area of the functioning of the judiciary. The six pieces of legislation mentioned in the Commission's 2004 recommendation entered into force. However, implementation on the ground remains uneven. On the one hand, several judgments suggest that the judiciary is increasingly acting in accordance with the case law of the European Court of Human Rights. On the other hand, there have been a number of decisions, in particular in relation to the expression of opinions on traditionally sensitive subjects, which have led to both prosecutions and convictions. Reforms concerning civil-military relations have continued, but the armed forces still exert significant influence by issuing public statements on political developments and government policies.

Concerning the *protection of human rights and minorities*, despite some progress,

23 *ibid.*

the picture remains mixed. As regards the fight against torture and ill-treatment, further provisions have entered into force, adding to the comprehensive legislative framework already in place, and the incidence of such practice is diminishing. Nevertheless, reports of torture and ill-treatment remain frequent and those perpetrating such crimes still often enjoy impunity. Legislative progress has been achieved with regard to the exercise of fundamental freedoms, notably through the entry into force of a new Penal Code and a new Law on Associations, and in practice both individuals and civil society organisations enjoy greater freedom than in the past. Nevertheless, individuals continue to be prosecuted and convicted for the expression of non-violent opinion and certain associations continue to face constraints on their activities. In this context court proceedings based on Article 301 will be closely monitored. There are still reports of the security forces using disproportionate force in the context of demonstrations. As regards freedom of religion, despite some ad hoc measures, religious minorities and communities still lack legal personality. There is an urgent need to address their problems through the adoption of a comprehensive legislative framework in line with European standards. Greater attention is being paid to women's rights, but violence against women remains a matter of serious concern. Notwithstanding a greater tolerance for the use of languages other than Turkish, the exercise of cultural rights is still precarious. No local broadcasting in Kurdish has yet been authorised, Kurdish language courses have closed down and politicians continue to be convicted for using the Kurdish language in certain contexts. Turkey continues to adopt a restrictive approach to minorities and cultural rights.

Although there is a growing consensus on the need to address the economic, cultural and social development of the Southeast, little concrete progress has been made and the security situation has worsened since the resumption of PKK violence. Internally displaced persons continue to face a number of difficulties."[24]

24 European Commission 2005 Progress Report on Turkey published on 9 November 2005 page 41

H. Conclusions

In November 2005 the Commission concluded that although human rights violations in Turkey are diminishing, they continue to occur and that Turkey's commitment to further political reforms should be translated into more concrete achievements for the benefit of all Turkish citizens regardless of their origin. The Mission has a number of concerns about the circumstances of the deaths of Ahmet and Uğur Kaymaz and the subsequent trial of the four police officers charged with killing them. These concerns are outlined below.

1. The Circumstances of the Deaths

The Commission has reported that allegations of extra-judicial killings have increased, particularly in the context of the deteriorating security situation in the south-east. The right to life enshrined in Article 2 of the ECHR ranks as one of the most fundamental provisions in the Convention and the use of force must be no more than absolutely necessary for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) of Article 2. In all the circumstances the Mission is concerned that the deaths of Ahmet and Uğur Kaymaz constitute a violation of this fundamental right.

2. The Investigation

The indictment proffered by the Chief Public Prosecutor of Mardin on 27 December 2004 essentially charges the four police officers in question with exceeding the limits of self defence causing the deaths of Ahmet and Uğur Kaymaz. The summary of information outlined in the indictment rests on the assumption that the officers were first shot at by Ahmet Kaymaz and his son. Where lethal force is used, deprivations of life must be subject to the most careful independent and public scrutiny, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such

matters as the planning and control of the actions under examination and leading to a determination of whether the force used was or was not justified in a particular set of circumstances. (*Mcann v United Kingdom* Application No. 18984/91 § 150; *Kaya v Turkey* Application No. 22729/93 § 88). It is the Mission's view that the trial of the charges as outlined in the indictment does not meet with the required standard of an effective investigation into the deaths of Ahmet Kaymaz and his son.

The Mission has also identified serious problems relating to the way in which the evidence for this trial has been collected and presented. It is particularly concerned about allegations that evidence was planted at the scene; the delay before any investigators attended the scene of the incident; that forensic evidence has been lost; procedural errors in taking statements; intimidation of witnesses; and that eye-witnesses' accounts do not appear to have been considered by the prosecuting authorities.

However, the Mission is pleased to learn of the positive effect of change in rules regarding questioning of witnesses.

3. Intimidation

The Mission is concerned at the climate of intimidation which is apparent in relation to these proceedings. It heard allegations that the victims' were publicly labelled as PKK operatives, in advance of any independent investigation; members of the victims' family have been threatened; witnesses have been intimidated and assaulted; and the police failed to protect NGO representatives from attack outside the court house in Eskişehir. The Mission itself felt intimidated by the actions of, and serious allegations made by one of the defence lawyers. Such intimidation can only have a negative impact on any investigation and trial.

4. Public Hearing

The right to a public hearing is an essential safeguard of the fairness and independence of the judicial process, and a means of protecting public confidence in the justice system. It is the Mission's view that the hearing it attended on 24 October 2005 was not open to the general public. It was clear that access was restricted to lawyers and family members whose names were on a list being used by police officers at the entrance to the court. The Mission was not told of any permissible reason why this restriction was in place. It suspects that there were no real public order concerns behind the order of the Governor to restrict entry to the city of Eskişehir and that

instead this was an attempt to limit public access to the hearing.

The Mission is concerned that the decision to move the trial from Mardin to Eskişehir some 900km away has impeded the victims' family members and supporters from attending the hearings. The lack of any financial assistance has exacerbated this impediment. The Mission did not hear any concrete evidence as to substantiate the claim made by the defence that it was under threat in Mardin, and is concerned that this decision was made without consulting the Kaymaz family or their representatives. The Mission feels that the decision to move the trial does not comply with the UN Basic Principles for Justice for Victims of Crime and Abuse of Power.

5. Equality of Arms and Impartiality

The Mission is concerned that there is an inequality of arms between the defence and the complainants in this case. Indications of such an inequality include public interest immunity decisions which do not seem to have been applied equally between the parties; late disclosure of evidence to the complainants which had already been disclosed to the defence; limitations on the introduction of key witnesses for the complainants; apparent inaction of the prosecutor both in court and during the investigation; and limitations on cross examination of defence witnesses. The right to trial before an independent and impartial tribunal requires that justice must not only be done, it must also be seen to be done. The Mission is concerned that the seating arrangement in the court room does not fulfil the requirement of justice being seen to be done and suggests a lack of impartiality and independence.

The Mission is also concerned that the indictment is not impartial as it sets out the defence case, which gives the impression that those allegations form part of the case to be 'disproved' by the victims.

6. Freedom of Expression

The European Commission has concluded that individuals in Turkey continue to be prosecuted and convicted for the expression of non-violent opinion. The Mission heard of many instances where freedom of expression has been impermissibly interfered with in relation to the deaths of Ahmet and Uğur Kaymaz. Such instances include the injury of Ahmet Kaymaz's sister during a demonstration following the incident; arrests of protesters during a demonstration following the transfer of an accused police officer to Bursa; criminal charges arising out of the publication of a

report by the Human Rights Commission about the incident; moving the trial in response to demonstrations in Mardin; restricted public access to Eskişehir where the trial is taking place; and the detention of protesters subsequently denying them access to legal representation.

7. Torture, Inhuman and Degrading Treatment

Reports of torture and ill-treatment remain frequent in Turkey and those perpetrating such crimes still often enjoy impunity. Article 1 of the Convention against Torture provides that the term 'torture' means, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The Mission is concerned that the treatment of Witness B at the scene of the killings and later during his detention at the petrol station and the treatment of Ahmet Kaymaz's sister during a demonstration after the incident may amount to such treatment. Because action by the public prosecutor depends on whether individuals wish to make a complaint often results in this treatment not being investigated.

8. Impunity

The Mission is concerned that there remains a strong climate of impunity in Turkey. Of the 1,239 cases that were filed against law enforcement officials in the first quarter of 2005, only 447 prosecutions were pursued. In 2004 of the 1,831 cases concluded, 99 led to imprisonment, 85 to fines and 1,631 to acquittals.

The Mission heard numerous complaints that the defendants had only temporarily been suspended from duty following the incident. Of particular concern was the apparent promotion of one of the defendants to a position in Bursa. The climate of impunity is further indicated by the fact that defence felt able to harass the Mission's interpreter in court while the judge and prosecutor were present.

Recommendations

For the Turkish Government

- To conduct an effective investigation into the deaths of Ahmet and Uğur Kaymaz;
- To investigate allegations of intimidation of witnesses and victims' family members;
- To investigate allegations of torture or inhuman and degrading treatment of "Witness B" and Ahmet Kaymaz's sister;
- To ensure that all future hearings in the case are open to the public and that any limitation of this right shall be solely for purposes permitted in international law;
- To move the trial back to Mardin or at least require that the decision to move the trial to Eskişehir is subject to public scrutiny;
- In the event that the trial remains in Eskişehir, to ensure that the victim's family receive assistance to travel to each hearing of the trial;
- To implement measures which will provide for the independence and impartiality of the judiciary;
- To ensure equality of arms between the parties;
- To abolish those articles of the Turkish Criminal Code of Procedure which allow law enforcement superiors to be privy to a trial procedure different from other defendants;
- To provide protection to witnesses who have been subjected to intimidation and threats;

- To amend the Turkish Code of Criminal Procedure to include provisions which recognise that alleged state perpetrators should, in certain circumstances, be suspended from duty;

- To implement measures which will ensure that evidence is collected and disclosed in a timely fashion so that cases can be properly presented;

- To prevent further violations of freedom of expression;

- To translate Turkey's commitment to further political reforms into more concrete achievements for the benefit of all citizens regardless of their origin;

- To redress the climate of impunity that exists;

- To ensure compliance with the relevant international standards;

- To ensure that members of the judiciary, lawyers and security personnel are educated about legislative changes; and

- To ensure that the Kaymaz family are compensated for their losses.

For International Non-Governmental Organisations

In view of the concerns raised by this report,

- To monitor the trial against the police officers;

- To monitor compliance with the relevant international standards;

- To initiate and maintain contacts with human rights organisations in Turkey; and

- To maintain dialogue with the European Union on the issues raised in this report throughout future discussions on accession.

Appendix One – Indictment (Translation[25])

-T.R
MARDIN
CHIEF PUBLIC PROSECUTOR

27.12.2004

PREPATORY NO:2004/4054
ORIGINAL NO : 2004/2217
INDICTMENT NO :2004/896

INDICTMENT
PRESIDENCY OF HIGH CRIMINAL COURTMARDIN

PLAINTIFF : PUBLIC PROSECUTION

DECEASED:

1. AHMET KAYMAZ, son of Nuri and Emine, d.o.b. 08.06.1973 in Köprülü. He is registered at Tepebaşı Mahallesi, Kızıltepe - Mardin registry office. He died on 21.11.2004

2. UĞUR KAYMAZ, son of Ahmet and Makbule, d.o.b. 02.08.1992, p.o.b Savur. He is registered at Tepebaşı Mahallesi, Kızıltepe- Mardin registry office. He died on 21.11.2004.

25 Translation by KHRP conducted in-house

COMPLAINANTS:

1- MAKBULE KAYMAZ, daughter of Bahri and Hamdiye. D.o.b. 06.11.1971, p.o.b. Savur. She is registered at Tepebaşı- Kızıltepe- Mardin. She resides at No:4, 2227 Sokak , Vatan Caddesi (street), Turgut Özal Mahallesi.

2- EMINE KAYMAZ, daughter of Rizgo and Sureyya, d.o.b. 16.10.1939, p.o.b. Kayakdere. She is registered at Tepebaşı Mahallesi, Kızıltepe-Mardin. She resides at No: 4, 2227 Sokak, Vatan Caddesi, Turgut Özal Mahallesi.

REPRESENTATIVES:

1- Erdal Kuzu (Lawyer), a member of Mardin Bar, Gökçeli Sürücü Kursu Apartmanı, Kat:2/3, Kızıltepe Mardin.

2- Huseyin Cangir (Lawyer), a member of Mardin Bar, Gökçeli Sürücü Kursu Apartmanı, Kat:2/3, Kızıltepe/Mardin.

3- Sebahattin DEMİRTAŞ (Lawyer), a member of Diyarbakır Bar Association, Aliemri 1. Sokak, Yilmaz 2004 Apartmanı, No: 2/5 Yenişehir- Diyarbakir.

4- İrfan Eser (Lawyer), a member of Diyarbakir Bar Association, Lise Caddesi, 1. Sokak, Oran Apt. No:3/3, Yenişehir-Diyarbakır.

COMPLAINANT:

MURAT KAYMAZ, son of Nuri and Emine, d.o.b. 02.02.1978, p.o.b. Köprülü, registered at Tepebasi Mahallesi,-Kızıltepe- Mardin. He resides at Aktepe Mah. No:16/3, Sokak 142, Gaziemir- İzmir.

ACCUSED:

1- MEHMET KARACA, son of Kemal and Fethiye, d.o.b. 1971, p.o.b. Erzurum. He is registered to Bahçelievler Mahallesi, Yalova Merkez. He still is employed as a police officer at Mardin Province Police.

2- YASAFETTIN AÇİKSÖZ, son of Yaşar and Ferdane, d.o.b. 29.09.1971, p.o.b. Güney. He is registered to Sırrıpaşa Mahallesi, Derince-Kocaeli. He still is an employee of Mardin Province Police as a police officer.

3- SEYDİ AHMET TÖNGEL, son of Cemil and Sati, d.o.b.1971, p.o.b.Kavak. He is registered at Basalan village, Kavak-Samsun. He is still an employee of Mardin Province Police as a police officer.

4- SALİH AYAZ, son of Mehmet and Fatma. D.o.b. 1970, d.o.b. Afşin. He is registered at Essence town of Afşin-Kahramanmaraş.

CRIME:

Exceeding the boundary of the self defence by killing men in a way that the killers could not be identified.

CRIME DATE: 21.11.2004, at 16.13 -16.20.

TIKM:

1- In accordance with Articles 448, 50, 463,31,33 of Turkish Criminal Law, for their actions against Ahmet KAYMAZ and Uğur KAYMAZ, against the accused Mehmet KARACA, Yasafettin AÇIKSÖZ and Seydi Ahmet TÖNGEL…. To be practised twice (2),

2- In accordance with Articles 448,50,463,33 of Turkish Criminal Law against Salih AYAZ for his action against Ahmet KAYMAZ,

3- Article 36 of Turkish Criminal Law……

PREPARATORY DOCUMENTS AND THE APPENDICES WERE CONSIDERED:

After investigating the received documents titled 'The Summary and Investigation Documents' which were dated and numbered 24.12.2004, 2004/2676 Hz 2004/80 from Kızıltepe Chief Public Prosecutor:

On 20.11.2004 according to the information from the 155 Police helpline at Kızıltepe District Police Directorate, some persons who came to the address of No: 4, 2227 Sokak, Vatan Caddesi, Turgut Özal Mahallesi were carrying long barrelled guns.

Following this, intelligence work was carried out, the information gathered was evaluated together with the information given to the security forces by the accused Halil Ibrahim ÖZTÜRK who surrendered and became confessor saying that the PKK terrorist organisation was in preparation for an action against the security forces in Kızıltepe and for this action the house of a militia which was closest to Kızıltepe Central Gendarmerie Station was going to be used.

It is understood that Ahmet Kaymaz and his family resided at the aforementioned

address. The information documented that Ahmet Kaymaz had a connection with the PKK organization in the past, such as the criminal record which belongs to Ahmet Kaymaz (archive documents regarding his involvement with terrorist activities are enclosed in the file). In accordance with Article 6 of Legal Prevention and Search Public Act there was sufficient reasonable element of suspicion for Kızıltepe Chief Public Prosecutor to give written permission to the Security Forces to carry out searches on the address of No: 4, 2227 Sokak, Vatan Caddesi, Turgut Özal Mahallesi. The police officers of the Special Forces Branch Directorate were given duty to put the aforementioned house under closer observation, as there was a high risk of clashes during the scheduled search by the Security Forces and there was a possibility that the people in the house could have been harmed during the search in the house.

On 21.11.2004 at around 16.00 after it became dark, the police officers of Special Force Branch Directorate were positioned at the MOIL petrol station in Vatan Caddesi in different groups of different numbers to observe the house in a closer range. They were instructed to put the house under closer observation andthose taken duty were transferred to their new positions.

The accused Salih Ayaz was given duty as an internal security member in the operation carried out at the address of No: 4, 2227 Sokak,Vatan Caddesi, Turgut Özal Mahallesi, that was prepared by the Police Security Forces in accordance with the legal obligation and within the legal boundaries.

When the statement of the accused was considered together with the statements of other witnesses and accused, it was found that during the incident, Salih Ayaz was in charge of controlling the Nusaybin side of the road in front of the house numbered No 4. After the gunfire ceased he came in front of the house numbered No 4 and opened fire. The empty bullet cartridges belonging to the gun used by the accused were found right in front of the house No:4. In addition the bullet kernel fired from the gun used by the accused was extracted from the left leg of the deceased Ahmet Kaymaz.

When all the evidences were put together, it was found that the accused Salih Ayaz, even though the attack against the life of his duty friends ended, went beyond the limit of using a gun legitimately and shot at the leg of the deceased Ahmet Kaymaz. According to the Forensic Medicine report this shot did not create the threat to life, however the fact that the accused shot more than once and the existence of plural bullet entry and exit holes in the body of the deceased means it is not clear which gun caused which entry or exit hole. When all these matters were considered I reached the opinion that though the court has the discretion over the evidence, the accused has committed the alleged crime.

The accused Mehmet Karaca, Seydi Ahmet Töngel, Yasafettin Açıksöz and Salih Ayaz were charged with a duty by Police Forces who prepared the operation at the address of No 4, Sokak 2227, Vatan Caddesi, Turgut Özal Mahallesi, to remain within legal boundaries and comply with all the legal obligations.

The accused were charged with a duty to arrest and also to act as internal security units at this operation. During their duty, the accused encountered fire arms resistance, which created a life threatening situation for the accused. However, the accused police officers went beyond the limit of the using guns legitimately (Ek Article 6 of PVSK numbered 2559) and caused the death of Ahmet Kaymaz and Uğur Kaymaz, in such a way that the killers could not be identified.

The guns that the accused used during the crime were able to kill and they were used by the accused effectively. According to the wounds that were made on the bodies of the victims, the shots hit the victims in the vital parts of their bodies. It is clear that the number of wounds at the vital parts of the bodies is high, and that the victims died immediately after the executive actions of the accused. It is understood that the victims attacked in a way that was threatening the lives of the accused, but the accused went beyond the limit of the using his rights of the self-defence (Turkish Criminal Law, law code numbered 765 of Article 49). It is understood that while the accused were on official duty, they went beyond the limit of using the legal arms and self defence and committed the action by causing the death of Ahmet and Uğur KAYMAZ, in a way that the perpetrators could not be identified.

The file contains; allegations, confessions, witness statements, coroner examination and autopsy reports, reports of the crime scene and sketches, the reports produced by the forensic medicine, additional decisions of the stopping of proceedings, the summary dated and numbered 2004/2824 - Hz.no.2004/81 sent by Diyarbakir Public Prosecutor who was authorised with the law code numbered 5190.

After considering the summary and investigation documents, which were dated and numbered 24.12.2004, 2004/2676 Hz 2004/80 from Kızıltepe Chief Public Prosecutor, the crime evidences deposited in the court by Kızıltepe Chief Public Prosecutor registered as 2004/367-371-383-384-392-393-396-411 and 415 and various communiqué – documents, ID cards and Police Records and all the written contents of the file;

The accused be tried because of their action and in accordance with the articles above be punished one by one;

The two Kalashnikov rifles and the bullets and bullet clips belonging to these rifles that belonged to the victims, which are in the deposit of Kızıltepe Public Prosecutor and are numbered 2004/367 be confiscated in accordance with Article 36 of Turkish

Criminal Law, the materials, documents, communiqué which are deposited in the same place and described above as evidences in the file be kept as evidence in the file."

It is demanded and claimed on behalf of the public. 27.12.2004

MUSTAFA CAYMAZ (30022)
PUBLIC PROSECUTOR

Appendix Two – Articles 31, 33, 36 and 50 of the Turkish Penal Code[26]

Article 31: At the time of the crime, children who have not hit the age of 12 shall not be criminally liable; no criminal investigation shall take place. However, a specific safety measure can be enforced.

Article 33: (1) This article deals with sentences (decisions) for children under 12 years of age, children under 15 years of age who are deaf and mute; also could apply to children who reached the age of 12 but not 15, children who reached the age of 15 but under 18 deaf and mute; children who reached the age of 15 but under 18, persons who reached the age of 18 but under 21 deaf and mute.

Article 36: (1) If a wrongdoer voluntarily renounces his own actions and decides not to complete the act, the wrongdoer will not be punished unless the part of an action which is completed does not amount to a sufficient offence.

Article 50: (1) Short-Term imprisonment according to the offender's character, socio-economic circumstances, remorse and by examination of the features of an offence, the imprisonment could be turned into :

Into a fine;

On the condition of obtaining the victim's or victims' exact loss, bring the victim to the exactly the same position as it was before the offence;

The prisoner could be sent to an education centre with a shelter for a minimum or two years in order to gain a profession or skill;

Could be prohibited from some designated areas or some activities for the half of the sentence;

26 Translation by KHRP conducted in-house

In case of mistreatment of authority; the qualifications could betaken away for the half of the sentence;

The prisoner could be subjected to a volunteering work within civil service for the half of the sentence;

An offence which is dealt with in the options of imprisonment or fine and results in imprisonment; that sentence could not be subjected to a fine again.
If not convicted before, in under the age of 18 or over 65 years of age from date of offence, 30 days or fewer sentences could be applicable, or options in section 1 of Article 50 could be applied.

Even though long-term sentence which resulted in underperformance; that sentence could be applicable to section 1a of Article 50 unless the offence is not committed intentionally.

The real sentences, regarding to these subsections and articles are; fine and correction.

If the action regarding to determined sentence has not yet been taking in spite of 30 day official notification of the Public Prosecutor Office, the court then may decide immediate execution for a short-term sentence. In this case section 5 would not be applicable.

If the punishment given under these Articles and subsections becomes impossible to carry out which is not because of the prisoner, the court may take different measure.

Publications List

Other materials available from the Kurdish Human Rights Project include:

- A Fearful Land: Fact-Finding Mission to Southeast Turkey (1996)
- A Delegation to Investigate the Alleged Used of Napalm or Other Chemical Weapons in Southeast Turkey (1993)
- Advocacy and the Rule of Law in Turkey (1995)
- After the War: Fact-Finding Mission to Iraqi Kurdistan (2003)
- *Akduvar v. Turkey* - The Story of Kurdish Villagers Seeking Justice in Europe (1996)
- *Aksoy v. Turkey* & *Aydin v. Turkey*: Case reports on the practice of torture in Turkey -volume I (1997)
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