OPINION No. 35/1999 (TURKEY)

Communication addressed to the Government on 1 June 1999

Concerning Abdullah Öcalan

The State is not a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group expresses its appreciation to the Government for providing timely information.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);

(ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).

4. The information available to the Group - beyond the original communication - consists of two documents furnished by the Government, namely:

(a) The report of the Ad Hoc Committee of the Bureau to ensure the presence of the [Parliamentary] Assembly [of the Council of Europe] at the trial of Abdullah Öcalan (document 8502);

(b) A report by Amnesty International accompanied by a government submission to the Working Group refuting Amnesty International’s allegations.

5. According to this information, Abdullah Öcalan, born on 14 April 1949, a Turkish national, leader of the PKK (Kurdish Workers' Party), was arrested in Nairobi, Kenya, on 15 February 1999 and transferred, blindfolded, to Turkey by plane. Following his arrest, which was effected without a warrant, it is alleged that Mr. Öcalan was not given a fair trial for the following reasons:

(a) Mr. Öcalan was incarcerated on the island of Imrali, which was declared a military zone, the prison having been evacuated before his arrival, and remained incommunicado for 10 days while being interrogated in secret by members of the special forces, some of whom were masked, and, during the final two days (21 and 22 February), by a judge accompanied by a court assistant who produced a transcript of the interrogation. Thus, he was brought before a judge only on the seventh day of that period, and it was not the judge's task to rule on the legality of his detention but to formalize, in adversarial proceedings, the procedure in absentia to which Mr. Öcalan had been subject before his arrest;

(b) Besides the fact that he was not allowed access to a lawyer until the tenth day after his arrest, Mr. Öcalan's right to a defence is said to have been subject to the following restrictions:

(i) Only two interviews per week, initially of 20 minutes, later of 45 minutes, and lastly of one hour each; the interviews were cancelled on several occasions (lawyers stopped and questioned, permission refused, bad weather);

(ii) His lawyers were not permitted to bring writing implements or printed documents, including items from the case file;

(iii) In breach of the principle of confidentiality (article 144 of the Turkish Code of Criminal Procedure), the visits took place with guards posted within earshot;

(iv) For the court hearings, Mr. Öcalan was placed in a transparent cage so that his lawyers had no opportunity to communicate with him orally or in writing;

(v) His lawyers were not able to obtain a copy of the case file (45 volumes) until two weeks before the trial commenced;

(c) His lawyers were harassed on a number of occasions:

(i) On 25 February Ahmet Zeki and Hatice Korkut were set upon as they arrived at the quayside for their first visit to the island;

(ii) The lawyers received abusive and threatening anonymous telephone calls;

(iii) At a press conference held by the lawyers at the Press Museum in Cagaloghe, a crowd gathered outside the building shouted hostile slogans;

(iv) On his way to the press conference, Osman Baydemir was arrested and detained for 24 hours for statements he had made to the press arguing for the right to a fair trial;

(v) At the end of the trial on 24 March, despite appeals for calm from the court president, the lawyers, threatened by the civil parties to the suit, were forced to leave the court building through a window;

(vi) On 9 April, Ahmet Zeki Okçuolgu and Even Keskin were subjected to verbal and then physical abuse in Taksim Square in Istanbul;

(vii) Hiyazi Bulgan and Irfan Dündar were struck by uniformed policemen on court premises;

no inquiry was ever initiated into these incidents;

(d) The presumption of innocence was compromised by the communication to the press of details of the case for the prosecution even before they were made known to the court and lawyers;

(e) The principle of adversarial proceedings (equality of arms) was compromised when the records of the proceedings in absentia mentioned above were added to the file without reopening the discussions;

(f) The European Court of Human Rights has ruled (case *Incal v. Turkey*) that the presence of a military judge in the State Security Court was contrary to the principles of independence and impartiality, which are essential prerequisites for a fair trial. Between 31 May and 23 June, however, a military judge sat in the State Security Court. In the face of repeated criticism, the Constitution was amended so that a civilian judge could take his place. Encouraging though this reform may be, it took place during the trial and a reopening of the discussions ab initio should therefore have been ordered; the fact that the civilian judge had been present during the discussions from the outset of the trial does not suffice for a correct procedure since he was not sitting on the bench.

6. In its reply and subsequent submission refuting the report of Amnesty International, the Government argues, on the subject of Mr. Öcalan's arrest in Kenya and transfer to Turkey, that "the Republic of Kenya apprehended the accused, who illegally entered Kenyan territory; consequently, Turkey did not exercise any power or competence of extraterritorial police in the conditions that led to his apprehension by the Kenyan authorities. As soon as the plane entered the Turkish air zone, the headband which had been put on his eyes by the Kenyan authorities was taken off", the object of the blindfolding of Mr. Öcalan for a brief period being to prevent the leader of a very dangerous terrorist organization from identifying the individuals accompanying him, so as to avoid reprisals.

7. In response to the allegations, the Government raises the following points:

(a) Detention in secret. The delays in bringing Mr. Öcalan before a judge and in allowing him access to lawyers only after 10 days were due to legal reasons and poor weather conditions.

(i) From the legal viewpoint, "the period before Öcalan was questioned before being allowed to see his lawyer was longer than in normal cases, but this was not an investigation of ordinary crime. It was an investigation spanning 15 years of terrorist activity". Moreover, the maximum time for detaining someone in custody before the State Security Court is, according to the Turkish Code of Criminal Procedure, four days. In the case of a complex inquiry it may be extended by three days (i.e. seven days altogether), at the request of the Public Procurator and with the consent of a judge. That was done in the instant case. Hence, following his arrest Mr. Öcalan was incarcerated for seven days before being brought before a judge and 10 days before being given access to a lawyer;

(ii) On the second point, the Government states that the weather was so bad that Imrali island was unreachable by sea or by air, so that the first visit by the lawyers could not take place before 25 February 1999, whence the unusual delay of 10 days;

(b) Criticisms of the restrictions imposed on the rights of the defence, the lawyers in particular:

(i) Duration of interviews. According to the Government, the duration of the interviews was not limited, the visits ending when the participants wished. On the other hand, it is true that the lawyers were not permitted to take writing implements, pens and paper being provided for them by the prison administration;

(ii) Lack of confidentiality. The Government maintains that, Mr. Öcalan being so dangerous, guards had to be present for security reasons, but they were at a distance where they could not overhear the interviews with the lawyers. The Government adds that when the lawyers challenged the situation Mr. Öcalan dismissed their objections, stating on several occasions that he had been questioned freely during his detention;

(iii) Inability to communicate with Mr. Öcalan during the hearing. The Government emphasizes that, for security reasons, individuals do appear in court protected by a transparent cage in other countries whose democratic credentials are not challenged - Italy for example - and that in fact, contrary to the allegations, the lawyers could communicate with Mr. Öcalan;

(iv) Transmission of the case file less than two weeks before the start of the trial. The Government offers no explanation;

(c) Molestation of the lawyers. This is not contested by the Government, which expresses its regret, but explains that account must be taken of reactions among the family members of the PKK's numerous victims. It appears that these incidents very often took place before the police had had time to intervene;

(d) Presumption of innocence compromised by transmission of the case file to the press before their transmission to the court and lawyers. The Government offers no response;

(e) Proceedings in absentia before the trial. The Government argues that it was not necessary to reopen the discussions ab initio, Mr. Öcalan having confessed before the court to all the charges of which he stood accused;

(f) Military judge on the bench. The Government asserts that the status of the military judge who sat for two thirds of the trial was comparable to that of a "British Judge-Advocate General's department"; to allay criticism, he was replaced by a civilian judge, and this required a constitutional reform.

8. In the light of the foregoing, the Working Group considers it appropriate to base its Opinion on the following points. It considers as generally established the fact that a number of breaches of the principles guaranteeing the right to a fair trial took place; the question it must answer is which, among these breaches, are of such gravity as to render Mr. Öcalan's detention arbitrary within the meaning of category III of the cases submitted for the Group's consideration.

9. Among the breaches of the right to a fair trial which might be regarded as not meeting that measure of gravity, are for example, the fact that Mr. Öcalan was blindfolded for all or part of his transfer by air; that the writing implements which the lawyers needed during their visits were supplied by the prison administration; that Mr. Öcalan attended the hearing protected by a transparent cage; or that in absentia proceedings dating from before the trial were joined with the trial proceedings, inasmuch as:

(a) First, the facts, which were repeated in toto in the summing-up for the prosecution, were all formally acknowledged by Mr. Öcalan when he spoke in court, conducting his defence from the political standpoint, as he put it;

(b) Second, Mr. Öcalan did not dispute that he had committed the offence defined in article 125 of the Criminal Code: "Whoever commits an act intended to put the entire or a part of the territory of the State under the sovereignty of a foreign State or to decrease the independence or to disrupt the union of the State or to separate a part of its territory from the administration of the State, shall be punished by penalty of death."

10. On the other hand, other allegations meeting the criterion of greater gravity can be allowed to stand either because the Government has not provided a satisfactory response, or because the allegations have not been challenged. The Group considers unsatisfactory the following points:

(a) The explanation that Mr. Öcalan's lawyers could not have access to him during the first 10 days of his incarceration because of poor weather conditions is hard to believe since a number of judges and officials reached Imrali island during that period by helicopter;

(b) Even if it were justified, the argument that the guards (hooded on several occasions) who were present during Mr. Öcalan's meetings with his lawyers were not able to hear their conversations is contrary to paragraph 22 of the United Nations Basic Principles on the Role of Lawyers;

(c) The threats, insults and attacks which the lawyers suffered were particularly serious; the Government, however, which does not contest the complaint that no inquiry has ever been initiated, does no more than mention that the police forces often arrived late.

11. The following points of particular gravity cannot be or have not been challenged:

(a) The Government does not contest that Mr. Öcalan was indeed held in secret for 10 days (or 11 days, given that the record refers to a transcript dated 15 February 1999 which mentions a "medical visit of the individual under interrogation"; the agreement in dates between that certificate and Mr. Öcalan's transfer by air (during which, according to the Government, he was examined by a doctor), justifies the conclusion that the medical certificate was drawn up during a first round of questioning in the airplane which, in that case and in the Group's view, can be assimilated to a place of detention). Placing Mr. Öcalan in secret detention during this initial period is all the more serious - as emphasized in the legal opinion attached to the report of the Ad Hoc Committee - "as access to counsel is of determinatory character for the defendant during the detention period since many prosecutions in state security court cases are based on statements taken from the accused during the pre-trial phase" (appendix 8, sect. 2, third paragraph);

(b) While the "demilitarization" of the State Security Court is without question a step forward for future cases, it is less clear that the circumstances in which it took place were conducive to respect for the right to a fair trial;

(c) As the Ad Hoc Committee points out in its report, "In the Incal case, the European Court of Human Rights made clear that the presence of a military judge amongst the State Security Court entailed a violation of the right to a fair trial" (report, para. 22). To implement the European Court's decision, it would have sufficed, as Mr. Öcalan's lawyers requested at the opening of the trial, to adjourn the proceedings until the vote on the constitutional reform (ibid.), especially since the amendment was finally adopted after proceedings had been suspended for only five days. Yet the application for adjournment, although evidently justified, was denied.

12. Hence, the Working Group finds:

(a) From the response of the Government, it transpires that the amended law did not prescribe any specific procedure to be followed in respect of cases that had been tried under the repealed law. What emerges, however, is that Mr. Öcalan's trial did not begin de novo after the amendment of the law. Since the military court could no longer try Mr. Öcalan pursuant to the amendment, he was tried by a civil court and the proceedings before it continued, taking into account the entire proceedings before the military court until the amendment of the law. The reason adduced by the Government is that the judge trying the case happened to be witnessing the proceedings in Mr. Öcalan's case before the military court. This is probably the reason why

no need was perceived to commence the trial de novo. The reasons for the continuation of the proceedings by the civil court appear to be based not on any provision of law but on grounds of expediency, related to the coincidental fact that the judge appointed to try the case before the civil court had witnessed the proceedings before the military court;

(b) In the above circumstances, the Working Group is of the belief that the judge trying the case in the civil court could only have been witnessing Mr. Öcalan's trial before the military court either at his own initiative or had been nominated by the Government to do so. In either hypothesis, the Group believes that he should have disqualified himself from trying Mr. Öcalan's case. If he witnessed the proceedings in his personal capacity, he disqualified himself from being appointed a judge to try Mr. Öcalan. In the eventuality that he was nominated by the Government to witness the proceedings, he also stood disqualified. The Government's decision to nominate a sitting judge who had witnessed the proceedings in the case before the military court to the civil court on the ground that he had witnessed the proceedings is per se arbitrary. In the Working Group's opinion, for that reason alone the trial of Mr. Öcalan can be considered to be arbitrary and actuated by non-judicial considerations. All proceedings rendered pursuant to such appointment must be declared to be void and, accordingly, stand vitiated.

13. In the light of the foregoing, the Working Group delivers the following opinion:

> Considering the seriousness of some of the violations of the right to a fair trial that have been noted, the deprivation of liberty to which Abdullah Öcalan has been subject from 15 February 1999 onwards is arbitrary, as it is contrary to the safeguards laid down in article 10 of the Universal Declaration of Human Rights and falls within category III of the categories of cases submitted to the Working Group's consideration.

14. Accordingly the Working Group:

(a) Requests the Government to take the necessary steps to remedy the situation so as to bring it into line with article 10 of the Universal Declaration of Human Rights;

(b) Decides to transmit this Opinion (as amicus curiae) to the European Court of Human Rights, to which the case of Mr. Öcalan has been submitted.

Adopted on 2 December 1999