İNSAN HAKLARI ÇALIŞMA METİNLERİ: XIV
HUMAN RIGHTS WORKING PAPERS: XIV

STRASBOURG'S CHANGING REVIEW OF ARTICLE 3 CUSTODIAL TORTURE ALLEGATIONS AGAINST TURKEY:
A COMPARATIVE CASE STUDY

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Ankara – 2010

STRASBOURG'S CHANGING REVIEW OF ARTICLE 3 CUSTODIAL TORTURE ALLEGATIONS AGAINST TURKEY: *A Comparative Case Study*

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I. Background

When it was established in Strasbourg in 1959, the European Court of Human Rights did not immediately provide a viable mechanism for Turkish human rights litigation. This was because Turkey, though a founding Member State of the Council of Europe which ratified the European Convention on Human Rights[1] in 1954, did not initially recognise the right of individuals to bring claims in Strasbourg, nor did it accept the Court's compulsory jurisdiction.[2] After several decades, however, individual Strasbourg litigation against Turkey became possible. In 1987, the same year it applied for European Union membership and declared a State of Emergency in most of its eastern and south-eastern provinces, Turkey accepted the right of individual complaint.[3] Then, in 1990, it accepted the Court's compulsory jurisdiction.[4] In 1995, the Court issued its first judgment against Turkey in the *Loizidou* case, finding a violation of Article 1 of Protocol 1 (protection of property).[5]

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, opened 4 Nov. 1950, entered into force 3 Sept. 1953 (hereinafter "the Convention").

[2] *See generally* İbrahim Özden Kaboğlu & Stylianos-Ioannis G. Koutnatzis, The Reception Process in Greece and Turkey, 455-529, in *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Helen Keller & Alec Stone Sweet eds., Oxford U. Press, 2008). Under the early Convention system, the now-defunct European Commission on Human Rights acted as a filtering mechanism for the Court. If the Commission judged a claim to be admissible and a friendly settlement between the parties proved impossible, it issued a report on the facts and merits of the case. The Court reviewed this report only if a Contracting Party sought a final, binding resolution and had accepted the Court's compulsory jurisdiction.

[3] Dilek Kurban, Turkey, *Supranational Rights Litigation, Implementation, and the Domestic Impact of Strasbourg Court Jurisprudence: A Case Study of Turkey*, JURISTRAS, at 3. Available at http://www.juristras.eliamep.gr/?p=156 (accessed 16 July 2009); *see also* Kaboğlu, *supra* note 3, at 457-58.

[4] Kaboğlu, *supra* note 1, at 458.

[5] Loizidou v. Turkey (Preliminary Objections), 23 Mar. 1995, A310.

Lawyers in Turkey began to more frequently invoke the so-called "Strasbourg mechanism" throughout the 1990s. This effort was helped by the Essex Human Rights Centre, which in 1992 joined with local Kurdish lawyers to launch a strategic litigation project challenging the abuses of Turkish anti-terror operations under the State of Emergency.[6] By 2000, many Kurdish individuals, as well as a growing number of non-Kurdish applicants, had succeeded in bringing claims against Turkey in Strasbourg. Today, the Strasbourg mechanism is widely known in Turkey. Though some Kurdish lawyers have become disenchanted with the Court's high rate of inadmissibility decisions and perceived political bias, the Court continues to find myriad violations against Turkey.[7]

Indeed, since the *Loizidou* judgment in 1995, the Court has decided thousands of cases against Turkey.[8] The Court has found violations under a wide range of the Convention's articles, including the right to liberty and security (Article 5), the right to a fair trial (Article 6), freedom of expression (Article 10), and the prohibition of discrimination (Article 14). This report will only consider the Court's judgments against Turkey under Article 3, which prohibits torture as well as inhuman and degrading treatment.[9] In particular, this report will examine Article 3 cases where Turkish security forces are alleged to have mistreated suspected militants in temporary police custody.[10] Before turning to the Court's review of custodial torture

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[6] *See* Kurban, *supra* note 3, at 4-6; Kevin Boyle, *Twenty Five Years of Human Rights at Essex*, 5 ESSEX HUM. RTS REV. 1, 11 (July 2008). In total, Essex Human Rights Centre lawyers litigated over 60 cases against Turkey in Strasbourg. The aim of this litigation was not only to provide individual remedies to victims of human rights abuses, but also to increase accountability and the documentation of ill treatment in Turkey. According to the former Director of the Centre, Kevin Boyle, the litigation was fairly successful in awarding victims just compensation and creating a strong body of Article 3 case law, but was less effective in changing Turkey's domestic regime, with the possible exception of more accountability for torture. *Id.*

[7] Kurban, *supra* note 3, at 44-46. *See* European Court of Human Rights, ANNUAL REPORT 2008, at 133. Available at http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/ (accessed 16 July 2009).

[8] For example, between 1 November 1998 and 31 December 2008, the Court issued 1652 judgments finding at least one violation of the Convention against Turkey. ANNUAL REPORT 2008, *supra* note 7, at 139.

[9] Convention art. 3. Note that Article 3 verbatim prohibits "inhuman or degrading *treatment and punishment*" (emphasis added). This report, following the practice of Registry lawyers and the Court itself, will use "inhuman treatment" and "degrading treatment" as shorthand.

[10] The ambit of Article 3 is wide and includes many cases falling outside the context of temporary custodial interrogation. For example, Turkey's Article 3 violations have implicated the destruction of homes in the southeast of Turkey, the continual imprisonment of a conscientious objector to military service, the torture of a

allegations against Turkey, however, several critical points should be emphasised with regard to Article 3 jurisprudence.

(1) Article 3 is an absolute, fundamental value of the Convention. Though Article 15 permits Contracting Parties to "derogate" from many of their obligations in times of "war or other public emergency threatening the life of the nation," no derogation is allowed for Article 3.[11] Thus, the Kurdish separatist unrest in Turkey's south-east, no matter how serious, has no bearing on Turkey's obligations under Article 3.

(2) In order to pass the admissibility stage of the Court's proceedings, the applicant must make an "arguable claim" that Article 3 was violated.[12] If a panel of the Court deems the claim to be admissible, the standard of proof that a Chamber uses in deciding an Article 3 violation is "beyond reasonable doubt."[13] However, per the Court's post-*Ribitsch* and post-*Tomasi* case law, this standard may be satisfied by clear and concordant inferences and, in the custodial context, by burden-shifting.[14]

(3) Some forms of custodial ill treatment do not reach the minimum level of severity necessary to trigger a violation of Article 3.[15] The Court's jurisprudence and the Commis-

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detainee in the course of a prison transfer, and the proposed deportation of Iranian nationals to Iran to face punishment under Shariah law. *See e.g.,* Selçuk and Asker v. Turkey, 24 Apr. 1998, Reports 1998-II; Ülke v. Turkey, 21 Jan. 2006, no. 39437/98; Diri v. Turkey, 31 July 2007, no. 68351/01; Jabari v. Turkey, 11 July 2000, Reports of Judgments and Decisions 2000-VIII.

[11] Convention art. 15. Derogation is also not allowed for Article 2 (right to life), Article 4, para. 1 (prohibition of slavery and servitude), and Article 7 (no punishment without law).

[12] UĞUR ERDAL AND HAKAN BAKIRCI, ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A PRACTITIONER'S HANDBOOK, OMCT Handbook Series (2006), 118-19; PHILIP LEACH, COSTAS PARASKEVA, GORDANA UZELAC, INTERNATIONAL HUMAN RIGHTS AND FACT-FINDING, A Report by the Human Rights and Social Justice Research Institute of London Metropolitan University, Feb. 2009, at 17.

[13] ERDAL, *supra* note 12, at 121-123. The Court's "standard of proof" refers to the probability that facts must be proven true. LEACH, *supra* note 12, at 14. For the standard in case-law, *see e.g.*, Ireland v. United Kingdom, 18 Jan. 1978, Series A no. 25, § 161; Talat Tepe v. Turkey, 21 Dec. 2004, § 48, no. 31247/96. This standard is not contained in the Convention and is not synonymous with the "beyond reasonable doubt" standard of proof used in criminal proceedings under the common law system; instead, it has an "autonomous meaning." ERDAL, *supra* note 12, at 257-258.

[14] *E.g.*, Ataş and Seven v. Turkey, 16 Dec. 2009, § 36-37, no. 26893/02.

[15] ERDAL, *supra* note 12, at 116. In the *Greek* case, the Commission allowed for a certain "roughness of treatment" in police custody, including slaps and blows to the side of the face and head, without implicating the protections of the Convention. The Turkish Government cited to this case in the Observations it made to the Court in *Durmuş Kurt and Others* (2007). *See* Observations of the Turkish Government on the Application Lodged by Durmuş Kurt and Others, at 5, § 28. European Court of Human Rights Registry, Case Files, Observations Folder, Strasbourg, France.

sion's reports provide some idea of when ill treatment implicates a State's obligations under the Convention, as well as when ill treatment is severe enough to be classified as torture. However, this jurisprudence is not determinative. As the Court established in *Selmouni v. France*, it is a "living instrument" and may find Article 3 torture for acts which, in the past, were only classified as inhuman or degrading treatment.[16]

(4) The Court has working case-law definitions for the substantive terms of Article 3 (torture, inhuman treatment, and degrading treatment), which a Grand Chamber first articulated in the *Ireland v. United Kingdom* case (1978). Inhuman treatment is premeditated, continues for an extended period of time, and results in intense, discernible mental and physical suffering.[17] Degrading treatment breaks the subject's spiritual resistance and causes humiliation, anguish, and fright.[18] Torture is an "aggravated and deliberate form of cruel, inhuman, or degrading treatment," marking the Respondent State with a "special stigma."[19] In the *Ireland* case, the Court found that the subjection of suspected IRA terrorists to wall-standing, hooding, noise, sleep deprivation, and food and drink deprivation while in detention constituted inhuman and degrading treatment, but not torture.[20]

(5) The obligations of Contracting Parties under Article 3 are not only negative and substantive; the Court has found that Article 3 also includes a positive, "procedural," obligation. In the context of custodial ill treatment, this procedural obligation requires States to effectively investigate any "arguable" allegation of an Article 3 violation.[21] If no such account-

[16] Selmouni v. France, 28 July 1999, § 101, Reports of Judgments and Decisions 1999-V.
[17] Ireland v. United Kingdom, 18 Jan. 1978, § 167, Series A no. 25 (hereinafter "the *Ireland* case"); *see generally* EUROPEAN HUMAN RIGHTS LAW (Mark Janis, et al. ed., Oxford U. Press 2008), at 170-177.
[18] Ireland at § 167.
[19] *Id.*
[20] Ireland at § 167. However, in advance of the Court's review, the Europion Commission of Human Rights found the methods serious enough to constitute torture under Article 3. *Id.* § at 165, 167. For other views on the substance of Article 3's terms and the "five methods" of the UK security forces, see the separate opinions of, for example, Judge Zekia and Judge O'Donoghue. The Court has revisited the distinction between inhuman treatment and torture many times since the *Ireland* case, though never in as much expositive detail. For a case in which the Court found four of the applicants were subject to torture, but five were only subject to inhuman and degrading treatment, *see* Elçi and Others v. Turkey, 13 Nov. 2003, § 646-647, nos. 23145/93 and 25091/94.
[21] *E.g.*, Assenov and Others v. Bulgaria, 28 Oct. 1998, § 118, Reports 1998-VIII.

ability requirement existed, the protections guaranteed by the Convention would be "theoretical and illusory" because agents of the State, without any fear of sanction, could "abuse the rights of those within their control with virtual impunity."[22]

A high number of the Article 3 cases brought against Turkey implicate the interrogation of suspected terrorists in temporary custodial settings, similar to the seminal *Ireland* case. However, unlike the *Ireland* case, where the United Kingdom Government did not contest the facts (or the violation), Article 3 cases against Turkey usually involve disputed facts.[23] In addition, the alleged torture methods in cases against Turkey are at times more egregious than those considered in the *Ireland* case, including claims of beatings, rape, and electric shock treatment. This report will consider how the Court today is reviewing custodial torture allegations against Turkey, and how this differs from the Court's review of its first stream of Article 3 cases against Turkey in the mid-1990s. To note and explore these changes, three cases that the Court decided between 1996 and 1998 will be compared with several recent cases decided between 2007 and 2009.

[22] *Id.* at § 102.
[23] Compare the Ireland case, § 152 with Aksoy v. Turkey, 18 Dec. 1996, § 17, Reports 1996-VI.

II. The Court's Review of Article 3 Custodial Torture Allegations against Turkey under the Former Commission System

In the mid-1990s, the Court's review of custodial torture allegations against Turkey was much different than it is today. The European Commission of Human Rights, before it was abolished by Protocol 11 in 1998, issued its own findings on the facts and merits of cases prior to the Court's review and often served as the Court's "de facto court of first instance" for claims arising under the State of Emergency in Turkey's south-east.[24] At the same time, the mid-1990s Court was still forming the contours of its Article 3 jurisprudence, as it had not yet decided now-leading cases such as *Assenov and Others v. Bulgaria* and *Selmouni v. France*. The three cases detailed below—*Aksoy v. Turkey* (1996), *Aydın v. Turkey* (1997), and *Tekin v. Turkey* (1998)—are among the most commonly-discussed cases in treatises on Article 3, as they illuminate how the Court reviewed custodial torture allegations before the Commission was abolished in 1998, and also before Turkey unofficially lifted the State of Emergency in its southeast in 2003.

The Court found its first violation of Article 3's prohibition against torture, as well as its first Article 3 violation against Turkey, in the 1996 *Aksoy* case.[25] In *Aksoy*, the applicant was suspected of aiding and abetting the PKK, an illegal Kurdish separatist-terrorist organization, and taken into custody. On his second day of detention, he alleged that he was stripped naked, blindfolded, and strung up in a torture method known as "Palestinian hanging" for

[24] LEACH, *supra* note 12, at 26. The former Commission carried out fact-finding pursuant to former Articles 28 § 1 and 31 of the Convention. However, the Court was still free to make separate determinations of fact in light of all the materials before it.

[25] JANIS, *supra* note 17, at 190. The Commission found torture in the *Ireland* case, as mentioned above, and also in the *Greek* case (1969), based on evidence that the Athens Security Police had subjected political detainees to bastinado/falanga (repeated beatings on the soles of the feet) to extract confessions during a period of public disorder in the mid-1960s. The Greek Case, 12 European Yearbook on the Convention of Human Rights (1969); *see also* CASES AND MATERIALS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Alastair Mowbray ed., Oxford U. Press, 2007), at 164.

thirty-five minutes.[26] During this time, he also claimed that interrogators placed electrodes on his genitals, poured water on him, and electrocuted him.[27] Over the next two days, he alleged that he was repeatedly beaten and refused permission to see a doctor, even though he complained about loss of feeling in his arms and hands.[28] Upon his release, the applicant secured a medical report documenting radial paralysis, an uncommon medical condition consistent with his allegation of Palestinian hanging.[29]

In reviewing these allegations under Article 3, the Court considered the fact-finding of the Commission, which had sent Delegates to Diyarbakır and Ankara in 1995 to hear oral testimony from witnesses and facilitate a quasi-judicial hearing.[30] The Commission report found, among other things, that the applicant's injuries were consistent with torture and that the testimony of the police officer who interrogated the applicant was unconvincing.[31] The Court, by a vote of eight to one, accepted the Commission's report and applied the qualitative Article 3 definitions formulated in the *Ireland* case. It reiterated that torture is "*deliberate* inhuman treatment causing very *serious* and *cruel* suffering" (emphasis added).[32] It also reiterated that, under the Convention, a finding of torture is meant to attach a "special stigma" to the Respondent State.[33] Though it could not find sufficient evidence that the applicant had been beaten and electrocuted, the Court accepted that the applicant had been stripped naked and suspended from a bar.[34] It then concluded:

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[26] Aksoy v. Turkey, 18 Dec. 1996, § 12, 14, Reports 1996-VI. For an explanation of torture methods and documentation techniques, *see* Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, United Nations Publication, 1999, § 186-231. The Istanbul Protocol was compiled by a worldwide consortium of human rights organisations, including many Turkish organisations, and was adopted by the United Nations as an official document in 1999. "Palestinian hanging" or "Palestinian suspension" involves the victim being suspended from a horizontal bar or a ligature with his hands tied behind his bank. *Id.* at § 205d.
[27] Aksoy at § 14.
[28] *Id.* at § 14-15.
[29] *Id.* at § 19.
[30] *Id.* at § 23. For example, representatives of both the applicant and the State were allowed to cross-examine witnesses.
[31] *Id.*
[32] *Id.* at § 63.
[33] *Id.*
[34] *See id.*; MOWBRAY, *supra* note 25, at 162.

> 64. In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time [...]. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.

Thus, the Court, considering the purposive intent of the treatment, as well as the duration of the treatment and the severe pain and lasting trauma that it caused, found that Turkey had violated Article 3's prohibition against torture.

Yet, the *Aksoy* Court did not stop after finding a substantive violation of Article 3. In addition, it also found, eight votes to one, that Article 13 (right to an effective remedy) was violated because the domestic prosecutor in the case failed to carry out an investigation into the applicant's ill treatment claim, ignoring what the Court characterised as "visible evidence" of torture.[35] The Court stated:

> 98. Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" 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 complainant to the investigatory procedure.

In deciding that the failure of the domestic authorities to investigate "arguable" claims of ill treatment triggered a violation of Article 13, the Court not only demonstrated that Article 3 torture claims could implicate a State's obligations Article 13, but also that it would use a different measure— "arguable claim" rather than "beyond reasonable doubt"—for finding a violation under this latter article.

In *Aydın v. Turkey* (1997), a Grand Chamber of the Court found another torture violation against Turkey. The applicant, a seventeen-year old female, was taken into gendarmerie custody during an anti-PKK operation in the southeast of Turkey; while in custody, she alleged that she was blindfolded, stripped, spun around in a car tyre, beaten, sprayed with cold

[35] Aksoy at § 99.

water, and raped.[36] Six days after being released from custody, the applicant underwent a medical examination noting bruising to her thighs and a torn hymen, consistent with her allegation of rape but date-inconclusive.[37] Delegates from the European Commission conducted hearings in Turkey and found, twenty-six votes to one, that the applicant's allegations were established "beyond reasonable doubt."[38] Even though there were notable inconsistencies in the testimony given by the applicant and her father, the testimony on the whole provided "strong, clear, and concordant evidence" that the applicant had been ill-treated and raped under gendarmerie custody.[39]

The Court, fourteen votes to seven, accepted the Commission's report.[40] In reviewing the established facts under Article 3, it stated that rape leaves "deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence."[41] It also considered that the applicant was a female youth, and that she was subject to ill treatment because authorities needed information regarding the "security situation in the region."[42] With this as background, the Court found ill treatment rising to the level of torture could be established either for the rape or, separately, for the "accumulation of acts of physical and mental violence" that the applicant was made to suffer while in custody.[43] Finally, the Court found, sixteen votes to five, that Article 13 was violated for lack of effective investigation,[44] as in *Aksoy*.

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[36] Aydın v. Turkey, 25 Sept. 1997, § 103-109, Reports 1997-VI.
[37] *Id.* at § 22, 24.
[38] *Id.* at § 71-72.
[39] *Id.* at § 73; *see also* MOWBRAY, *supra* note 25, at 165.
[40] Aydın at § 72.
[41] *Id.* at § 83.
[42] *Id.* at § 84-85.
[43] *Id.* at § 85-86. For a wider discussion of rape cases considered by the Court, *see* Ivana Radacic, *Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations*, 3 EUR. HUM. RTS L. REV. 357-375 (2008). Though Radacic considers rape to be a "gender-based" concern (357), male applicants frequently allege rape and sexual assault (e.g., squeezing of testicles) while in custody. *See e.g.*, Keser and Kömürcü v. Turkey, 23 June 2009, § 18, no. 5981/03 (judgment only available in French).
[44] Aydın at § 103-09.

The seven judges who dissented from the *Aydın* Court's finding of torture did not object that the alleged torture, if proven, constituted an Article 3 violation; instead, they stated that they were not convinced that the applicant had established her claims beyond reasonable doubt, citing evidentiary gaps, contradictory testimony, and the lack of any evidence from an independent source.[45] The five judges who dissented from the Court's finding of a violation under Article 13 acknowledged shortcomings in the investigation but found that the applicant, and the Diyarbakır Bar Association representing her, had not taken enough independent steps to document the alleged ill treatment and exhaust available domestic remedies.[46] Judge Gölcüklü, elected in respect of Turkey, was among the sharpest critics of the Court's findings of violations under both articles.

In the *Tekin* case (1998), the applicant, a "Turkish citizen of Kurdish origin," was arrested on suspicion of threatening village guards and taken to the Derinsu gendarmerie headquarters.[47] Once there, he alleged that he was detained for more than a day in a cell in subzero temperatures, without any lighting, bedding, or blankets; he also claimed that, upon being taken to another gendarmerie station, he was subjected to cold water treatment, electric shocks, and beatings designed to elicit a confession.[48] Though the Turkish domestic authorities ultimately decided there was not enough evidence to prosecute the gendarmerie officers, the Commission proceeded to conduct fact-finding both in Diyarbakır and Strasbourg, considering witness statements, reports about Turkey, documents relating to the applicant's deten-

[45] *See* Aydin v. Turkey, Joint Dissenting Opinion of Judges Gölcüklü, Matscher, Pettiti, De Meyer, Lopes Rocha, Makarczyk, and Gotchev (on the Alleged Ill-Treatment (Article 3 of the Convention)), §§ 1-4.
[46] *Id.* Article 35 § 1 of the Convention (admissibility criteria) requires an applicant to exhaust all domestic remedies before petitioning the Court. This includes following all domestic rules of procedure and raising all substantive issues of ill treatment before domestic courts. *See* ERDAL, *supra* note 12, at 95-106. At times, however, the domestic investigation of an applicant's ill treatment claim is slow-moving and unlikely to produce any tangible remedy, and in such cases, the applicant may—indeed, she must—apply to the Court before the official conclusion of the investigation, regardless of the exhaustion principle.
[47] Tekin v. Turkey, 9 June 1998, § 7-9, Reports 1998-IV.
[48] *Id.* at § 9-10, 49.

tion, and a floor plan of the gendarmerie headquarters.[49] Ultimately, the Commission, without any medical evidence before it, "was satisfied that the applicant had been kept in a cold and dark cell and blindfolded and treated in a way which left wounds and bruises on his body in connection with his interrogation."[50] It thus found, thirty votes to one, that the applicant had been subject to "at least inhuman and degrading treatment" within the meaning of Article 3 of the Convention.[51]

The Court recognised that the applicant was unable to provide any independent evidence (e.g., medical reports) to substantiate his allegations; however, it noted that the Commission found the applicant's testimony credible, whereas it found the testimony of the Government's witness to be "flawed and unreliable."[52] It also noted that the Turkish authorities took no positive steps to ensure that the applicant was seen by a doctor during his time in detention or upon his release.[53] In reviewing the applicant's claim under Article 3, particularly his claim that the gendarmes knew he only had one kidney when they ill treated him, the Court reiterated that the Article 3 inquiry is fact-specific, taking into account "all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and *state of health of the victim*" (emphasis added).[54] Ultimately, the Court, six votes to three—much narrower than the Commission—found inhuman and degrading treatment, given the "standards imposed by Article 3."[55] It also found, seven votes to two, a violation of Article 13 for lack of effective remedy.

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[49] *Id.* at § 15-23. The "reports about Turkey" were presumably from the Committee on the Prevention of Torture (CPT). The CPT is a non-judicial Council of Europe body composed of lawyers, doctors, and other experts. Since 1990 it has carried out visits to places of detention in Turkey and made recommendations to help prevent future violations of Article 3. For a case in which the Court explicitly considered CPT reports, *see* Elçi and Others, at § 599.
[50] Tekin at § 13, 24, 31.
[51] *Id.* at § 51.
[52] *Id.* at § 40.
[53] *Id.* at § 41
[54] *Id.* at § 52; *see also* JANIS, *supra* note 17, 182.
[55] Tekin at § 53-54.

Conclusion

The *Aydın*, *Aksoy*, and *Tekin* cases, read together, provide a fairly representative illustration of the Court's review of early Article 3 custodial torture cases against Turkey. They indicate, first and foremost, the central importance of the Commission's fact-finding report in the Court's review. They demonstrate the Commission's greater certainty in finding ill treatment prior to the Court's review.[56] They also demonstrate that the main hurdle to finding a violation was not whether the alleged ill treatment was severe enough to be considered torture (or inhuman treatment), as in *Ireland v. United Kingdom*. Instead, it was whether the applicant's allegations could be established "beyond reasonable doubt," given that the facts were murky and contested.

Even with the Commission's sympathetic fact-finding and reports (as well as reports from the Committee on the Prevention of Torture), it was difficult to meet such a rigorous standard. The Court, and especially the Commission, recognised the difficulty of substantiating ill treatment in the custodial context and *de facto* mitigated this standard in the review of Article 3 cases, for example, by accepting contradictory witness testimony to establish torture in *Aksoy*, and in *Tekin*, finding inhuman and degrading treatment without any direct evidence at all.[57] However, as the numerous dissenting votes indicate, many individual judges refused to join the judgments in these cases, in effect distancing themselves from a full realization of the Court's post-*Ribitsch* custodial case law.

The cases considered in this section show that even during the 1990s, the Court demanded some medical documentation of serious, lasting injury to find an Article 3 torture

[56] In this connection, it should also be restated that, though the Court only found inhuman and degrading treatment in the *Ireland* case, the Commission determined that the ill treatment amounted to torture. *See* note 23 above.

[57] For an excellent discussion of the Court's standard of proof, *see* ERDAL, *supra* note 12, at 236, 238-239, 255; *also* Uğur Erdal, *Burden and Standard of Proof ın Proceedıngs Under the European Conventıon*, 26 EURO. L. REV. HUM. RTS. SURV., 68-85 (2001).

violation. In *Aksoy*, this was a medical report noting paralysis; in *Aydın*, it was a medical report suggesting aggravated loss of virginity (rape), which the Court considered more permanently scarring than physical violence. In terms of establishing torture's requisite "intentionality" or purposefulness, *Aydın* in particular represents how the Court of the mid-1990s considered the State of Emergency in Turkey's southeast as evidence that, by itself, could validate allegations that an applicant was tortured in order to extract a confession.[58] Finally, *Aksoy*, *Aydın*, and *Tekin* all demonstrate that the Court, in its early review of Article 3 cases against Turkey, considered the lack of effective investigation of torture under a separate article—Article 13.

[58] *See* note 43 above; Aydın at § 14.

III. The Court's Recent Review of Article 3 Custodial Torture Allegations against Turkey (2007-2009)

Recently, the Court has, in some material ways, reviewed Article 3 custodial torture allegations against Turkey differently from the mid-1990s. The Court no longer has access to the reports of the Commission, its former "court of first instance," since it was abolished in 1998.[59] Though the Court may undertake fact-finding (both *in propio motu* and at the applicant's request), its increasing backlog of cases, as well as the expenses and logistical difficulties involved, have put silent pressure on it not to do this.[60] As a result, custodial torture applicants today have less of a credibility-building (and sympathy-building) opportunity than did applicants in early Article 3 cases against Turkey, making establishing violations more difficult. In some cases, the Court still finds an Article 3 violation, even torture, by making stronger use of its post-*Ribitsch* custodial jurisprudence to mitigate the rigor of "beyond reasonable doubt." However, as will be demonstrated by the cases and concluding statistics in this section, it is increasingly considering torture allegations only under Article 3's procedural limb, which requires domestic authorities to investigate "arguable" claims of ill treatment, essentially identical to Article 13. The cases below further explore these current features[61] of the Court's custodial Article 3 jurisprudence.

In *Emirhan Yıldız and Others v. Turkey* (2007), the applicants were arrested and taken into police custody on suspicion of involvement with an illegal leftist organization. They submitted that they were variously blindfolded, threatened with death, sexually harassed,

[59] Though the Commission was abolished in 1998, cases in which it conducted fact-finding continued to come before the Court for several years afterward. *See e.g.*, Dikme v. Turkey, 11 July 2000, Reports of Judgments and Decisions 2000-VIII; LEACH, *supra* note 12, at 27-28.

[60] LEACH, *supra* note 12 , at 5; ERDAL, *supra* note 12, at 232-35. The Court has also expressed ambivalence about finding facts because it is obviously far removed from the time, place, and language of most individual cases. *See e.g.*, Süleyman Erkan v. Turkey, 31 Jan. 2008, § 32, no. 26803/02 (stating that the Court "must be cautious in taking on the role of a first-instance tribunal of fact").

[61] It is difficult to track the changing features of the Court's Article 3 jurisprudence with scientific data. The selection of the cases in this section as most representative of the Court's current Article 3 review is the result of the author's summer experience cataloguing European Court of Human Rights judgments at Human Rights Foundation of Turkey, as well as his research trip to the Library and Archives of the European Court of Human Rights in Strasbourg, France in July 2009.

beaten, suspended and hosed with pressurised cold water, as well as stripped naked and prevented from going to the toilet.[62] They also submitted medical reports after their release from custody which noted injuries consistent with ill treatment, including hyperaemia, scab wounds, and eccymoses.[63] The Court prefaced its review of these facts under Article 3 with a summary of its post-*Ribitsch* case-law regarding custodial ill treatment:

> 41. The Court reiterates that where an individual is taken into custody in good health but is found to be injured by the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention [citing *Selmouni v. France*, *Aksoy v. Turkey*, *Tomasi v. France*, and *Ribitsch v. Austria*]
>
> 42. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" [citing *Avşar v. Turkey*] Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact [citing *Ireland v. United Kingdom*] Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation [citing *Salman v. Turkey*]

The Court then applied these principles to the *Emirhan Yıldız* case. It found a violation of Article 3 with respect to three of the four applicants since their medical reports "match at least the applicant's allegations of having being beaten," and the Turkish Government had failed to provide a plausible explanation for the custodial injuries suffered.[64] For the fourth applicant, Emirhan Yıldız, the Court could find no violation of Article 3 beyond reasonable doubt because his documented injury (a scab wound on his wrist) did not match his allegations of ill treatment, and also because he failed to seek out an independent medical evaluation validating his claims upon being released by the prosecutor.[65]

In *Kemal Kahraman v. Turkey* (2008), the Court, reviewing allegations similar to *Emirhan Yıldız*, was able to go further and find torture under Article 3. The applicant, sus-

[62] Emirhan Yıldız and Others v. Turkey, 5 Dec. 2006, § 26-29, 40, no. 61898/00.
[63] *Id.* at § 10-13, 17-20.
[64] *Id.* at § 43-45.
[65] *Id.* at § 46-47.

pected of being a member of a militant Islamic organization, claimed he was blindfolded, subject to reverse hanging, hosed with cold water, and beaten up while in custody.[66] When he underwent a medical evaluation after being released, the doctor noted bruising, scab-covered lesions, and arm pain, concluded the applicant had been subjected to physical violence, and declared him unfit for work for two days.[67] Reviewing the facts, the Court considered that the applicant's injuries were consistent with his torture allegations, that the Turkish Government had not provided a plausible explanation for the injuries or challenged the medical evidence, and that the ill treatment was inflicted to extract a confession.[68] The Court thus found that this treatment—particularly cruel, serious, and "capable of causing severe pain and suffering"—amounted to torture.[69]

Erdoğan Yılmaz and Others v. Turkey (2008) was the second of the Court's three torture findings against Turkey in 2008. In *Erdoğan Yılmaz*, the applicants were three members of an illegal Marxist-Communist organization, and the relatives of a fourth member. The four members of the organization were taken into police custody in March 1997.[70] While in custody, it was alleged that the members were blindfolded, beaten, suspended, subjected to electric shocks, forced to remain standing, and threatened.[71] Each of the suspected militants underwent medical evaluations that documented pain, numbness and/or lesions consistent with these allegations.[72] Upon being released, they officially complained of abuse, and the relevant public prosecutor indicted eight police officers for ill treatment pursuant to Article 243 of the Turkish Criminal Code.[73] After a hearing in October 1997 before the Istanbul Assize Court, Süleyman Yeter, one of the suspected militants, was taken back into custody, where he died

[66] Kemal Kahraman v. Turkey, 22 July 2008, § 6, no. 39857/03.
[67] *Id.* at § 8.
[68] *Id.* at § 31-33.
[69] *Id.* at § 34-35.
[70] Erdoğan Yılmaz and Others v. Turkey, 14 Oct. 2008, § 6-7, no. 19374/03.
[71] *Id.* at § 9.
[72] *Id.* at § 10-13.
[73] *Id.* at § 14-19.

two days later.[74] Five years later, in 2002, the public prosecutor recommended conviction of the officers based on witness statements and medical reports confirming physical and psychological torture.[75] The Istanbul Assize Court convicted and sentenced four of the officers, but their sentence was reduced, and then the execution of the sentence was stayed, as the officers had no criminal record and the judge was convinced they would not re-offend.[76] The Court of Cassation then quashed the decision to convict, noting the statutory time limit of five years for an ill treatment claim had expired; the criminal proceedings were later dropped and the applicant's appeal was rejected.[77]

The Court, in reviewing the applicant's custodial torture claim under Article 3, noted that the Istanbul Assize Court had already found that the applicants were ill treated through suspension, electric shocks, and beatings, and that the ill treatment had been purposively inflicted to extract a confession.[78] It considered that the applicant's injuries were documented by a medical report, and thus found that the severity of the treatment was such that the applicants had been tortured—a substantive violation of Article 3.[79] In addition to finding substantive torture, the Court also considered whether the Turkish Government was responsible for an Article 3 violation for lack of effective remedy/investigation.[80] It summarised its case law on the procedural obligation of Article 3 as follows:

> 54. The Court reiterates that where an individual raises an arguable claim that he or she has been ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, [Article 1] requires by implication that there should be an effective official investigation [citing *Assenov and Others v. Bulgaria*]. The minimum standards as to effectiveness defined by the Court's case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary diligence [citing *Çelik and İmret v. Turkey*] […]
>
> 56. The Court reaffirms that when an agent of the State is accused of crimes that violate Article 3, the criminal proceedings and sentencing must not be time-barred

[74] *Id.* at § 20-27.
[75] *Id.* at § 32.
[76] *Id.* at § 34.
[77] *Id.* at § 35-37.
[78] *Id.* at § 48.
[79] *Id.* at § 50.
[80] *Id.* at § 56-57.

> and the granting of an amnesty or pardon should not be permissible [citing *Yeşil and Sevim v. Turkey*]

Given the fact that, in the present case, proceedings against the police officers allegedly responsible for Article 3 violations were dropped due to being time-barred, and given that the length of these proceedings was unjustifiably excessive, the Court found a violation of Article 3's procedural obligation in addition to its antecedent finding of a substantive violation of Article 3.[81]

In *Ataş and Seven v. Turkey* (2008), the Court again reviewed a very egregious set of allegations, but this time could ultimately find *only* a procedural violation under Article 3. The female applicants were taken into custody in a rural area of Diyarbakır on suspicion of membership in the PKK.[82] While in custody, they alleged that they were blindfolded, threatened, insulted, stripped naked, given electric shocks, beaten, and hung by their arms to extract a confession; they also claimed gendarmerie officers anally and vaginally raped them with a truncheon, even though several custodial medical examinations noted that neither of the applicants had been subject to ill treatment or sexual intercourse.[83] After the applicants complained before a judge, domestic criminal proceedings were initiated against the gendarmerie officers allegedly responsible, but the Supreme Administrative Court suspended them on condition that the officers did not re-offend.[84]

In restating its case law on custodial torture, the Court affirmed that, due to the "high level of scrutiny" required by Article 3, it would consider "all the material submitted by the

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[81] *Id.* at § 57-59; *see also*, Human Rights Watch, CLOSING RANKS AGAINST ACCOUNTABILITY: BARRIERS TO TACKLING POLICE VIOLENCE IN TURKEY, 5 December 2008, 1-56432-409-5. Though articles 95/2 and 95/4 of Turkey's new Criminal Code increase the limitations period for torture claims to 15 years or more, the existence of any limitations period at all is inconsistent with Turkey's obligations under the United Nations Convention Against Torture (17). Furthermore, Turkish criminal proceedings against alleged State perpetrators of torture have been criticised for other defects, including excessively long trials, low conviction rates, light punishments, and suspended sentences (3-4).
[82] Ataş and Seven v. Turkey, 16 Dec. 2008, § 6, no. 26893/02.
[83] *Id.* at § 6-7, 9-10.
[84] *Id.* at § 13-17.

parties."[85] The Court acknowledged, at least in principle, the applicants' claim that the three medical reports from gendarmerie custody were dictated by the security forces, and it reiterated its position in *Aydın* that rape is a very serious, permanently scarring experience.[86] However, the Court ultimately stated that: "the material in the case file does not enable it to conclude to the required standard of proof that there has been a substantive violation of Article 3 of the Convention as a result of the treatment allegedly sustained by the applicants."[87] The Court faulted the applicants' legal representative not only for failing to have the applicants obtain and submit an alternative medical report after being released from custody (or at any time during the proceedings before the Court), but also for not submitting any independent witness evidence on behalf of the applicants.[88] Thus, the Court suggested that, had the applicants submitted more corroborating evidence to Strasbourg, it might have decided differently and found a substantive violation.

Despite the fact that it could not find a substantive Article 3 violation in *Ataş and Seven*, the Court continued its Article 3 review, turning to the domestic investigation of the applicants' ill treatment allegations. It noted that the Provincial Administrative Council, which was in charge of the investigation, was also directly linked to the security forces being investigated.[89] It considered the fact that the Supreme Administrative Council had suspended its proceedings against the gendarmerie officers, and in accordance with Article 245 of the Criminal Code, would discontinue them so long as the officers did not commit the same or a more serious offence within a five-year period. [90] Given the judiciary's lack of independence, and the fact that the Criminal Code in force at the material time did little to deter gendarmerie

[85] *Id.* at § 40.
[86] *Id.*
[87] *Id.* at § 41
[88] *Id.*
[89] *Id.* at § 43
[90] *Id.* at § 44.

officers from committing egregious crimes with "virtual impunity," the Court found a procedural violation of Article 3.[91]

Salmanoğlu and Polattaş v. Turkey (2009) is one of the Court's most recent Article 3 judgments against Turkey. The applicants in the case were females, arrested in an anti-PKK operation when they were 16 and 19 years old.[92] While in police custody at the Anti-Terrorist Branch of the Iskenderun Security Directorate, the applicant Salmanoğlu alleged that she was blindfolded, beaten, forced to stand for a long time, deprived of food, water and sleep, sexually harassed, threatened, and beaten.[93] The applicant Polattaş alleged she was blindfolded, insulted, and beaten, and that police officers inserted a truncheon into her anus.[94] Though both applicants underwent pre-custodial virginity tests, as well as medical examinations after their release from custody which noted no signs of physical violence or sexual intercourse, these examinations, according to the Turkish Medical Association, were "medically invalid" (incapable of actually documenting ill treatment).[95] Furthermore, the Association, without examining the applicants, submitted that their complaints of pain matched their allegations of torture in police custody.[96]

The Iskederun public prosecutor decided not to prosecute any police officers in connection with the applicants' allegation, but this decision was quashed by the President of the Hatay Assize Court.[97] Still, there was no trial, as the Iskederun Assize Court acquitted the accused police officers based on insufficient evidence. Despite an appeal by the applicants, the Court of Cassation terminated the criminal proceedings on the ground that the prosecution was time-barred (*zamanaşımı*).[98] Because of the time-barred proceedings, the applicants fur-

[91] *Id.* at § 45-47
[92] Salmanoğlu and Polattaş v. Turkey, 17 Mar. 2009, § 4-5, no. 15828/03.
[93] *Id.* at § 10.
[94] *Id*
[95] *Id.* at § 23.
[96] *Id.* at § 21-22.
[97] *Id.* at § 26-28.
[98] *Id.* at § 54.

ther submitted to the Strasbourg Court that the domestic investigation of their claims had been ineffective.[99]

In reviewing the applicants' Article 3 claim, the Court noted that both parties had submitted medical reports, and that the applicants' medical reports, along with the consistency and seriousness of their allegations, raised at least a "reasonable suspicion" that the applicants were subjected to ill treatment.[100] Before considering the applicants' allegations of substantive torture in more detail, it found that the Turkish Government was responsible for at least one violation of Committee on the Prevention of Torture standards, as well as for violating principles enunciated by the Istanbul Protocol, because doctors examined the applicants at the same time, in the same room, while police officers were present.[101] The Court also noted that there was no valid security reason for carrying out pre-custodial virginity tests on the applicants without their consent.[102]

Because the custodial medical examinations carried out upon the applicants fell short of international standards, the Court reasoned that they were not capable of producing reliable evidence, and thus would not be considered.[103] Though it decided that the Turkish Medical Association's reports could not be taken into account because they were not drafted following a direct medical examination, and also that a number of independent medical tests carried out eight months to five years after the applicants' detention in police custody could not be accepted,[104] the Court stated that it *would accept* several other independent medical reports documenting the applicants' post-traumatic stress disorders as "conclusive evidence in the

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[99] *Id.* at § 69.
[100] *Id.* at § 78. In the lack of effective investigation context, "reasonable suspicion" is synoymous with "arguable claim."
[101] *Id.* at § 80-85.
[102] *Compare id.* at § 88 *with* Juhnke v. Turkey, 13 May 2008, no. 52515/99. In *Junke*, a doctor persuaded the applicant, a suspected female terrorist, to undergo a pre-custodial gynaecological examination. While the Court found that this did not constitute a violation of Article, 3 it was deemed a violation of Article 8 (right to respect for private and family life) in part because it was not supported by a valid security reason—protecting gendarmes from false accusations of rape (the reason submitted by the Government) did not justify imposing such a serious "interference" with the applicant's "physical integrity" without her free and informed consent. *Id.* at § 76, 81-82.
[103] Salmanoğlu and Polattaş at § 89.
[104] *Id.* at § 91.

applicants' favour."[105] Along with the other circumstances of the case, in particular the fact that the applicants had been subjected to pre-custodial virginity tests without "any medical or legal necessity," this evidence of psychological suffering was enough to persuade the Court, four votes to three, that the applicants were subjected to "severe ill treatment."[106] Nonetheless, the Court stated that it was "unable to establish the complete picture of the severity the applicants' ill treatment" because of the Turkish domestic authorities' lack of effective investigation; thus, it could not find torture.[107] It then went on to find, unanimously, a violation of Article 3's procedural limb for lack of effective investigation.[108]

The three partly-dissenting judges in *Salmanoğlu and Polattaş* considered that a substantive Article 3 violation was not proven beyond a reasonable doubt. They stated that the repeated medical examinations conducted shortly after the applicants' alleged abuse (which found no signs of ill treatment), along with the inconclusive origins of the applicants' psychological disorder and the domestic court system's prior review, left the applicants with no *prima facie* case of ill treatment.[109] The judges also capriciously discussed the Court's consideration of the virginity test as a factor in its substantive Article 3 analysis, ultimately suggesting that, though it was impossible to establish the applicants' lack of consent in the present case, youth should generally not have to undergo virginity tests because of the humiliation, "bordering on degrading treatment," involved.[110]

Conclusion

The cases in this section point up the important features of the Court's current Article 3 jurisprudence in the custodial interrogation context. In most cases, today as in the mid-

[105] *Id.* at § 95.
[106] *Id.* at § 96.
[107] *Id.* at § 97. The Court has often found that the domestic authorities' lack of effective investigation precludes it from finding any substantive violation where it otherwise might have. *See e.g.*, Hüseyin Şimşek v. Turkey, 20 May 2008, no. 68881/01.
[108] *Id.* at § 99-103.
[109] *Salmanoğlu and Polattaş v. Turkey*, Partly Dissenting Opinion of Judges Sajo, Tsotsoria and Karakaş.
[110] *Id.*

1990s, the Court's main hurdle in finding an Article 3 violation is lack of sufficient evidence.[111] However, today that hurdle seems to be set even higher. The Commission, which was always more willing and more certain in its findings of Article 3 violations, no longer hears testimony, nor does it issue sympathetic reports, including credibility assessments, to the Court. At the same time, today's Court, burdened by an exceptionally heavy caseload, rarely sanctions its own fact-finding. The result is that a higher standard of diligence has been imposed on applicants and their legal representatives to establish evidence of torture themselves. Even where the Court has recently been able to find an Article 3 violation based on torture allegations identical to *Aksoy* and *Aydın*, it has at times stopped short of finding substantive torture due to a lack of conclusive evidence, as was the case in *Erdoğan Yılmaz* and *Salmanoğlu and Polattaş*.

Recent statistics confirm what the cases in this section suggest: that, particularly within the last three years (2007-2009), the Court has decided an increasing number of cases under Article 3's procedural limb. The Court found 40 violations for lack of investigation between 2007 and 2008, compared to only 6 violations against Turkey for lack of effective investigation between 2003 and 2006.[112] Furthermore, Article 3 procedural violations are increasingly the only violations that the Court is finding in its review of custodial torture, as cases such as *Ataş and Seven* and *Hüseyin Şimşek* suggest. The Court, though it only considered lack of effective investigation claims under Article 13 for much of the 1990s, now seems determined to consider almost all of these claims under Article 3, after several years of

[111] In *Salmanoğlu and Polattaş*, as stated above, the Court found, four votes to three, that ill treatment could be established beyond a reasonable doubt. For a recent judgment in which the same Chamber (the Second Section) found, four votes to three, that evidence of an Article 3 violation was *not* established beyond reasonable doubt, *see* Ersoy and Aslan v. Turkey, 28 Apr. 2009, no. 16087/03.

[112] This represents more than a *ten-fold* increase. Annual Statistics. *See* European Court of Human Rights, ANNUAL REPORT 2003, at 115; ANNUAL REPORT 2004, at 128; ANNUAL REPORT 2005, at 132; ANNUAL REPORT 2006, at 107; ANNUAL REPORT 2007, at 143; ANNUAL REPORT 2008, at 133. All reports are available at http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+Reports/ (accessed 16 July 2009).

inconsistent review.[113] Because Article 3 violations for lack of effective investigation, like identical earlier violations under Article 13, only require the Court to find that an "arguable" or "reasonably suspicious" claim of ill treatment was not effectively investigated, this imposes a less rigorous standard on both the applicant and the Court. The result is that the Court is registering more Article 3 violations against Turkey than ever before[114] in perhaps as expedited a way as possible.

Still, the finding of procedural violations where there is insufficient evidence of inhuman treatment or torture is not the ideal human rights outcome. This sentiment was expressed by the dissenting judges in *Labita v. Italy*:

> Even though we consider that in some cases a procedural approach may prove both useful and necessary, [...] it could permit a State to limit its responsibility to a finding of a violation of the procedural obligation only, which is obviously less serious than a violation for ill-treatment. In addition, we consider that the matters that led the Court to hold that there had been a procedural violation of Article 3 [...] are in themselves sufficiently clear and evident to justify finding a violation of the substantive point.[115]

Though Article 3 announces, in principle, a less rigorous evidentiary standard for applicants to meet in bringing an Article 3 claim, it also allows a Contracting Party, in anticipation of Strasbourg litigation, to "limit its responsibility" to a procedural violation by simply not taking statements and evidence. Over the past few years, there has been serious debate, both in Strasbourg and among scholars, about whether the Court should more widely exercise its fact-finding powers, lower its standard of proof for finding substantive Article 3 violations (fol-

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[113] *See* ERDAL, *supra* note 12, at 221. Though in *İlhan v. Turkey*, § 102-06, a Grand Chamber of the Court expressed uncertainty about reviewing lack of an effective remedy under Article 3, this no longer seems to be a consideration. *See* MOWBRAY, *supra* note 25, at 156-57.

[114] The Court found 57 Article 3 violations against Turkey in 2008, 47 in 2007, 28 in 2006, 28 in 2005, 52 in 2004, and 11 in 2003. At the same time it has found decreasingly fewer Article 13 violations: 12 in 2008, 25 in 2007, 55 in 2006, 36 in 2005, 52 in 2004, and 4 in 2003. *See*ANNUAL REPORT 2003, at 115; ANNUAL REPORT 2004, at 128; ANNUAL REPORT 2005, at 132; ANNUAL REPORT 2006, at 107; ANNUAL REPORT 2007, at 143; ANNUAL REPORT 2008, at 133.

[115] Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Straznicka, Butkevych, Casadevall, and Zupancic, § 1, Labita v. Italy, 2000, no. 26772/95. For another expression of one judge's individual frustration with the Court's standard of proof, *see*, Sevtap Veznedaroğlu v. Turkey, 11 Apr. 2000, no. 32357/96, Partly Dissenting Opinion of Mr. Bonello.

lowing the Inter-American and African systems), or adopt other changes to better recognise and remedy serious violations of the Convention.[116]

The cases in this section demonstrate that the Turkish Government, since the mid-1990s, has implemented some custodial safeguards in view of reducing its exposure to Strasbourg litigation. For example, it has performed gynaecology tests upon female applicants taken into custody, carried out custodial medical evaluations, and pursued criminal proceedings further against alleged perpetrators of ill treatment. However, these measures may not have prevented many forms of custodial abuse because applicants have recently submitted, for example, that their medical reports were dictated by police (*Ataş and Seven*) or carried out in such a summary manner that they were not able to reveal ill treatment (*Salmanoğlu and Polattaş*).[117] Furthermore, even where the Turkish justice system has investigated, prosecuted, convicted, and sentenced the perpetrators of ill treatment under Article 243 of the Turkish Criminal Code, procedural defects, such as a short limitations period, have nullified the justice that was achieved, as in *Erdoğan Yılmaz*.

In terms of what conduct rises to the level of torture, the Court has not expanded its substantive definition, despite leaving open the possibility to do so in *Selmouni*. The Court still insists, as it did in the mid-1990s, that in order to constitute torture, the treatment in question must be applied over an extended period of time, be "capable" of causing severe physical pain and suffering, produce discernible effects, and be sufficiently cruel and severe.[118] The

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[116] *E.g.*, LEACH, *supra* note 12, at 16; Pietro Sardaro, *Jus Non Dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court*, 6 EURO. HUM. RTS. L. 601-30 (2003); Kerem Altıparmak, *The European System for the Protection of Human Rights in Crisis: The End of the Road?*, 3 EURO. J. OF CRIM. L. 5-23 (2009).

[117] *See also* ERDAL, *supra* note 12, at 237-38. Erdal cites *Akkoç v. Turkey*, § 118, where a custodial medical report stated that the applicant had suffered no injury, but an x-ray examination several days later showed the applicant had suffered a broken chin. Human rights organizations in Turkey also report that the ill treatment of detainees has moved from detention centers, where some safeguards are now in place, to cars and outdoor areas. Kurban, *supra* note 3, at 26.

[118] The Court generally finds torture where it finds that the ill treatment was inflicted with the purpose of extracting a confession or information. However, the Court has also noted that the aim of torture can be to inflict punishment or intimidate, citing Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. İlhan v. Turkey, 27 June 2000, § 85, Reports of Judgments

rigor of the Court's substantive definition is demonstrated by *Emirhan Yıldız and Others*, where the Court decided that evidence of beatings alone did not establish torture; instead, it implied, there must evidence of more egregious treatment (such as the suspension in *Kemal Kahraman*). Though the Court has recognised threats and mental or psychological torture as one circumstance in its Article 3 inquiry, these factors have never by themselves been dispositive.[119]

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and Decisions- 2007. In *İlhan*, the Court found torture without any evidence that the gendarmerie tried to extract information from the applicant. *Id.*

[119] *But see* İrfan Neziroğlu, *A Comparative Analysis of Mental and Psychological Suffering as Torture, Inhuman or Degrading Treatment or Punishment under International Human Rights Treaty Law*, 4 ESSEX HUM. RTS REV. 1, 1-17 (Feb. 2007). Neziroğlu, former Secretary of the Human Rights Committee of the Grand National Assembly of Turkey, states that "mental and psychological suffering alone may constitute torture, depending on its severity, seriousness and cruelty and the vulnerability of the victim" (9). He bases this conclusion on the *Selmouni* case and a number of Turkish cases. However, in the cases he cites, the Court recognised threats as only *one* circumstance in establishing torture: for example, in *Akkoç v. Turkey*, the Court noted that police made threats towards the female applicant's children, but also noted that the applicant was subjected to hot-and-cold water treatments, electric shocks, and blows to the head while in police custody. *See* Akkoç v. Turkey, 10 Oct. 2000, § 116-117, Reports of Judgments and Decisions 2000-X.

IV. Policy Implications

For Turkish human rights organisations, as well as international human rights organisations concerned with the human rights situation in Turkey, the European Court of Human Right's current review of custodial torture allegations under Article 3 has at least two important policy implications.

First, the Court's rigorous standard of proof, combined with the practical unavailability of Strasbourg fact-finding, mean that in many cases where an applicant makes a custodial torture allegation, the Court can only find a procedural violation of Article 3. The Court is therefore involved much less in documenting substantive torture than it was in the mid-1990s under the Commission system. Instead, this task is now almost completely left to human rights organisations, including an array of Turkish NGOs that has become increasingly self-confident since the mid-1990s.

Second, despite the Court's less active function in documenting torture, the so-called Strasbourg mechanism has not bankrupted itself as a human rights remedy for custodial torture and ill treatment victims. The Court has very liberal rules of evidence and, in some contexts, has shown a willingness to consider independent witness testimony and alternative medical reports obtained several months or years later. The standard of diligence foisted upon applicants and their legal representatives is higher than under the Commission system, but it is not impossible to meet with proper training.