

Compiling Trial Observation Reports – based on ‘Advocacy and the Rule of Law in Turkey’

Delivered at Zimbabwe Lawyers for Human Rights Regional Training at Lusaka, Zambia on 27 July 2007

The Kurdish Human Rights Project’s work started in London, focusing on a conflict region that was largely ignored by the international community. This was between a stateless people spread across four states - Turkey, Iran, Syria and Iraq. Each of these countries was actively pursuing policies of forced assimilation, in part by using forced displacement. The heart of the conflict was inside Turkey’s border and so it remains today. At all international fora, Turkey denied not only the existence of its Kurdish population but also any form of discrimination or abuse against any of its citizens. The Kurdish Human Rights Project was formed to challenge this notion internationally, to bring the plight of anyone living in those regions to light and force the international community to recognise its responsibility. Therefore, KHRP started by challenging Turkey at the European Court of Human Rights, and is now considered ‘the pioneer’ in bringing individual complaints against Turkey. Today, there are far more complaints against Turkey than any other member state. Russia is next in line, but it is nowhere close.

In support of this work, we realised that it was vital for the international teams working on the cases in Strasbourg to understand the constraints of Turkey’s legal system, as well as to understand the conditions under which the advocates and applicants were living. In light of the need for indisputable evidence and the high burden of proof required by Strasbourg, we began undertaking Trial Observations and Fact-Finding missions. These missions were carried

11 Guilford Street
London WC1N 1DH
United Kingdom
Tel: +44 (0)207 4053835
Fax: +44 (0)207 4049088
khrp@khrp.org
www.khrp.org

Honorary President
Lord Avebury

Executive Director
Kerim Yildiz

Board of Directors
Chairman
Mark Muller QC (Barrister)
Secretary
Michael Ivers (Barrister)
Treasurer
Rajesh Kumar Rai (Ecologist)

Members
Tertia Bailey (Development Consultant)
Ed Grieves (Barrister)
Julian Ozanne (Journalist)
Gareth Peirce (Solicitor)

Legal Consultant
Tim Otty QC (Barrister)

Board of Patrons
Prof. Haci Akman
Geoffrey Bindman
George Black
Hans Branscheidt
Noam Chomsky
Julie Christie
Andrew Collender QC
Nazmi Gür
Paul Hoffman
Bridget Hughes
Bianca Jagger
Baroness Helena Kennedy QC
Bruce Kent
Lord Kirkhill
Michael Mansfield QC
Ian Macdonald QC
Harold Pinter
Lord Rea
Jon Rud
Per Stadig
Willem Van Genugten
Sanar Yurdatan
Leo Zwaak

Advisory Group
William Archer (Writer)
Meral Daniş Beştaş (Lawyer)
Mesut Beştaş (Lawyer)
Ayhan Bilgen (HR Defender)
Bill Bowring (Professor)
Peter Carter QC (Barrister)
Louis Charalambous (Solicitor)
Louise Christian (Solicitor)
Jane Connors (Lecturer)
Julie Flint (Journalist)
Michael Gunter (Professor)
Malcolm Harper (formerly UNA)
Gillian Higgins (Barrister)
Stuart Kerr (Barrister)
Laurence Lustgarten (Professor)
David McDowall (Writer)
Chris Milroy MD (Forensic Pathologist)
Jacqueline Muirhead (Human Resources)
Caroline Nolan (Solicitor)
Colin Wells (Barrister)

Consultant on Women and Children’s Rights
Margaret Owen (Barrister)

out by European advocates and medical experts who, as individuals and with their professional organisations, had established credibility before the Court and in other international bodies. Today, we continue to use experts across disciplines and throughout Europe to do this work. Sometimes they are new to the region, and sometimes we have found that to be preferable in terms of objectivity. Furthermore, we often do not send the same mission observer to re-trials of an earlier trial observed. Again, we have found that this lends credibility to findings.

We have benefited from both esteemed experts and young talent in carrying out these missions and believe it is vital to have both. The experts often are needed for weight and strategic thinking, while the young talent often 'does the actual work', namely takes notes and writes the reports.

The key to our success has been this mix of talents as well as consistency in language, ensuring a neutral tone, timeliness and reliability to our partners in the regions. We have a style guide which explains how we refer to different acronyms, as well as how we couch political issues, such as names of peoples or regions. We also have a Best Practise Guide for Trial Observations. These tools enable consistency which enables readers to easily recognize our work.

In 1995, the Bar Human Rights Committee of England and Wales undertook one of its first trial observations to SE Turkey, supported by the fledgling Kurdish Human Rights Project. The subsequent report

entitled 'Advocacy and the rule of law in Turkey: Advocates under attack' set an example for all KHRP-BHRC reports and highlights practical techniques we employ in carrying out trial observations and compiling the subsequent reports.

The 1995 trial observation was based on the plight of 20 Turkish and Kurdish lawyers, defense lawyers practicing before the State Security Tribunals in Diyarbakir and Istanbul, who were arrested in late 1993/early 1994 and charged with various political offences. Furthermore, they had all been involved in the defence of suspected members of the Kurdistan Workers Party (PKK) accused of terrorist offences. They all claimed to be subjected to varying forms of torture and ill-treatment during their extensive pre-trial detentions of 2-3 months.

In the conclusion of this report, KHRP recommended, inter alia, that the Turkish government should 'undertake to establish proper and independent mechanisms by which allegations of torture of detainees can be investigated and dealt with'. The question of torture of detainees was subsequently addressed by Supplementary Article 7 of Turkey's Code of Criminal Procedure. This provided that the investigation and prosecution of cases of torture and maltreatment are to be considered as urgent matters and, as priority cases, they are to be treated without delay. Unless absolutely necessary, hearings may not be adjourned for more than thirty days at the most, and these hearings will also be held during the judicial recess. The aim of this amendment is to ensure the speedy conclusion of the investigation and prosecution

of cases of torture and maltreatment. Although torture and especially ill-treatment remain a practise of the state, this amendment and subsequent changes to detention periods has made this practise much less common than even 10 years ago. In 2005, courts investigated numerous allegations of torture by state security forces. There were 232 convictions out of the 531 cases that actually went to full verdict.

Here I would like to note that in any trial observation report, KHRP has found it important for the observer to do and then note the following: we believe it is vital to 'paint a picture'. Many of our readers are policy makers and influencers who are not in courtrooms on a day-to-day basis, and may never have been in one outside of Europe.

- Ensure that the Court is aware of our presence - placing ourselves in the front and centre of the courtroom, if possible, whilst avoiding the public gallery or sitting with the defence team. In some instances, it may be appropriate to introduce ourselves to the court.
- Bring credentials/ cards - proof that we are observers of high standing and skill
- Take notes during the proceedings, noting the set up of the courtroom: where does the judge, prosecution and defendant sit? Is there enough room for outside observers and the public? Are the guards menacing? What is their relationship to the Court? What is the rapport between the Counsel and Judiciary?
- Ensure that our observers know the mandate and limits therein of their mission and are able to explain it to anyone they meet.

- Our observers must approach the mission with attention to detail and impartiality. Note when, where, how, why and who or to whom. All of this is noted in most Trial Observer's best practise guides. Details such as how defendants were arrested, who was involved, when, at which point they had access and in what intervals have they had access to legal counsel, under which charges have they been prosecuted and has the burden of proof been adjusted to ensure guilt or innocence?
- Conduct interviews with affected/ involved parties - including the prosecution/ government. Respect the rule of law and the concept of the role of properly functioning government institutions. KHRP has always taken the view that its reports and interviews in the course of its missions should serve to promote a positive view of NGOs and their conduct and government respect for them.
- Maintain a professional demeanour and appearance.
- Be consistent in approach and practises, especially with follow-through - KHRP's established reputation is derived largely from its consistent presence and consistent language.

Furthermore, KHRP has strategically chosen the trials it observes based both on the immediate need related to the individual defendant/ victim, his her family, the region and also the ability for the case to be used as a tool in demonstrating consistent practises by the state that are in direct violation of its international commitments. Facts found in the trial observations assist us in our casework at the European Court of Human Rights, as well as in our submissions to UN

Special Rapporteurs and Committees, the OSCE or other Council of Europe bodies. The cases at these courts and bodies have in the long-term affected the length and treatment of detainees in pre-trial detention periods, the conduct of investigations and led to the development of public prosecutors independent of government control, though not yet of undue influence.

Since our inception, our goal was to bring about domestic change by challenging the then current practice in an international forum. We wanted to demonstrate the precedent of discrimination and abuse set by the governments of the Kurdish regions. Hence, when we became aware of the case involving the 20 lawyers, we saw the opportunity to support those 20 individuals but also a much larger group, namely 'human rights defenders', while also tackling the serious deficiencies posed by the increasing use of State Security Tribunals in Turkey, as the only functioning means of justice. Furthermore, we highlighted a gaping hole in the European Convention on Human Rights in the protection of human rights defenders. While Article 6 protects the right to a fair trial and defence, it does not protect those doing the 'defending' from prosecution for carrying out this right. In so doing, we were able to focus both local and international attention on the broader picture and not merely on the case at hand. Implicit in this are 3 fundamental questions:

- *What is the strategic importance of carrying out a trial observation report?*
- *Why would an international team be useful to local advocates?*

- *What would an international team be looking for when observing a trial?*

Following this approach allows trial observers to consider the country-context, in this case Turkey, against the broader background of international law allowing for a comparison and therefore an evaluation of the country's compliance with international human rights standards. In fact, KHRP's focus was on the ever-increasing allegations of institutionalised and anonymous harassment encountered by Turkish defence lawyers involved in sensitive political cases before the State Security Tribunals in Diyarbakir, rather than merely looking at the fairness of the proceedings against the defendants in question. This enabled KHRP to gain an insight and evaluate the overall judicial process in Turkey.

Wide-ranging questions such as:

- *Was the trial conducted openly?*
- *If conducted in chambers, was this announced and justified in open court?*
- *Is there a presumption of innocence?*
- *Does the prosecutor appear to exercise undue influence over the tribunal?*
- *Is prosecuting counsel objective and fair in presenting the case against the accused?*

should be considered to be able to ascertain whether overarching principles of open justice are complied in line with the notion that

“justice should not only be done, but should manifestly and undoubtedly be seen to be done” (Lord Hewart), as this constitutes the foundations for the protection of human rights.

In the case of the 20 lawyers, the State Security Court, though a non-judicial court, had come to usurp the functions of the judicial courts. It was composed of 1 military judge, appointed by the Minister of Justice or Minister of National Defense and 2 civilian judges appointed by other government ministries, demonstrating its relationship to the Executive branch of government. Furthermore, as is still the case today in Turkey, the prosecutor sits in close proximity to right of judge, whilst the defence sat at a small table in the well of the courtroom, below both judge and prosecutor.

The general purpose of the questions is therefore to ensure that the broader picture is always at the back of the observer’s mind. The work of NGOs is not merely focused on attempting to find immediate solutions to specific issues, but to act in a preventative manner by using past violations as examples and lessons to be learned. It follows that one of the objectives of trial observations is to prevent similar violations as those observed from occurring in the future by raising awareness of the issue with a view to having a long term impact. In terms of trial observations, these do not necessarily aim to impact or change the case at hand, though the very presence of observers often results in this, but instead to raise awareness of a particular issue for the benefit of future cases. It is therefore crucial to maintain the

broader picture in mind when observing the trial and compiling the report. To this end, useful questions to consider are:

- *What would be the repercussions of the outcome of the trial, both successful and not, on the human rights situation of that country?*
- *What international/regional human rights obligations are being disregarded by the domestic legal system?*

The outcome of a case will either be part of a country's progress towards eliminating a culture of impunity or it is evidence of a continuing culture of impunity, thus providing useful information for compiling recommendations. For example, KHRP looked at the interference with obligatory human rights appeals procedures guaranteed by the European Convention on Human Rights to which Turkey is a signatory and made specific recommendations which a view to addressing the various violations under the ECHR.

Once a broader picture has been set, specific issues that are nonetheless of general application, should be considered. An example of this would be looking at the role of defence counsel. KHRP investigated the disregard of special procedures for the prosecution of lawyers under domestic legal provisions and the criminalisation of lawyers who exercise a legitimate right to apply under the European Convention for redress for their clients (as they had been charged under the 1991 Anti-Terror Law and Turkish Penal Code with, inter alia, disseminating ill-founded and unwarranted claims of human

rights abuses carried out by the state against their clients to European Human Rights organisations including the European Commission of Human Rights).

Questions such as:

- *Does the defence counsel's role/work comply with international standards? If not, why? Does the legal system of the country in question allow defence counsel to carry out their work effectively? If not, why?*
- *Is there an issue with defence counsel being able to put his case without intimidation or interruption?*
- *Does the judiciary comply with international standards? If not, why? Is it an competent, independent and impartial tribunal?*

are of use in evaluating the role of lawyers in the Turkish legal system/judicial system as a whole.

In the trial observation, KHRP considered how much influence the State Security Tribunals had within the Turkish Legal system, again focusing on the workings of the State Security Tribunals as a body rather than merely on the fairness of the judge(s) in the proceedings in question.

In the context of allegations of torture during pre-trial detention, another of KHRP's legal concerns that prompted the trial observation, it examined how, although any suspect who experienced torture at the

hands of the authorities is at liberty to apply to the judicial prosecutor to bring proceedings against any state official so accused, there had not been a single successful prosecution within the emergency regions of south-east Turkey in the last year.

In Turkey, at the time of the commissioning of the report, confessions obtained under torture were prima facie admissible in the security tribunals; therefore the role of the lawyer was crucial. An important question would be:

- *Is, and if so, to what extent, is the domestic judicial system accessible to defendants?*

In particular, though not a serious problem in this case, it is important to specifically address:

- *Is the domestic judicial system accessible to defendants of 'minority groups', women and those lacking formal education?*
- *With specific respect to women, were they treated differently than a man would have been in any part of the trial or pre-trial period?*
- *What are the most eroded aspects of the rule of law in the country in question? What other avenues of redress, if any, are available to the defendant(s)?*

are crucial in determining whether the legal system complies with fundamental human rights such as Article 6 of the ECHR. By asking

questions such as the one above, KHRP came to the conclusion that in reality defendants were placed at a disadvantage by the system as their lawyers found themselves to be victims of harassment and assault and, as a result, unable to carry out their legal duties.

Looking at the work of defence lawyers in places such as the State Security Tribunals is crucial to the survival of what little rule of law is left in the region. It allows to raise awareness of the matter and ascertain Turkey's overall compliance with human rights standards.

With regard to concluding remarks, observers should take an objective stance looking at the trial observation from a domestic and an international point of view and consider questions such as:

- *What needs to be addressed in this trial observation that was not done previously?*
- *What aspects of the legal system of the country in question should be government be most concerned with?*

As trial observations are aimed at monitoring and raising awareness of human rights problems in a particular country, questions that are able to channel the observation so that the focus is broad and far-reaching are a useful tool. In this case, one of the most shocking points was that advocates were being prosecuted for having brought 'defamatory' cases to the European Court of Human Rights, so they were actually being tried for enacting rights voluntarily given to them by their

government's signing of the European Convention of Human Rights. It therefore had an impact on all countries who had ratified the ECHR.

KHRP has several examples of the direct correlation between the trials we have chosen to observe and communications we have had with international human rights bodies. By including in each report sections of both national and international law and drawing out deficiencies and inconsistencies, trial observation reports have proven invaluable in challenging governments denials in Council of Europe and UN fora.

Further Examples

With regard to the question of violence against Kurdish women in Turkey, KHRP sent two mission members to observe the trial of five women prosecuted in the State Security Court of Istanbul. The charges related to speeches made at a conference on sexual violence in custody held in Istanbul in which the women spoke in public for the first time about the phenomenon of sexual harassment, rape and torture in custody at the hands of Turkish officials. In its report on 'State Violence against Women in Turkey and Attacks on Human Rights Defenders of Victims of Sexual Violence in Custody: Trial Observation Report (December 2001)' KHRP recommended that all laws, including the Civil Code Family Law, should be amended to ensure that they comply with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In due course, reservations previously made by Turkey to the CEDAW (those pertaining to women's legal capacity, such as; right to enter into contractual

relationships; responsibilities concerning children; and choice of domicile, family name, work and job) were withdrawn on September 1999 in the light of the review and amendment of the Civil Code. The Optional Protocol to the Convention, which was signed on 8 September 2000, was ratified on 30 July 2002. By adopting the Optional Protocol, Turkish Government has strongly confirmed its commitment to women's advancement and full compliance with the Convention on the Elimination of All Forms of Discrimination against Women. The discriminatory clauses of the Optional Protocol have been amended in compliance with the norm of non-discrimination, thus bringing the Civil Code in line with the Convention. The new Civil Code was adopted by the Turkish Parliament on 22 November 2001 and came into effect on 1 January 2002. Additionally, in October 2001, Article 41 of the Constitution was amended to define the family as an entity that is .based on equality between the spouses.

Another recommendation put forward by KHRP concerned the amendment of the Penal Law so as to provide a wider definition of the crime of "rape" and other acts of sexual violence, and to provide for appropriately serious penalties. The new Turkish Penal Code, which states in the first article that the aim of the law is to "protect the rights and freedoms of individuals," brings progressive definitions and higher sentences for sexual crimes.

In the old penal code, sexual offences were regulated under the section "Crimes against Society" in the sub-section "Crimes against Public

Morality and Family." This classification reflected a patriarchal notion that women's bodies and sexuality did not belong to themselves, but rather to their families or society.

In the new penal code, sexual offences are now regulated as "Crimes against Persons," in the sub-section "Crimes against Inviolability of Sexual Integrity." This constitutes a groundbreaking shift in the overall perspective of Turkish Penal Law, legally acknowledging women's ownership of their bodies and sexuality.

The definition of rape has been expanded to include anal and oral penetration, as well as the insertion of an object or any organ to the body. Psychological coercion is recognized as a means of coercion by the perpetrator and damage to the victim's psychological health is acknowledged as an aggravating circumstance. Sexual assaults under custody or by security forces, public officials or employers, by relatives or in laws are also regulated as aggravated offences.

Sexual harassment is defined to include "all harassment with sexual intent" and sexual harassment in the workplace, perpetrated both by superiors and co-workers, is explicitly recognized as an aggravated offence.

Marital rape has explicitly been acknowledged as a crime in the reformed penal code. It can be prosecuted upon the victim's complaint

In May 2005 KHRP undertook a trial observation on writers on trial in turkey, freedom of expression at risk. The report constitutes the findings of a mission to observe the trials of Ragip Zarakolu, a writer

and publisher who was charged for an article he wrote in a newspaper expressing the right of the Kurdish people for self-determination and Dr Fikret Baskaya, an intellectual and writer, for publishing two articles which the prosecutor claimed were an insult to the Republic. KHRP urged the Turkish government to comply with international human rights treaty obligations and in particular, obligations under Article 10 of the ECHR.

With the enactment of the Seventh Harmonization Package, progress has been achieved in fulfilment of the Copenhagen Political Criteria (which has often constituted the subject of KHRP recommendations).

The amendment to Article 159 of the Turkish Penal Code reduces the minimum penalty for those who “openly insult and deride Turkishness, the Republic, the Grand National Assembly, the moral personality of the Government, the Ministries, the military or security forces of the State or the moral personality of the judiciary” from “one year” to “six months”. The second amendment to the same article ensures that expressions of thought undertaken solely for the purpose criticism do not incur any penalties.

The amendments to Articles 426 and Article 427 of the Turkish Penal Code excludes scientific and artistic works and works of literary value from the scope of criminal offences related to published or unpublished work that are offensive to morality or by being of a nature that provokes and exploits sexual desires. The term “destroy” is deleted from the text of the article, ensuring that the destruction of

these works is no longer to be undertaken as part of the sanctions imposed on offences of this kind.

In order to meet the criteria sought by the European Court of Human Rights in this area, the expression "(incitement to) violence" has been incorporated into the text of Article 7 of the Anti-Terrorism Act, which deals with aiding and abetting terrorist organizations. As such, propaganda that incites to terrorism and other forms of violence continues to be a criminal offence.