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GRAND CHAMBER JUDGMENT ÖCALAN v. TURKEY

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment in the case of ***Öcalan v. Turkey*** (application no. 46221/99).

In its judgment the Grand Chamber made the same findings of violation and non violation of the European Convention on Human Rights as the Chamber in its judgment of 12 March 2003[1].

Detention

The Court held, unanimously, that there had been:

- **a violation of Article 5 § 4** (right to have lawfulness of detention decided speedily by a court) of the European Convention on Human Rights, given the lack of a remedy by which the applicant could have had the lawfulness of his detention in police custody decided;
- **no violation of Article 5 § 1** (no unlawful deprivation of liberty) of the Convention, concerning the applicant's arrest;
- **a violation of Article 5 § 3** (right to be brought promptly before a judge) given the failure to bring the applicant before a judge promptly after his arrest.

Fair trial

The Court held:

- by 11 votes to six, that there had been **a violation of Article 6 § 1** (right to a fair trial) in that the applicant had not been tried by an independent and

impartial tribunal; and,

- unanimously, that there had been **a violation of Article 6 § 1**, taken together with Article 6 § 3 (b) (right to adequate time and facilities for preparation of defence) and (c) (right to legal assistance), in that the applicant had not had a fair trial.

Death penalty

The Court held:

- unanimously, that there had been **no violation of Article 2** (right to life);
- unanimously, that there had been **no violation of Article 14** (prohibition of discrimination) taken in conjunction with Article 2, concerning the implementation of the death penalty;
- unanimously, that there had been **no violation of Article 3** (prohibition of ill-treatment), concerning the implementation of the death penalty;
- and, by 13 votes to four, that there had been **a violation of Article 3** concerning the imposition of the death penalty following an unfair trial.

Treatment and conditions

The Court held, unanimously, that there had been:

- **no violation of Article 3** concerning the conditions in which the applicant had been transferred from Kenya to Turkey or the conditions of his detention on the island of •mral•.

Other complaints

The Court also held, unanimously, that:

- there had been **no violation of Article 34** (right of individual application); and that
- it was not necessary to examine separately the applicant's remaining complaints under Articles 7 (no punishment without law), 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 13 (right to an effective remedy), 14 and 18 (limitation on use of restrictions on rights).

Under Article 41 (just satisfaction), the Court held, unanimously, that its findings of violations of Articles 3, 5 and 6 constituted in themselves sufficient just satisfaction for any damage sustained by the applicant and awarded the applicant's lawyers 120,000 euros (EUR) for costs and expenses.

(The judgment is available in English and French.)

1. Principal facts

The case concerns an application brought by a Turkish national, Abdullah Öcalan, who was born in 1949. He is currently incarcerated in •mral• Prison (Bursa, Turkey).

At the time of the events in question, the Turkish courts had issued seven warrants for Mr Öcalan's arrest and a wanted notice (red notice) had been circulated by Interpol. He was accused of founding an armed gang in order to destroy the integrity of the Turkish State and of instigating terrorist acts resulting in loss of life.

On 9 October 1998 he was expelled from Syria, where he had been living for many years. From there he went to Greece, Russia, Italy and then again Russia and Greece before going to Kenya, where, on the evening of 15 February 1999, in disputed circumstances, he was taken on board an aircraft at Nairobi airport and arrested by Turkish officials. He was then flown to Turkey.

On arrival in Turkey, he was taken to •mral• Prison, where he was held in police custody from 16 to 23 February 1999 and questioned by the security forces. He received no legal assistance during that period. His lawyer in Turkey was prevented from travelling to visit him by members of the security forces. 16 other lawyers were also refused permission to visit on 23 February 1999.

On 23 February 1999 the applicant appeared before an Ankara State Security Court judge, who ordered him to be placed in pre-trial detention.

The applicant was allowed only restricted access to his lawyers who were not authorised by the prison authorities to provide him with a copy of the documents in the case file, other than the indictment. It was not until the hearing on 4 June 1999 that the State Security Court gave the applicant permission to consult the case file under the supervision of two registrars and authorised his lawyers to provide him with a copy of certain documents.

On 29 June 1999 Ankara State Security Court found the applicant guilty of carrying out actions calculated to bring about the separation of a part of Turkish territory and of forming and leading an armed gang to achieve that end. It sentenced him to death, under Article 125 of the Criminal Code. That decision was upheld by the Court of Cassation.

Under Law no. 4771, published on 9 August 2002, the Turkish Assembly resolved to abolish the death penalty in peacetime. On 3 October 2002 Ankara State Security Court commuted the applicant's death sentence to life imprisonment.

An application to set aside the provision abolishing the death penalty in peacetime for persons convicted of terrorist offences was dismissed by the Constitutional Court on 27 December 2002.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 February 1999. A Chamber hearing was held on 21 November 2000 and the case was declared partly admissible on 14 December 2000. In its Chamber judgment of 12 March 2003, the Court held, among other things, that there had been a violation of Article 5 §§ 3 and 4, Article 6 §§ 1 and 3 (b) and (c), and also of Article 3 on

account of the fact that the death penalty had been imposed after an unfair trial.

The case was referred to the Grand Chamber[2] at the request of the applicant and the Government. A Grand Chamber hearing was held on 9 June 2004.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Luzius **Wildhaber** (Swiss), ***President***,
Christos **Rozakis** (Greek),
Jean-Paul **Costa** (French),
Georg **Ress** (German),
Nicolas **Bratza** (British),
Elisabeth **Palm** (Swedish),
Lucius **Caflisch** (Swiss)[3]
Loukis **Loucaides** (Cypriot),
Riza **Türmen** (Turkish),
Viera **Strážnická** (Slovakian),
Peer **Lorenzen** (Danish),
Volodymyr **Butkevych** (Ukrainian),
John **Hedigan** (Irish),
Mindia **Ugrekhelidze** (Georgian),
Lech **Garlicki** (Polish),
Javier **Borrego Borrego** (Spanish),
Alvina **Gyulumyan** (Armenian), ***judges***,

and also Paul **Mahoney**, ***Registrar***.

3. Summary of the judgment

Complaints

The applicant complained, in particular, that:

- the imposition and/or execution of the death penalty was or would be in violation of Articles 2, 3 and 14 of the Convention;
- the conditions in which he was transferred from Kenya to Turkey and detained on the island of •mral• – in particular that the Turkish authorities failed to facilitate transport to and from the island, making it difficult for his family and lawyers to visit him – amounted to inhuman treatment in breach of Article 3;
- he was deprived of his liberty unlawfully, that he was not brought promptly before a judge and that he did not have access to proceedings to challenge the lawfulness of his detention, in breach of Article 5 §§ 1, 3 and 4;
- he did not have a fair trial because he was not tried by an independent and impartial tribunal (given the presence of a military judge on the bench of the State Security Court), that the judges were influenced by hostile media reports and that his lawyers were not given sufficient access to the court file to enable them to prepare his defence properly, in breach of Article 6 § 1;
- his legal representatives in Amsterdam were prevented from contacting him after his arrest and that the Turkish Government failed to reply to the request of the European Court of Human Rights for them to supply information, in violation of Article 34.

He also relied on Articles 7, 8, 9, 10, 13, 14 and 18.

Decision of the Court[4]

Detention

Right to have lawfulness of detention decided speedily by a court

The Government had raised a preliminary objection that the applicant had failed to exhaust his domestic remedies under this head. However, the Grand Chamber saw no reason to depart from the Chamber's findings in this respect, notably as to the impossibility for the applicant in the circumstances in which he found himself while in police custody to have effective recourse to the remedy indicated by the Government. Nor could the possibility of obtaining compensation satisfy the requirement of a judicial remedy to determine the lawfulness of detention. The applicant did not therefore have an effective remedy available to him and there had accordingly been a violation of Article 5 § 4 of the Convention.

No unlawful deprivation of liberty

The Grand Chamber agreed with the Chamber that the applicant's arrest on 15 February 1999 and his detention had been in accordance with "a procedure prescribed by law" and that there had, therefore, been no violation of Article 5 § 1.

Right to be brought promptly before a judge

The Grand Chamber found that the total period spent by the applicant in police custody before being brought before a judge came to a minimum of seven days. It could not accept that it was necessary for the applicant to be detained for such a period without being brought before a judge. There had accordingly been a violation of Article 5 § 3.

Fair trial

Whether Ankara State Security Court was independent and impartial

The Grand Chamber noted that the military judge on the bench of Ankara State Security Court which convicted the applicant had been replaced on 23 June 1999. However, the replacement of the military judge before the end of the proceedings could not dispose of the applicant's reasonably held concern about the trial court's independence and impartiality. There had been a violation of Article 6 § 1 in this respect.

Whether the proceedings before the State Security Court were fair
The Grand Chamber agreed with the Chamber's findings that the applicant's trial was unfair because: he had no assistance from his lawyers during questioning in police custody; he was unable to communicate with his lawyers out of the hearing of third parties; he was unable to gain direct access to the case file until a very late stage in the proceedings; restrictions were imposed on the number and length of his lawyers' visits; and his lawyers were not given proper access to the case file until late in the day. The Grand Chamber found that the overall effect of those difficulties taken as a whole had so restricted the rights of the defence that the principle of a fair trial, as set out in Article 6, had been contravened. This amounted to a violation of Article 6 § 1, taken together with Article 6 § 3 (b) and (c).

The Grand Chamber further held that it was unnecessary to examine the other complaints under Article 6 relating to the fairness of the proceedings.

Death Penalty

Implementation of the death penalty
The Grand Chamber noted that the death penalty had been abolished in Turkey and the applicant's sentence had been commuted to one of life imprisonment. Furthermore, on 12 November 2003, Turkey had ratified Protocol No. 6 to the Convention concerning the abolition of the death penalty. Accordingly, there had been no violation of Articles 2, 3 or 14 on account of the implementation of the death penalty.

Legal significance of the practice of Contracting States regarding the death penalty
The Grand Chamber shared the Chamber's view that capital punishment in peacetime had come to be regarded as an unacceptable form of punishment which was no longer permissible under Article 2.

The fact that there were still a large number of States which had yet to sign or ratify

Protocol No. 13 concerning the abolition of the death penalty in all circumstances might prevent the Court from finding that it was the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3, since no derogation might be made from that provision, even in times of war. However, the Grand Chamber agreed with the Chamber that it was not necessary to reach any firm conclusion on this point since it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.

Death penalty following an unfair trial

The Grand Chamber agreed with the Chamber that in considering the imposition of the death penalty under Article 3, regard had to be had to Article 2, which precluded the implementation of the death penalty concerning a person who had not had a fair trial.

In the Grand Chamber's view, to impose a death sentence on a person after an unfair trial was to subject that person wrongfully to the fear that he would be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there existed a real possibility that the sentence would be enforced, inevitably gave rise to a significant degree of human anguish. Such anguish could not be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life was at stake, became unlawful under the Convention.

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

However, the Grand Chamber agreed with the Chamber that the applicant's background as the leader and founder of the PKK, an organisation which had been engaged in a sustained campaign of violence causing many thousands of casualties, had made him Turkey's most wanted person. In view of the fact that the applicant has been convicted of the most serious crimes existing in the Turkish Criminal Code and of the general political controversy in Turkey – prior to the decision to abolish the death penalty – surrounding the question of whether he should be executed, there was a real risk that the sentence might be implemented. In practical terms, the risk remained for more than three years of the applicant's detention in •mral• from the date of the Court of Cassation's judgment of 25 November 1999 affirming the applicant's conviction until Ankara State Security Court's judgment of 3 October 2002 which commuted the death penalty to which the applicant had been sentenced to one of life imprisonment.

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

Treatment and conditions

Conditions of the applicant's transfer from Kenya to Turkey
The Grand Chamber considered that it had not been established 'beyond all reasonable doubt' that the applicant's arrest and the conditions in which he was transferred from Kenya to Turkey exceeded the usual degree of humiliation that was inherent in every arrest and detention or attained the minimum level of severity required for Article 3 to apply. Consequently, there had been no violation of Article 3 on that account.

Detention conditions on •mral•
While concurring with the Council of Europe's Committee for the Prevention of Torture's recommendations that the long-term effects of the applicant's relative

social isolation should be attenuated by giving him access to the same facilities as other high security prisoners in Turkey, such as television and telephone contact with his family, the Grand Chamber agreed with the Chamber that the general conditions in which the applicant was being detained at •mral• Prison had not reached the minimum level of severity required to constitute inhuman or degrading treatment within the meaning of Article 3. Consequently, there had been no violation of Article 3 on that account.

Other complaints

Article 34
The Grand Chamber noted that there was nothing to indicate that the applicant had been hindered in the exercise of his right of individual petition to any significant degree. And, while regrettable, the Turkish Government's failure to supply information requested by the Court earlier had not, in the special circumstances of the case, prevented the applicant from setting out his complaints about the criminal proceedings that had been brought against him. There had accordingly been no violation of Article 34.

Other complaints
The Grand Chamber considered that no separate examination of the complaints under Articles 7, 8, 9, 10, 13, 14 and 18 was necessary.

Article 46
The Grand Chamber reiterated that the Court's judgments were essentially declaratory in nature and that, in general, it was primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46.

However, exceptionally, with a view to assisting the State concerned to fulfil its obligations under Article 46, the Court had sought to indicate the type of measure that might be taken in order to put an end to a systemic situation. In such

circumstances, it might propose various options and leave the choice of measure and its implementation to the discretion of the State concerned. In other exceptional cases, the nature of the violation found might be such as to leave no real choice as to the measures required to remedy it and the Court might decide to indicate only one such measure.

In the specific context of cases against Turkey concerning the independence and impartiality of the state security courts, Chambers of the Court had indicated in certain judgments that were delivered after the Chamber judgment in the applicant's case that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial without delay if he or she so requested.

The Grand Chamber endorsed this general approach. It considered that, where an individual, as in the applicant's case, had been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represented in principle an appropriate way of redressing the violation.

However, the specific remedial measures, if any, required of a respondent State in order to discharge its obligations under Article 46 had to depend on the particular circumstances of the individual case and be determined in the light of the terms of the Court's judgment in that case, and with due regard to the above case-law of the Court.

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Judge Garlicki expressed a partly concurring, partly dissenting opinion; Judges Wildhaber, Costa, Caflisch, Türmen, Garlicki and Borrego Borrego expressed a joint partly dissenting opinion and Judges Costa, Caflisch, Türmen and Borrego Borrego expressed a further joint partly dissenting opinion, all of which are annexed to the judgment.

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The European Court of Human Rights *was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. Since 1 November 1998 it has sat as a full-time Court composed of an equal number of judges to that of the States party to the Convention. The Court examines the admissibility and merits of applications submitted to it. It sits in Chambers of 7 judges or, in exceptional cases, as a Grand Chamber of 17 judges. The Committee of Ministers of the Council of Europe supervises the execution of the Court's judgments.*

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[1] The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

[2] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17 member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

[3] Elected in respect of Liechtenstein.

[4] This summary, produced by the Court’s Registry, does not bind the Court.