

THE MINORITY REPORT AFFAIR IN TURKEY

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INTRODUCTION

*Baskin Oran**

On October 1, 2004 the Prime Ministry's Human Rights Advisory Board ("Advisory Board") adopted, among others, the report of its Working Group on Minority and Cultural Rights (the "Report"; see Appendix for its full text).

On February 17, 2006 in a trial before the 28th Penal Court of First Instance in Ankara, Turkey, the Public Prosecutor asked that each of the two suspects,¹ the author of the Report and the president of the board that adopted the Report, be sentenced to a maximum of five years for "insulting state institutions" and for "inciting people to hatred and enmity" through the Report.

To a Westerner such things may not always be easy to comprehend. Therefore it would be helpful to relate in some length the background in which the Report was written and the trial took place. One should start by describing the different parties and documents in this situation.

THE "ADVISORY BOARD"

The Advisory Board was established by a law dated April 12, 2001, no.4643 as part of Turkey's endeavor to abide by the human rights provisions of the Copenhagen political criteria required for Turkish accession to the European Union ("EU"). This became necessary when the Helsinki Summit declared Turkey "a candidate State destined to join the Union on the basis of the same criteria as applied to other candidate States."² The law's Provisionary Article 5 said:

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¹ According to the new Turkish penal system that started on June 1, 2005 a person is a "suspect" (*süpheli*) during the investigation and is called an "accused" (*sanik*) after the indictment is lodged. TÜRK CEZA KANUNU [TCK] madde 67 (Turk.), available at <http://www.ihracatkontrol.org/web/dosyalar/mevzuat/11.doc> (last visited Jan. 30, 2007).

² Presidency Conclusions, Helsinki European Council (December 10-11, 1999), available at <http://www.dpt.gov.tr/abigm/abtb/Zirveler/1999%20Helsinki%201011%20Aralik.pdf>.

The Advisory Board is established to ensure communications between the relevant public institutions and the NGOs on issues relating to human rights and to function as an advisory body on national and international issues...[It] shall consist of representatives of ministries, public institutions and bodies and professional associations relating to human rights, representatives of human rights NGOs and persons who have publications and works in this field...The expenses of the Board shall be met from the budget of the Prime Ministry.³

The actual regulation of the Advisory Board entered into force on November 23, 2003.⁴ Among its duties described in Article 5, writing advisory reports on human rights were particularly stressed:

- a) to issue an opinion and recommendation, as well as to give advice and to submit reports on issues relating to the promotion and protection of human rights;⁵
- b) to issue an opinion and to advise administrative measures in order to ensure that the existing legislation and draft bills are brought into line with the fundamental principles of human rights, and the international instruments and mechanisms in the area;
- c) to act as an advisory body on national and international affairs encompassing human rights;⁶

Article 14(c) of the regulation required the meetings of the Advisory Board (normally three times a year) would be held with more than half of the members and that decisions would be taken by more than half of the members present at the meeting.⁷

³ Regulation on the Principles and Procedures Relating to the Establishment, Duties and Functioning of the Human Rights Advisory Board, OFFICIAL GAZETTE NO. 24494, Nov. 23, 2003 (Turk.).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See generally, Ibrahim O. Kaboglu, *Le Conseil des Droits de l'Homme Devant le Tribunal Penal/Cas de la Turquie*, REVUE DE SCIENCES CRIMINELLES ET DE DROIT PÉNAL COMPARÉ 521, (July-Sept. 2006); Ibrahim O. Kaboglu, *Quelques Remarques Preliminaires a Propos d'une Institution Nationale des Droits de l'Homme (Cas de la Turquie)* 68 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 1057 (Oct. 2006) (These articles give a detailed account of the Advisory Board activities).

THE MINORITY REPORT

At the Advisory Board's first meeting on February 26, 2003, Ibrahim Kaboglu, professor of constitutional law at Marmara University, was elected as its president. Additionally, thirteen separate working groups were established to produce reports in their respective fields. Baskin Oran, professor of international relations and Faculty of Political Sciences at Ankara University was elected chairman of the Working Group on Minority and Cultural Rights.

On October 1, 2004, after working for approximately a year and a half, the general assembly of the Advisory Council met to discuss the report of the Minority and Cultural Rights for a third time. Of the seventy-eight total assembly members, sixty-seven were present that morning. After much discussion the vote was taken in the late afternoon: twenty-four in favor, seven against, with two abstaining. Additionally, in accordance with the "Paris Principles" and a consensus reached at an earlier meeting, many members present, almost all of them government agency representatives, refrained⁸ from casting their votes (this was testified by all witnesses at the Minority Report Trial).⁹ No one objected to the voting and the President announced that the Report was adopted and that he would now personally ask Professor Oran to make minor changes in the wording of the text to soften the tone as he had done on similar, previous occasions. Oran agreed, provided that these minor changes would not interfere with the essence of the Report.

Unfortunately, the following weeks were not that peaceful. On October 22, the Report was officially presented to the Prime Ministry and a press conference was held. During the press conference, Mr. Fethi Bolayir—a member of the Advisory Council—cut off Professor

⁸ As opposed to abstention where a representative would raise his hand and say, "I abstain." These civil servants as a matter of principle did not want to take part in the vote although they were present. Refraining from voting was part of a Gentlemen's Agreement proposed by Chairman Kaboglu at the formation of the Advisory Council almost two years ago.

⁹ See generally Paris Principles, G.A. Res. 48/134, 85th plen. Mtg., U.N. Cod. A/RES/48/134 (Dec. 20, 1993). (The Paris Principles concerning the defense and promotion of human rights were first formulated and accepted in 1991 at a meeting of national institutions on human rights.)

Kaboglu's speech and declared in front of TV cameras that he would take this "high treason" case to the Public Prosecutor's Office.¹⁰

Further still, while Professor Kaboglu was reading a summary of the Report to media representatives on November 1, Mr. Fahrettin Yokus—a member of the Advisory Council and *Turkiye Kamu-Sen Konfederasyonu* representative (a right-wing civil servant's trade-union)—leaped onto the stage, grabbed the summary and tore it up yelling, "This report is aimed at dividing Turkey. This is an externally funded ploy against our country."¹¹ Mr. Yokus held a press conference the next day declaring, "We'll tear up this report ten thousand, one hundred thousand times if necessary. This is not physical violence but the exercise of a democratic human right."¹²

Mr. Suleyman Saribas, a congressman took the floor at the National Assembly and said, "Those who look for minorities in our country should ask their mother who their father is."¹³ Bircan Akyildiz, president of the trade-union *Turkiye Kamu-Sen Konfederasyonu*, de-

¹⁰ Turks.US, *Human Rights Report May End Up In Court*, Oct. 25, 2004, <http://www.turks.us/article~story~20041025125652305.htm> (last visited Jan. 28, 2007).

¹¹ AP Flash Bulletin, *Human-rights Rules of EU Rankle Turkey*, Nov. 28, 2004, <http://www.flash-bulletin.de/2004/eNovember29.htm> (last visited Jan. 28, 2007).

¹² See Human Rights Agenda Association: Reform the Penal Code for Human Rights, *Crimes of Discrimination, Racism, and Hatred in Turkey*, <http://www.rightsagenda.org/main.php?id=61&lg=en> (last visited Jan. 29, 2007); See also *They Tore Up the Minority Report*, TURKISH DAILY NEWS, Nov. 3, 2004.

¹³ *Liberal (Libos) of Today is the Doggy of EU*, HÜRRIYET, October 27, 2004, available at <http://arama.hurriyet.com.tr/arsivnews.aspx?id=268184>. Congressman Saribas was sued by Oran and Kaboglu and was condemned by a first instance court of Ankara to pay indemnities. However, this decision was overruled (with one member dissenting) by the Court of Cassation on 16 January 2007 (the case is therefore returned to the first instance court again). The legal reasoning, published unusually late, was in brief as follows: "The responsables of the Report voiced very heavy criticisms by profiting from a very large freedom of expression, they therefore should expect the same degree of heavy criticism. On the other hand, a congressman is expected to voice his opinions on such an important issue." The Court made no comment on the sentence "... who their father is." This reasoning ("they have criticized severely therefore they should expect to be criticized the same way") became in Turkey a sort of "freedom to insult" replacing the "freedom of speech" and was repeated word for word in eight other cases of insult opened (and lost) until the end of March 2007, the total number of such cases opened being fourteen in total. See editorial by B.Oran, "Open letter to prosecutors and judges", weekly *Agos*, 16 Feb. 2007, www.agos.com.tr.

clared in a press conference, “This is treason to the Fatherland. The price of the land is blood. That blood will be shed if necessary.”¹⁴

The Government tried to stay out of the issue because the right-wing protesters had gone wild and also because it did not want trouble before December 17, 2004—the date at which the EU Summit was to officially pronounce a date for the start of accession negotiations. The Minister of Justice, however, known for his “Turco-Islamist” tendencies, qualified the Report as an “Intel mischief-maker” (“intel” is pejorative for intellectual in Turkish).¹⁵ The head of the Human Rights Presidency, a governmental body charged with providing secretarial services to the Advisory Council, declared to the press that the Report was not official¹⁶ (this declaration will be used by the Prosecutor at the Minority Report Trial).

Conversely, the Chief Prosecutor-General of the Court of Cassation, Mr. Nurettin (Nuri) Ok, joined the chorus against the Report. On two occasions he said, “The concept of *Turkiyeli*¹⁷ is an extremely harmful concept that negates the Turkish Nation and prepares the ground for dismemberment and division.”¹⁸ In contrast to this opposition, the human rights NGOs in Turkey, headed by the Big Three (The Human Rights Association, Turkish Foundation for Human Rights, and the *Mazlum-Der* [Association of the Oppressed]), declared their unequivocal support for the Report.¹⁹ It is of interest to note that after the Report was made public the Prime Ministry announced that President Kaboglu’s mandate was over and that the Advisory Board’s meeting already scheduled for February 4, 2005 should instead be held the next day to elect a new president.²⁰ When time came, this meeting was

¹⁴ See DAILY YENI CAG, Oct. 27, 2004.

¹⁵ See DAILY RADIKAL, Nov. 19, 2004, <http://www.radikal.com.tr> (last visited Jan. 31, 2007).

¹⁶ TUSIAD-US Website, Human Rights Report on Minorities Stirs Controversy, Selected News on Turkey (Oct. 19-25, 2004), http://www.tusiad.us/specific_page.cfm?CONTENT_ID=498

¹⁷ “*Turkiyeli*” means “of Turkey”, “from Turkey”, and ultimately “citizen of Turkey.” This term is a *territorial* definition of citizenship in contrast to “Turk” which is an *ethnic* definition of citizenship. In other words, “*Turkiyeli*” is a direct counterpart for “British” while “Turk” is the direct counterpart for “English.”

¹⁸ See, *Ok Says Separatists Efforts Partially Successful*, TURKISH DAILY NEWS, Apr. 30, 2005; *Calls for Judicial Reforms Increase*, TURKISH DAILY NEWS, Apr. 30, 2005, available at Lexis ACC-NO: A200411052D1-9A98-GNW.

¹⁹ See also, Baskin Oran, *Rapor’un Butun Oyusu* [*The whole story of the Report*], 188 MONTHLY BIRIKIM 17 (Dec. 2004).

²⁰ The mandate of Professor Kaboglu was three years; he was elected at the first meeting on February 26, 2003 as stated above. But the Prime Ministry started

cancelled by the Prime Ministry. In protest, President Kaboglu and his presidency team resigned.²¹

The Prosecution

Ten months after the Report was made public the Public Prosecutor decided to open an investigation that emanated from two sources. The first source was the complaint of two private complainants one of which was the man who interrupted the press conference of October 22, 2004; and the second was from the Public Prosecutor himself.²²

The process took ten months and ended with the Prosecutor issuing an indictment on November 14, 2005, more than a year after the Report was made public.²³ The prosecution was initiated under two articles of the new Turkish Criminal Code (law no.5237),²⁴ namely articles 216(1) and 301(2). Article 216(1) reads as follows:

Any person who openly incites a group of people belonging to different social class, religion, race, sect, or coming from another origin, to enmity or hatred against another group, is punished with imprisonment from one year to three years in cases where such act causes a risk of public disorder.²⁵

301(2) reads: “Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment between six months and two years.”²⁶ The last paragraph of this article—added on July 30, 2003 as part of the EU Harmonization Package no.7—reads:

the calculation from the date Mr. Arvesen, the then minister in charge of human rights, sent out his circular letter to notify everyone that they were assigned as member of the Advisory Council: February 5, 2002.

²¹ See *IHDK Board Resigns, Saying They Were Pushed Out*, TURKISH DAILY NEWS, Feb. 8, 2005, available at <http://www.turkishdailynews.com.tr/article.php?enewsid=5448>; United Nations High Commissioner for Refugees [UNCHR], Immigration and Nationality Directorate, Country Information and Policy Unit, *Turkey Country Report*, ¶ 6.382 (April 2005), available at <http://www.unhcr.org/home/RSDCOI/429f15da4.pdf>.

²² EDWARD GRIEVES, SUPPRESSING ACADEMIC DEBATE: THE TURKISH PENAL CODE-TRIAL OBSERVATION REPORT 22 (Joanna Hunt, et. al. eds., 2006), available at <http://khrp.org/publish/p2006/Suppressing%20Academic%20Debate%20ONLINE.pdf>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 22.

²⁶ *Id.*

“Expressions of thought intended to criticize shall not constitute a crime.”²⁷

THE INDICTMENT²⁸

The Prosecutor’s indictment is a long, (eleven pages, single spaced; in contrast to the Report’s seven pages) unconventional document. Although it is written in a complex manner, it does not seem to follow a pre-conceived plan; however it could be analyzed in six sections:

(1) A procedural introduction, (2) the reproduction of the principles constituting the Advisory Board and governing its voting principles, (3) the alleged reasons for the actual prosecution, which are the alleged breaches of the criminal code, (4) a section refuting the Report, (5) the alleged procedural voting violations and their relevance to the charges, and finally (6) a discussion of Articles 301(2) and 216(1).

In the section refuting the Report, instead of contending and proving that specific parts of the Report carry specific violations of law like an indictment is supposed to do, the Indictment embarks upon challenging the academic analyses and recommendations of the Report. It tries to prove that anything outside of Turkey’s defining minorities as “non-Muslims only” is dangerous. The Indictment asserts:

Therefore, to make or create a new minority definition along with a new application thereof other than the concept of “minority” accepted with the Treaty of Lausanne will cause chaos, and will lead to a result that will endanger the unitary structure of the State which includes a lot of ethnic groups within it, the territorial unity and the indivisible unity of the nation.²⁹

But while doing this the Prosecutor does not realize that it is openly discriminating against and denigrating the non-Muslims: “So, in Turkey, minorities are the non-Muslim citizens... All citizens who are outside the mentioned group, who have played a role in the establishment of this State and who are within these borders are the constituent elements of this State and not ‘minorities.’”³⁰

²⁷ *Id.* at 32.

²⁸ Press Indictment No. 2005/250 (Ankara Penal Court of 1st Instance, Nov. 14, 2005) app. B at 76.

²⁹ *Id.* at 83.

³⁰ *Id.* at 82.

The indictment proceeds to challenge the Report's proposition that the concept of the 'indivisible entity of the nation' is incomprehensible to a Westerner because this is tantamount to denying sub-identities in this nation and therefore constitutes a refusal of democracy.³¹ To prove its point the Indictment enters dangerous waters by attempting to draw comparisons to France and Spain.³²

Regarding the Report's criticism of the Constitutional Court's decisions the Indictment defends this Court saying, "with many of its decisions the Constitutional Court has made contemporary interpretations which clear the path for democracy and freedoms in Turkey."³³ It then seeks to refute the Report's recommendation to use the territorial term "Turkiyeli" (being from Turkey) instead of "Turk," a term with ethnic connotations by stating, "England calls its citizens English, not 'people from England'. . . The French nation [consists of many ethnic elements, and yet a French citizen says] 'Je suis Français.'"³⁴ Ironically, the Indictment concludes this reasoning with an argument that was voiced by certain Kurdish nationalists who criticized the Report after it was published: "When suggesting the term *Turkiyeli*, is the Report unaware that the name of this country (Turkiye) also has an ethnic association?"³⁵

In outlining the alleged procedural voting violations and their relevance to the charges, the Indictment asserted:

What leads to an offense here are 'the approval of the Report despite the lack of quorum and . . . making the Report appear as if it were valid and its approval had complied with the 'procedures', and 'the announcement of the Report as if it were prepared by the Prime Ministry' and as if it concluded the confessions of the State' although the Board had no relation to the Prime Ministry.³⁶

After this statement one would normally expect the Indictment to cite the articles of the Criminal Code penalizing such offenses, but it just repeats articles 216 and 301 that have no relevance for such offenses. Therefore it is surprising that the Prosecutor made this detour at all and cited these "offenses."

³¹ See, e.g., *id.* at 84; GRIEVES, *supra* note 22, at 23.

³² See, e.g., Indictment, *infra* app. B at 85-87; GRIEVES, *supra* note 22, at 23-24 ("Minority is a concept that is alien to the French laws," and "the Spanish Constitution, just like the Constitution of the Republic of Turkey, includes the principle of indivisibility of the nation").

³³ E.g., Indictment, *infra* app. B at 85-86; GRIEVES, *supra* note 22, at 24.

³⁴ *Id.* at 86-87.

³⁵ *Id.*

³⁶ E.g., Indictment, *infra* app. B at 88; GRIEVES, *supra* note 22, at 25.

After detouring to proclaim that the vote is invalid, the Indictment returns to its legal claims based on these two provisions. The Prosecutor first undertakes to discuss Article 301—concerning the “public denigration of the judicial institutions of the State”—declaring,

[In the] last paragraph [the already mentioned paragraph, added to Art. 301 in July 2003], it is stipulated that expressing opinions for the purpose of criticism does not constitute an offense. However what is done in the Report is not mere criticism or expression of opinion but something beyond. The fundamental elements of the Republic of Turkey have been targeted; and in doing so, the Report was presented as if it had been prepared by the Prime Ministry.³⁷

In its assessment of Article 216 the Indictment analyzes it the following way:

In order for the offense... to take place:

- People should be incited to enmity or hatred against one another;
- This act of inciting should be based on social class, race, religion, sect or regional differences,
- The acts undertaken during the act of inciting should be such that there may be a potential disruption of public order;

And finally,

- The perpetrator should have the intention to commit that offense.³⁸

Immediately afterwards, the Indictment concludes by referring to the violence displayed by the Report’s opponents: “When the reactions and the indignation after its announcement are taken into account, all these elements exist in the Minority and Cultural Rights Report prepared by the suspects.”³⁹

THE DEFENSE

At the trial, Professors Oran and Kaboglu were represented by a legal team, coordinated by Ms. Oya Aydin, of over twenty-five lawyers who volunteered from different provinces of Turkey and particularly from the bar associations of Ankara, Istanbul, Izmir, Batman, and

³⁷ Indictment, *infra* app. B at 89.

³⁸ *E.g.*, Indictment, *infra* app. B at 90; GRIEVES, *supra* note 22, at 25-26.

³⁹ *E.g.*, Indictment, *infra* app. B at 90; GRIEVES, *supra* note 22, at 26.

Diyarbakir. According to the booklet “Trial Observation Report” this team considered the following technical points.⁴⁰

1) Permission to Prosecute: Academic Institution.

Both defendants are academics. The Law on Higher Education foresees that “a prosecution cannot be initiated unless permission is granted by the [university administration]. No such permission was sought or granted in this case.”⁴¹ However, both professors agreed that this argument should not be stressed by the defense for two reasons: (1) they did not want privileges, and (2) more importantly, they wanted to go to the Court and read their defences aloud.

2) Permission to Prosecute: Minister of Justice.

“In order to initiate a prosecution under [the old form of] Article 301 [(previously Article 159)] permission [was] required from the Minister of Justice. No such permission has been obtained.”⁴² Both professors agreed the former law would not prevail in matters of procedure even in cases where this former law was in favour of the defendants. They also agreed this technical point should not be stressed in Court for the second reason expressed above in the previous subsection.

3) Competency and Jurisdiction

The investigation was initially under the laws relating to the press and media as the alleged crime had become known through the media.⁴³ Curiously, the Indictment was sent to an ordinary criminal court instead of a specialized media court. Moreover, the prosecution was lodged ten months after the Report was published when it should have been initiated within two months from the date of publication in the media.⁴⁴ Both professors made their defences at the Court personally.⁴⁵

⁴⁰ GRIEVES, *supra* note 22, at 26-27.

⁴¹ *Id.* at 26.

⁴² *Id.*

⁴³ *Id.* at 27.

⁴⁴ *Id.*

⁴⁵ *Id.*

THE HEARINGS

The first hearing took place on February 15, 2006,⁴⁶ with over fifty observers including those from foreign countries and embassies.⁴⁷ As a larger court room was previously requested by the defense but had not been granted,⁴⁸ there was only standing room for most of the defense attorneys, and most of the observers stayed outside of the courtroom. The hearing started at ten in the morning and lasted uninterrupted until seven in the evening. Contrary to most judges in Turkey, the judge displayed tolerance. He also refused to accord “*partie civile*” status to the two informants.⁴⁹ On the other hand, he made no ruling on the technical points raised by the defense other than that of the permission to prosecute under Article 301.⁵⁰ On this issue he decided to write to the Ministry of Justice to ask for the permission of the Minister of Jus-

⁴⁶ *Id.* at 29.

⁴⁷ Among these foreign observers were professors Jean-Pierre Marguenaud, (France), Olivier Dubos (France), and Tania Groppi (Italy) representing an international Initiative Group of nine academics who collected, in support of the two accused, a total of 1257 signatures from academics and lawyers of 38 countries (Prof. Christian Grellois of Bordeaux will assist to the third hearing on May 10, 2005). As to the Prosecutor, Mr. Muhittin Kaya, he was a totally different person than the one who had prepared the Indictment (Mr. Nadi Turkaslan), according to the legal system in Turkey.

⁴⁸ *Id.*

⁴⁹ *Partie civile* is someone whose main interests are directly and badly hurt and who can therefore take part in the case with powers similar to the prosecutor: questioning the witnesses, calling for new ones, appealing to a higher judicial authority, etc. For example a fifteen year-old boy whose schooling expenses are paid by his father can apply to become a *partie civile* against the killer of his father. This refusal of the judge in the Minority Report Trial was a first and therefore a very severe blow against those who had, since several months, been accustomed to “use the code against the concept of law.”

Explaining this to a Westerner could also be difficult but it’s worth a try. Since 2005 an interesting practice had developed in Turkey in trials of freedom of speech, especially cases involving Arts. 288 (see the end of this Introduction), 216, and 301. A couple of private individuals would go to the Prosecutor and say: “So and so article published by so and so person is an insult to Turkishness; you should open an investigation and lodge an indictment.” As if the Prosecutor was obliged, he very often complied because since two years now there is a very strong wave of ethnic Turkish nationalism due to reaction against globalization (especially against EU) and against the terror of Kurdish organization PKK. Once the indictment was lodged, these individuals would go to the judge this time and say: “Turkishness is insulted. We are Turks. So, you should recognize the statute of *partie civile* to us.” And the judges would comply. But this would probably be too much in a “boneless” case of free speech like the Minority Report Trial.

⁵⁰ GRIEVES, *supra* note 22, at 29.

tice. The date for the hearing had been known for several months but the judge had apparently preferred to wait.⁵¹ The judge also decided to hear the members of the Advisory Council testimony concerning the voting procedure. The defense strongly objected, saying that this would only dissipate attentions from the Report and lengthen the trial

⁵¹ This issue of permission from the Minister of Justice is worth telling about in more detail. This Art. 301 that in its first paragraph punished “to insult Turkishness” proved to be a real headache for the AKP Government. As a matter of fact before the new penal code went into effect on 1 June 2005 a court had already convicted Hrant Dink, editor-in-chief of the Armenian daily *Agos* (Istanbul), to six months imprisonment. *Appeal Court Upholds Suspended Prison Sentence Against Hrant Dink*, REPORTERS WITHOUT BORDERS, July 12, 2006, http://www.rsf.org/article.php3?id_article=14391; Amnesty International, *Turkey: Article 301: How the law on “denigrating Turkishness” is an insult to free expression*, 5-6, (AI Index: EUR 44/003/2006), Mar. 1, 2006, available at [http://web.amnesty.org/library/pdf/EUR440032006ENGLISH/\\$File/EUR4400306.pdf](http://web.amnesty.org/library/pdf/EUR440032006ENGLISH/$File/EUR4400306.pdf). But things changed when the well-known Turkish novelist Orhan Pamuk was tried for the same crime after 1 June, because a great reaction had developed in Turkey and especially abroad. Therefore a “way out” was invented to permit the State to “save both the stick and the kebab [from burning]”: At the time of the old penal code prior to June 1, Art.159 (the old form of Art. 301) required that the Minister of Justice gave a permission to prosecute, as already stated above. Turkish Criminal Code, Law No:5237 (2004) (replacing Turkish Criminal Code, Law No: 765 (1926) and subsequent amendments thereto). The new code required it no longer. *Id.* What’s more, penal procedure required, in contradistinction to the penal code, that the new code be applied even if it carried provisions against the accused. Nevertheless, Pamuk’s judge wrote to the Minister and asked for his permission. The Minister replied, and what he said was correct, that he had no such power under the new code.

At that moment it came out that in a similar case the Ministry of Justice had written to the Court of Cassation asking that the verdict of a first instance court be abrogated and that it had received the following answer: “For cases prior to June 1 you should either give permission, or openly refuse to give permission.” When this decision of the Supreme Court reached the first instance court, the latter assumed that the permission was refused. No one appealed against this interpretation and thus this became the rule. This was a way-out for all concerned, especially the State: The accused was not convicted therefore there would be no harsh reactions from EU especially, and the accused was not acquitted either therefore the State did not loose face and the “social order” remained intact. After this, Art.301 charges began to be dropped one after the other. The very same process was used in the Minority Report Trial.

A last word about the Minister of Justice Cemil Cicek: his answer was correct because effectively he had no power under the new code. But when he had that power (before June 1) he had given his permission to prosecute in a freedom of speech case: it was the already mentioned case against Hrant Dink, in which Dink was finally convicted of “insulting Turkishness” although his allegorical article was in fact criticizing the Armenian Diaspora (this verdict is now finalised. Mr. Dink will now have to apply to the European Court of Human Rights in Strasbourg).

because only the text of the Minority Report was being questioned and that the Prosecutor had made no charges whatsoever concerning the voting process. The judge overruled the objection and heard the witnesses who unanimously approved what the defense said about the voting.

The second hearing was held on April 11, 2006. More witnesses were heard. Professor Christian Grellois, of France, represented the previously mentioned Initiative Group.⁵² The judge declared that the Minister's answer had arrived and it said he had no powers under the new law. Therefore the Court interpreted this answer in the negative and would therefore drop the charges concerning 301(2) and continue with 216(1).⁵³ The Prosecutor refused to pronounce his Opinion; otherwise the verdict could have been given because the defense was ready for the last observations.⁵⁴

The third and last hearing was held on May 10, 2006. It was shorter than the previous ones. The two last witnesses were heard. The Prosecutor read his Opinion and asked that charges of 301(2) be dropped and that the accused be acquitted on 216(1). The defense asked for acquittal from both. The judge pronounced his verdict: Charges under 301(2) were dropped and the suspects were acquitted of charges under 216(1).⁵⁵

POST-TRIAL EVENTS

After the verdict was pronounced, Professor Oran received an invitation to the Prosecutor's Office to be questioned about a new investigation concerning a declaration he had made to the *Daily Radikal*, a Turkish newspaper, about his defense the day before the first hearing on February 15, 2006. This investigation, opened under Article 288 of

⁵² Christian Grellois, Vice-president, University Montesquieu-Bordeaux IV, An Open Letter to Supporters (May 5, 2006), <http://www.collectifvan.org/article.php?r=4&&id=1751>.

⁵³ *Id.*

⁵⁴ At the end of the hearings and before the verdict is pronounced by the judge, the Prosecutor expresses his opinion—he asks for acquittal or condemnation—and the defense attorney expresses his last observations in the form of asking for an acquittal. In this case, the prosecutor refrained from talking, which led to the trial being postponed.

⁵⁵ HUMAN RIGHTS AGENDA ASSOCIATION, FREEDOM OF EXPRESSION IN THE NEW TURKISH PENAL CODE: PROJECT OF REFORM THE PENAL CODE FOR HUMAN RIGHTS, 30 (Yılmaz Ensaroğlu & Jonathan Sugden eds., Helmut Oberdiek, trans., 2006), available at http://www.rightsagenda.org/dosyalar/dokuman/tpc_en.doc.

the new penal code⁵⁶ ended for yet unknown reasons before Oran could testify.

The defense immediately appealed to the Court of Cassation against the verdict concerning 301(2). Article 223(9) of the Penal Procedure Code stipulated that “In a case where the accused can be promptly acquitted the judge cannot stop or drop charges or cannot decide that punishment is unnecessary.”⁵⁷ The two professors asked to be tried with a view to either be condemned or acquitted. To the surprise of many, The Prosecutor General of Ankara, Mr. Huseyin Boyrazoglu, also appealed the verdict although this document was identical to the demands of the prosecutor presented at the hearings by Mr. Kaya. Mr. Boyrazoglu repeated the same arguments as the writer of the Indictment (Mr. Turkaslan) and also asked that the two informations be admitted as “partie civile.”

Upon the arrival of the file, the office of the Prosecutor of the Court of Cassation demanded, on October 9, 2006, almost exactly what the attorneys of the two professors asked for at the minority trial: 1) That the decision of not admitting the two informations as “partie civile” be approved, and 2) that the decision of acquitting the two professors of charges under Art. 216/1 be approved, and 3) that the Minister of Justice openly permit or refuse their being tried under Art. 301/2.

The Court of Cassation is expected to consider the case during 2007.

⁵⁶ “A person who, with the aim to influence the prosecutor, the judge, the Court, the legal experts, or the witnesses, makes an oral or written declaration from the start of an investigation until the definite verdict will be punished with imprisonment from six months to three years.” TURK CEZA KANUNU [TCK] madde 288 (Turk.). *See also* Human Rights Agenda Association, Freedom of Expression in the New Turkish Penal Code: Project of Reform the Penal Code for Human Rights, 27 (Yılmaz Ensaroğlu & Jonathan Sugden eds., Helmut Oberdiek, trans., 2006), available at http://www.rightsagenda.org/dosyalar/dokuman/tpc_en.doc.

⁵⁷ Crim. Proc. C. art. 223(9) (Turk.).

COUNTER INDICTMENT

*Full text translation of Oran's defense
read in Ankara at the "Minority Report" trial on 15 Feb. 2006
Baskin Oran*

Distinguished Judge, I do not understand why this case was filed.

One day a yellow [official] envelope was delivered to the Faculty which stated I was appointed to the Prime Ministry's Advisory Council on Human Rights ("ACHR") as a human rights expert academician. As such, I was given an assignment, Article 5 of which defined the assigned task as follows: "To provide opinion, recommendation, suggestions, and draft reports on development and protection of human rights."

We took it seriously and established thirteen working groups, and I was assigned head up one of these committees. I wrote the Minority Rights and Cultural Rights Report⁵⁸ ("Report") with the contribution and approval of my colleagues. We submitted it to the ACHR Plenary Assembly, and following a one and a half year discussion it was approved and accepted by the ACHR with twenty-four votes for approval of the Report against seven opposing the Report, with two abstentions.

Now the Public Prosecutor's Office ("Prosecutor"),⁵⁹ who issued the indictment, files a lawsuit against me and the former President of ACHR, Professor Kaboğlu, and demands a five year jail sentence. Why? Is it because we have fulfilled our task by drafting a report which does not include any expression of insult, any invitation to violence, and is based on the latest scientific data on human rights and sociology? We know there is no punishment in this country for those who do not do their job, but asking for punishment for those who do their job seems strange. Thus, I do not understand why this case was filed.

⁵⁸ Human Rights Advisory Board, The Minority and Cultural Rights Working Group Report (Oct. 2004), *infra* app. A [hereinafter Report].

⁵⁹ Each time the term "Prosecutor" is mentioned, it is written as "Public Prosecutor's Office" in the Turkish original of this text in order to ensure that the prosecutor would not sue the suspect for personal offense.

Secondly, I could not understand how this case could be opened through such an indictment. Initially, I spent two hours giving my statement at the onset of the investigation. I explained the contents of the Report, what it said, why it was drafted, and what it meant, and what it did not mean. I naively thought the Prosecutor summoned us to appear in court in order to learn about the Report and clarify certain details. Apparently this was not the case. The Prosecutor had taken every detail from information derived from “Dear Informant Citizens,”⁶⁰ and yet not a single line from me. Not even a single word from an explanation of two hours? Apparently I was summoned just for the sake of formality. In this case why have I given my statement? I wish I had joined Professor Kaboğlu and refused. Then I would not have wasted precious time I could have spent with my wife and my students.

Besides its partiality the file is entirely facetious. My attorneys will talk about this so I’m saving time and not elaborating on this issue. However there is a document dated July 1, 2005 and no. 2004/98063 in the file which I can not skip because it describes the file so well. The document, signed by the Chief Public Prosecutor, says, “The suspects had past records of selling pornographic CDs.” The names of the suspects are not mentioned. A researcher who would review these files years later in order to write a Ph.D. dissertation would normally think that Professors Oran and Kaboğlu were the unnamed suspects. This is the kind of file that the Prosecutor based its indictment on. Therefore at the expense of diverting suspicion to my “accomplice” Professor Kaboğlu, I hereby, as a precaution, declare that I am not the “pornographic CD seller.”

The Prosecutor presents to your court a pile of pages full of groundless allegations based on this file. It invents offenses not included in the Turkish Penal Code (“TPC”). I will explain all of them one by one. But first, let me mention the following.

I believe that the Prosecutor has misunderstood the matter. In traditional cases, there is first an incident—either a burglary or report-writing incident. Then the prosecution issues an indictment to claim that “This is an offense.” This indictment is a thesis as it is clear from its name. Against this indictment the alleged perpetrator presents a

⁶⁰ This expression has a specific meaning in Turkey. During the military coup of March 12, 1971, the radios—only state radios existed then—read the orders of the military government by appealing to the “Dear Informant Citizens” to denounce anybody who would be against the military.

defense in order to prove that “This is not an offense.” This is a counter-thesis.

But what does Prosecutor do in this case? It attempts to disprove our scientific Report throughout the entire indictment and tries to draft a counter-report claiming that the content of the Report is erroneous. This just cannot be done; this is contrary to the nature of things. If it were a burglary case then would the indictment say: “No, breaking into houses is not possible in day-time. It should be at night; through the window not through the door; what the burglar did is wrong!”? The Prosecutor can not do it, not merely because it is not a scholar but simply because this is a Public Prosecutor. A Public Prosecutor is obliged to claim and prove the offense. He can not attempt to produce a counter-report. However, this is what he has attempted to do in our case.

Therefore Distinguished Judge, I can not give a statement here in the form of a usual defense. Defending myself would be the gravest humiliation under such circumstances. Therefore I am here to expose the anti-democratic ideology represented by the Prosecutor in a counter-indictment.

I do this for two reasons Distinguished Judge. First of all I owe this to myself. I have been teaching my students at the Faculty of Political Science for thirty-seven years to stand against anti-democratic ideology; I can not ridicule myself at this age of mine. My students would not admit me to the class. Secondly I owe this to Turkey. Because this indictment has degraded the Republic of Turkey vis-à-vis the world even before the case started.

Let me explain the reason point by point. This is anything but an Indictment. Let’s take it through with the letter “I.”

1) This is not an “indictment” (*Iddia-name*, here *name* meaning “text”) but an *Icat-name* (invention). Finding something that already exists is called “discovery,” and finding something that does not exist is called “invention.” In this document, uncommitted crimes and non-existing intentions are invented. I will explain all of them, one by one.

2) Therefore, this document is only an *Itham-name* (imputation). In order for it to be an indictment, it also has to be an *Is-pat-name* (proof). It does not even attempt to prove any of its allegations.

3) Moreover, in its current state, this document is an *Istihare-name* (oneiromancy); it is as if it was prepared by lying down to sleep for divine guidance and seeing in that dream the informers.

4) This is an *Iftira-name* (calumniation), because a document can defame the accused only this much. I will explain it all.

5) Your Honour, please lend your attention; for all of us here, this is a document of *Istihza-name* (ridicule) and *Igfal-name* (deception).⁶¹ In other words, by producing such a compilation that is far from a touch of seriousness even—after ten months of preparation—the Prosecutor openly mocks all of us here and attempts to deceive this mechanism. I will explain them one by one with examples.

6) This text, which is devoid of even the tiniest bit of legal basis, has occupied me—a person who dedicates all his time to his students and research—needlessly for months. In recent years, indictments of this sort have stolen tens of thousands of hours of hundreds of journalists, academicians and thinkers in Turkey.⁶² These hours are different from the hours of those who play backgammon at the coffee houses. Therefore, this is not an indictment but an *Israf-name* (waste). It terribly wastes the intellectual resources of this country which are already scarce.

7) Lastly, Distinguished Judge, maybe the most saddening thing for the Prosecution and the Republic of Turkey is that this is an *Itiraf-name* (confession). I will also reveal this clearly.

8) In sum, Distinguished Judge, this is not an indictment. This is a pseudo-indictment.

This is why I will expose it by reading a Counter-Indictment. My method is as follows. I will address the issues directly related to my field of expertise, leaving some of the issues—in particular those concerning the issue of procedure to my “accomplice” Professor

⁶¹ At this point in the trial, the trial prosecutor immediately responded to the judge by asking, “Your Honor, what in the world is he saying!?” In everyday parlance “Igfal” means “rape by seduction” and it means “deception” only in the strict literal sense. However, the counter-indictment is ironic by nature and due to the double meaning of “Igfal” the prosecutor’s reaction was to no avail while everybody in the courtroom laughed.

⁶² See U.S. Department of State, *Turkey: Country Reports on Human Rights Practices* (2002), <http://state.gov/g/drl/rls/hrrpt/2002/18396.htm> (“The Government continued to harass, indict, and imprison human rights monitors, journalists, and lawyers for ideas that were expressed in public forums.”); See, e.g., PEN American Center, *Turkey Background Briefing: 2006*, <http://www.pen.org/viewmedia.php/prmMID/694> (“In all, PEN knows of more than 70 writers, publishers, and journalists who are currently under indictment or standing trial in Turkey.”).

Kaboğlu—and some others to the expertise of my attorneys. One of the most fundamental principles of trials, particularly in penal law, is that the accused and the complainant are equal in terms of opportunities to present evidence.⁶³ The Prosecutor charges me with non-existent offenses on baseless claims. Therefore, these baseless claims provide me with the opportunity to gravely criticize the indictment. I will make full use of that. The weapons should be equal. I will do it based on theoretical grounds, providing tangible examples, on the contrary to what the Prosecutor has done.

ABOUT THE PSEUDO- INDICTMENT

Let's start from the beginning and go over the pages one by one.

A. First Issue

On page two of the Indictment, it is stated that “the Report was initially made public by suspect Baskin Oran” and the same allegation is repeated in page four.⁶⁴ This Report has been through a process of one and a half years of discussions and voting, and the media was there for every second of it. How can you leak to the media a Report that was prepared and voted in front of them? What kind of logic is this? If the Prosecutor wrote this down without knowing how the process functions, then what kind of an indictment-writing is this? Besides, how does the Prosecutor prove this empty allegation? It doesn't. And if it cannot, then this [indictment] is nothing but an *Iftira-name* (calumniation).

B. Second Issue

On page four, the Indictment states, “Apart from meeting its expenses, the Prime Ministry does not have any relation or link with [the] Board.”⁶⁵ As I mentioned at the beginning of my speech, Article 6 of the Decree on the Establishment of the ACHR stipulates that “All its expenses shall be met from the budget of the Prime Ministry”; even its name is “Advisory Council on Human Rights Advisory of the

⁶³ Maurice Parmelee, *New System of Criminal Procedure*, 4 J. AM. INST. CRIM. L. & CRIMINOLOGY 359, 365 (May 1913 –Mar. 1914) (“In the interest of justice it is most essential that the two sides should be about equal in the ability to secure and present evidence.”).

⁶⁴ Indictment, *infra* app. B, at 78.

⁶⁵ Indictment, *infra* app. B, at 80.

Prime Ministry.” Now, if this Council is not affiliated to the Prime Ministry then to which organization is it linked? To a foreign Embassy? To the electricity network TEDAŞ (Turkish Electricity Distribution Company)? To the water network ASKI (Ankara City Water)?

With this allegation, the Prosecutor turned the document it prepared into *Istihza-name* (ridicule), in an act of *Igfal-name* (deception) that openly aims to deceive us all. If it is assumed that this is indeed the objective of the Prosecutor, then this enters the domain of personal liability. If such an objective cannot be proven, then we would have to conclude that he is unable to fulfil his duties because he does not understand what he writes. This would mean that liability would fall on the authorities who appointed him to that position and did not terminate him.

C. Third Issue

The indictment takes up the remarks we made about the Lausanne Treaty.⁶⁶ First of all, I’d like to raise a question. Why is the indictment criticizing my scientific analysis of the Lausanne Treaty? Is this indictment a document of international law or is it a text of criminal law? The duty of the Prosecutor is to quote the relevant articles of the TPC in case it finds an offense in my scientific report. How can it write an anti-thesis against the Report? Is that its duty? Is it equipped for that?

It would have been better for the Prosecutor if it had not made these criticisms, because by doing so it reveals that it lacks information on two fundamental issues that we teach to the sophomores at the Political Science Faculty during the spring semester. First, contrary to what the Prosecutor thinks, the “existence of a Minority” and “the status of a Minority” are two different issues. The “existence of a Minority” is a sociological fact. It is not within the power of the State to accept or to deny this. If there is a non-dominant group in a country that differs from the majority in various aspects and considers such differences to be an inseparable part of its identity, then international

⁶⁶ Indictment, *infra* app. B, at 83; *See also* Report, *infra* app. A, at 21. (The peace Treaty of Lausanne was signed in 1923 as a replacement for the previous lapsed peace Treaty of Sevres.); *See Lausanne, Treaty of*, in THE COLUMBIA ENCYCLOPEDIA (5th ed. 2000). (The treaty restored several areas of land to Turkish control, granted Turkey “full sovereign rights over all its territory,” and removed “foreign zones of influence and capitulations” on Turkish territory. In exchange, “Turkey renounced all claims on former Turkish territories outside its new boundaries and undertook to guarantee the rights of its minorities.”).

standards agree on the fact that there exists a minority in that country.⁶⁷ At this point, State claims are unimportant.⁶⁸ The “status of a minority” is a legal situation. Here, the sole authority lies with the State. It is up to the State to grant or to deny “minority status” to those it wishes. In other words, it freely grants or denies minority rights. By the way, again contrary to what is known by the Prosecutor, in Turkey, this status has been defined in two separate conventions. It has been granted to: (1) all non-Muslim citizens in Turkey through Articles 37 through 44 of the Lausanne Peace Treaty of July 24, 1923,⁶⁹ and (2) the “Christian Turkish citizens whose mother tongue is Bulgarian” through paragraph 2 of Article A of the Additional Protocol to the Turkey-Bulgaria Friendship Agreement of October 18, 1925.⁷⁰ In other words, by saying “there are no ethnic, religious and linguistic minorities in Turkey other than those defined in the Lausanne Treaty”⁷¹ the Prosecutor is merely referring to the “status of minorities,” which is also incorrect because it excludes the 1925 Agreement.

Secondly, the main mistake of the Prosecutor can be explained as follows: They are making judgments on the “existence of minorities” by saying “there are no other minorities in Turkey.” It is understand-

⁶⁷ International Humanist and Ethical Union, *Minorities*, Aug. 4, 1988, available at <http://www.iheu.org/node/2107>.

⁶⁸ “Some State parties which claim that they do not discriminate on ethnicity, language or religion, wrongly content, on the basis alone, that they have no minorities.” Office of the High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities (Art. 27)*, ¶ 4, CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994), <http://www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?OpenDocument>; “The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.” *Id.* at ¶ 5.2.; See also CERD, Office of the High Commissioner for Human Rights, *General Recommendation No. 24: Reporting of persons belonging to different races. National/ethnic groups, or indigenous peoples (Art. 1)*, ¶ 2 (Aug. 27, 1999), <http://www.unhchr.ch/tbs/doc.nsf/0/9ce4cbfde771452a8025684a0055a2d0?OpenDocument>. See also: (“2. It appears from the periodic reports submitted to the Committee under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, and from other information received by the Committee, that a number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others. Certain criteria should be uniformly applied to all groups, in particular the number of persons concerned, and their being of a race, colour, descent or national or ethnic origin different from the majority or from other groups within the population.”). I thank Professor Patrick Thornberry for his contribution.

⁶⁹ See Treaty of Peace, signed at Lausanne art. 37-44, July 24, 1923, 28 L.N.T.S. 11.

⁷⁰ Treaty of Friendship art. A, Oct. 18, 1925, 54 L.N.T.S. 127.

⁷¹ See Indictment, *infra* app. B at 82.

able—to a certain extent—that the Prosecutor does not know the rule stipulating that, “The existence of a minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.”⁷² The UN Rules whose reference has been cited in the footnote no.1 above were developed in the 1990s. One of them dates back to 1994 and the other to 1999. So, if you look at the registration number of the Distinguished Public Prosecutor it seems that he graduated some thirty years ago and such information was not available when he was studying at the Law School. Therefore, it is understandable that he is not aware of them.

Regardless, the fact that he did not inquire about them when he was demanding five years of imprisonment for each of the two university professors is incomprehensible. He could have asked it to the professor he summoned to his office for statement-taking and who gave his statement and made explanations for two hours. He could have said, “Why did you write it in this way? Is there a background to it?” If not, what is the purpose in taking statements. Let us assume that he did not notice the possibility of an explanation at that time. Then he should have asked about it when he was writing the indictment. Unfortunately, our “Dear Informant Citizens” would not know about these things. However, professors who follow up international instruments on a daily basis and who teach them every year would know about this.

D. Fourth Issue

We come across a much graver mistake on page five. According to the indictment: “All citizens [in Turkey] who are outside of the scope of the mentioned group, who have played a role in the establishment of this State and who are within these borders are the constituent elements of this State and not minorities.”⁷³ I would like to ask the same question once again: Why are there remarks about who the elements of the State are in this indictment? Is it a crime to say these things? And under which articles do they fall?

Let’s continue. Distinguished Judge, this is actually an incredibly catastrophic statement. In saying “these elements” the Prosecutor is

⁷² Human Rights Comm., Gen. Comment 23, 5.2, art. 27 (Fiftieth session, 1994), Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) available at <http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>.

⁷³ Indictment, *infra* app. B at 82.

referring to the “non-Muslim citizenry of the Republic of Turkey,” and by saying “. . . who are outside of the scope of the mentioned elements,” he is defining the Muslim citizens! In other words, without any hesitation the Prosecutor is openly considering the Muslim citizens of Turkey “the essential, dominant elements of the State,” and the remaining non-Muslim citizens “subsidiary” elements. That is to say, he is labelling the non-Muslims as “non-dominant,” second class elements. I wonder if the Prosecutor is aware of the fact that it is committing the crime of separatism that it charged us with without showing any evidence? Is not this “openly inciting [one] part of the population [of] a [one] race or religion to . . . hatred and enmity against the other?”⁷⁴ What happened to the notion that “sovereignty unconditionally belongs to the Nation?” Or is it that, according to the Prosecutor, our citizens with a different religion are not part of this sovereign nation? Then what kind of a nation, sovereignty and moreover, what kind of humanitarianism is this?

Of course, what I will tell you now will be even more unpleasant for the Prosecution. I wonder if the Prosecutor itself is aware that this separatist attitude stems from the fact that the Millet System is still continuous in its mind? The Millet System was introduced in 1454 and officially abolished in 1839 with the Tanzimat.⁷⁵ This System divided the Ottoman subjects into two groups: Millet-i Hakime (“The Dominant Community”), the Muslims, and Millet-i Mahkume (“The Dominated Community”), the non-Muslims⁷⁶ who were the second-class subjects. The Prosecutor—apparently having no familiarity whatsoever with these issues—may now think that “mahkume” means “condemned woman.” Here, the terms “hakime” and “mahkume” come from the Arabic root “hüküm” and the former means “the one who makes the judgment”, and the latter means “the one for whom judgment is made.” The first one is the subject. The second one is the object; it does not mean “condemned.” It is beyond lamentable that a prosecutor of the Turkish Republic can use the Millet System—which was the main pillar of the Ottoman Empire abolished on November 1st

⁷⁴ TURKISH PENAL CODE [T.P.C.] art. 216/1 (Turk.)

⁷⁵ See *Tanzimat*, in THE COLUMBIA ENCYCLOPEDIA 2788 (5th ed. 2000), (“[Turk., = Reorganization] The name referring to a period of modernizing reforms instituted under the OTTOMAN EMPIRE from 1839 to 1876. In 1839, under the rule of Sultan ABD AL-MAJID, the edict entitled *Hattı-I Sharif* of Gulhane laid out the most fundamental principles of Tanzimat reform.”); See also The Rescript of Gülhane 1939, <http://www.anayasa.gen.tr/gulhane.htm> (last visited Feb. 8, 2007).

⁷⁶ BİLAL ERYILMAZ, *OSMANLI DEVLETİNDE MİLLET SİSTEMİ [THE MILLET SYSTEM IN THE OTTOMAN EMPIRE]*, 13 (Istanbul, Ağaç Yayıncılık, 1992).

1922 by the Great National Assembly of Turkey⁷⁷—as the main pillar of his official indictment. I do not know what should be done about it; I am speechless.

E. Fifth Issue

Let us talk about another grave issue. At the top of page five, the indictment claims that article 39/4 of the Lausanne covers only non-Muslim citizens of the Republic of Turkey.⁷⁸ However in our Report, we had indicated that it included “all nationals of the Republic,” and brought along rights to all of them.⁷⁹ In fact, I explained this during my two hour interview with the Prosecutor. Now I repeat my question: Why does the coverage of Lausanne with respect to nationals concern the indictment? According to which article of the TPC does analyzing Lausanne constitute an offense?

But let us pause for a little while here; the mistake is not as small as to be corrected with small jack-knives like that in the Bektashi joke. Let us first read article 39/4: “No restrictions shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press, or in publications of any kind or at public meetings.”⁸⁰ Now, for the sake of law, what does “any Turkish national” mean? Does it mean “non-Muslim Turkish citizen?” Would those who wrote the Treaty not have written so if they had wanted it to be understood that way? Did not they know how to write? Here we face a serious problem Distinguished Judge. If the Prosecutor did not write this under the influence of the “Dear Informant Citizens,” which by itself would be quite grave, then there are only two possibilities: (1) Either he did not understand what he read, or (2) the Prosecutor is a victim of “ideological blindness” or “ideological horse-blindness,” which constitutes a more serious situation for all.

I will be extremely open. The ideology of the Prosecutor is its own business. While the ideology of the Prosecutor is his own business, this ideology aims at restricting human rights—particularly the freedom of expression—as much as possible; and as far as we see, this is

⁷⁷ British Institute for International Affairs, *Summary of Events - May 1, 1922-April 30, 1923*, 4 BRIT. Y.B. INT'L L. 234, 249 (1923-1923).

⁷⁸ Indictment, *infra* app. B at 81-82.

⁷⁹ Report, *infra* app. A at 69.

⁸⁰ Treaty of Peace, signed at Lausanne art. 39, July 24, 1923, 28 L.N.T.S. 11.

the case here. However, this ideology should not be reflected in the official indictment, as is the case here. This is abuse of duty.

Again I digress; however, this is extremely important. I cannot switch to another issue without handling this one. First of all, let me note that our Report is an ideological output. It is a product of a democratic ideology, which considers human rights superior to all else. Article Five of the ACHR assigned us the duty to “draft reports and conduct studies with the objective of improving human rights,” and this is what we had done. We have done it from a certain perspective, i.e., from the viewpoint of human rights ideology. Can anyone claim contrary? Can anyone out there with a scientific opinion say that “perspective” and “ideology” are different from one another? Since we want to study the very broad sociologic relationship between “the current status” and “the status that should be,” our Report is as ideological as possible.

Yet the Prosecutor—a jurist examining the very clear and narrow relationship between “available Report” and “available law”—can not and should not draft an ideological indictment. Moreover, apart from being ideological, this Indictment is also emotional. To illustrate, the prosecution can only write something this:

Your Honor, as demonstrated by such and such evidence, the author of the Report has uttered this and that sentence. When considered from the style and general context of the Report, these sentences openly violate paragraph X of the Article X of the TPC which penalizes insult and defamation, and instigation to crime and violence. The jurisprudence of our Court of Cassation is also along the same lines. Additionally there are no law articles that can enable these sentences to be considered as mere criticism. I hereby demand that he be sentenced under so and so Article.⁸¹

That is all he can do. Yet, as I will soon demonstrate, the Prosecutor’s indictment essentially says: “Well, the fact the Author has written this while such and such country does this and that shows he has ill intentions towards Turkey. What if what he said about the minorities causes chaos? What if it breaks up the country? What if it divides the nation?” The only thing the prosecution has left unsaid is “God forbid! What if it pierces his eye.” My Distinguished Judge, these are grave, even hilarious things. This indictment is an unlawful occupation. It needlessly occupies all of us. It is a document of occupation (*Isgal-*

⁸¹ This is my own illustration to help the reader better understand the error of the Prosecutor’s ways.

name). I will return to this “intention” issue a moment later in more detail and by means of the Zanardelli Report.

What if the Prosecutor approached the issue with the justification of “saving the country?” Even so this is still inexcusable. Let me explain it at once. Jurists cannot save the country themselves, just like the armed forces and security forces, or universities cannot. A country is protected through collective cooperation; by the armed forces protecting against outside dangers and by the security forces towards inside dangers. Additionally, the Ministry of Education and universities protect the country from ignorance and the judiciary from injustice. The judiciary cannot set itself to saving the country. If it does, then it will end up like other prosecutors we have seen in the past who tried to save the country. In the 1980s, a military prosecutor said in his indictment, “In the East it snows, then it freezes; and when stepped on, this snow produces khart-khurt sounds. The word Kurd has derived from this, so there is no such group as Kurds.” There was the military coup, so we said we understand. We said to ourselves: “This prosecution has not heard the joke about Hayri the Duck.”

In the 1970s, another prosecutor had enlightened us with his indictment by saying “The words Turk (Türk) and Kurd (Kürt) are a combined common value made up of the assembly of the same letters.”⁸² He taught us all that the same letters, T, Ü, R and K are the same letters aligned differently and therefore that the Kurds are in fact Turks. As if this was not enough, the same military prosecutor was able to say in his indictment the following, which I will read verbatim as it is quite hard to believe: “The Turkish nationalism is never racist in accordance with our Constitution. On the contrary, instead of an abstract racist view, it accepts an idealist, progressive, unifying national racism based on the unity of having the same culture and the same destiny.”⁸³ Then there was the military coup, so the people understood.

But in 2006, we do not understand any more. Thank God, there is no longer a military dictatorship but a Turkey moving forward on the democratic path to European Union (“EU”) membership.

Now let us voice an issue that will give comfort to the Prosecutor. In every country there is a pendulum that swings between two ends, the “Human Rights State,” and the “National Security State.” When

⁸² Indictment dated 23.10.1971, no.1971/160 (1971/130); Merit No: 1971/144 (1971/33-30), Decree No: 1971/100; see *DDKO Dava Dosyast-1* (DDKO Case File-1), Ankara, Komal Yayınları, 1975, p.22.

⁸³ *Id.* at 24.

the pendulum swings towards the latter, the Human Rights State comes to an end; it is destroyed. But when it swings towards the former, the National Security State does not come to an end; it is not destroyed. On the contrary, it gains strength because in countries where human rights are weak, people are “compulsory citizens.” When they feel their sub-identities are respected they feel they are “voluntary citizens.” A State founded on compulsory citizenship can collapse any moment just like the Berlin Wall. You cannot station a bayoneted-guard next to every single citizen. A State founded on voluntary citizenship is peaceful. It can sleep with deaf ears in peace and comfort.

Leaving that aside, if the Prosecutor had glanced at the Tanzimat Ferman—which is the first constitutional document that has carried Turkey to this day⁸⁴—before writing the indictment, it would have sufficed to educate him. Likewise, the Tanzimat Ferman of 1839 speaks to the same thing I said about the pendulum, but with different words, “Who indeed can, even if his character is against violence, refrain himself from resorting to violence and hence from bringing harm to his country and state when his life and honour are in danger? Whereas, in an opposite situation, if this person is in complete security in that sense, he will not abandon loyalty and all his actions will be targeted to the well-being of his country and his brothers.”⁸⁵ Yet, as far can be gleaned, the prosecution only read the denunciation petitions of “Dear Informant Citizens” before writing the indictment.

I now return again to Article 39 of Lausanne. There is a need for some technical information on this issue to avoid both this Prosecutor and other prosecutors from repeating the same mistake in other cases. It is likely that no one in Turkey has ever read the Lausanne Treaty; but of course, they know it by heart. Therefore there is a lot of information to provide, but here I will only elaborate on that which is absolutely necessary. It would be easy to only consider Section III of the Lausanne Treaty (“Protection of Minorities”, arts. 37-44) because it only talks about the rights of minorities. However, this would be because this section introduces rights for four different groups: (a) Non-Muslim citizens of the Republic of Turkey, (b) Everyone inhabiting in

⁸⁴ See *Tanzimat*, in THE COLUMBIA ENCYCLOPEDIA 2788 (5th ed. 2000), (“[Turk., = Reorganization] The name referring to a period of modernizing reforms instituted under the OTTOMAN EMPIRE from 1839 to 1876. In 1839, under the rule of Sultan ABD AL-MAJID, the edict entitled *Hatti-I Sharif* of Gulhane laid out the most fundamental principles of Tanzimat reform.”); See also The Rescript of Gülhane 1939, <http://www.anayasa.gen.tr/gulhane.htm> (last visited Feb. 8, 2007).

⁸⁵ See The Rescript of Gülhane 1939, <http://www.anayasa.gen.tr/gulhane.htm> (last visited Feb. 8, 2007)

Turkey, (c) All citizens of the Republic of Turkey, and (d) Citizens of the Republic of Turkey speaking languages other than Turkish.⁸⁶ Article 39 of Section III embodies four of these groups; it is an article similar to a laboratory concoction because the subject of the: first paragraph is the rights of (a), second paragraph is the rights of (b), third and fourth paragraphs are the rights of (c), and fifth or the last paragraph is the rights of (d).

Almost all of the remaining articles in Section III follow the same format. In other words, although the title of Section III is “Protection of Minorities,” all *residents* of the country—not just all *citizens*—have been inserted into this Section. In short Section III embodies the rights of all persons in Turkey; in technical terms, “human rights” have been positioned in this Section.

Why? There are a few reasons for this, which I have written about previously, but for the sake of time and space I will only mention two of them. First, the term “human rights” was first used in an international document in 1945 through the UN Constitution.⁸⁷ This means that when Lausanne was signed in 1923, these rights did not exist even conceptually in international documents. However, the concept of “minority rights” has been in international treaties at least since the Vienna Treaty of 1606.⁸⁸ Therefore Section III, which also includes human rights, was titled “Protection of Minorities.” Second, the term “minority” is not a specific but a generic term. When the specific terms of an international treaty are interpreted, the prevailing meanings during the signing of the treaty are taken into consideration.⁸⁹ But when generic terms are interpreted, meaning is determined in the light

⁸⁶ See Treaty of Peace, signed at Lausanne art. 37-44, July 24, 1923, 28 L.N.T.S. 11.

⁸⁷ U.N. Charter pmb1.

⁸⁸ See Treaty of Vienna, Jun. 23, 1606. FRANK KOSZURUS, JR., *The Forgotten Legacy of the League of Nations Minority Protection System*, in *ESSAYS ON WORLD WAR I: TOTAL WAR AND PEACEMAKING, A CASE STUDY ON TRIANON* (Bela K. Kiraly, et al. eds., 1982), available at <http://www.hungarianhistory.hu/lib/tria/tria41.htm> (“The Treaty of Vienna of 1606 was one of these which guaranteed the right of the Hungarian Protestant minority to exercise its religion in Royal Hungary.”).

⁸⁹ Vienna Convention on the Law of Treaties art. 31.1, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”)

of all developments that have taken place in international law since the signature of that treaty.⁹⁰

In this sense, the 1978 International Court of Justice rejected Greece's claim in the court case lodged against Turkey with respect to the Aegean Continental Shelf.⁹¹ It said that the term "disputes concerning the territorial status" as mentioned by Greece was a generic term, and should therefore be interpreted not on the basis of its meaning in 1928 but that of 1978 (verdict paragraph 77-80).⁹² Therefore, although the concept of "human rights" was not in the international jargon in 1923, the term "minority rights," in 2006, has been subsumed under the concept of "human rights." For instance, Article 39/2 of the Lausanne Treaty reads as follows: "All the inhabitants of Turkey, without distinction of religion, shall be equal before the law."⁹³ Now I wish I could spot the one who would interpret this as "minority rights" since it does not even speak about "majority" here. It does not even talk about "nationals" but about the rights of "all those that inhabit in Turkey"—whether it be a foreigner or a national. Did you happen to know that this Article 39/4 was the proposal of the Delegation of Ankara Government at the Lausanne Conference? If Article 39/4 were implemented today, we would not be having this silly problem concerning radio-TV broadcasts in "languages other than Turkish?" Have you ever thought that if there were no such problems, the Kurdish nationalism would not have gained strength?⁹⁴

⁹⁰ Vienna Convention art. 31.3 (There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.").

⁹¹ Aegean Sea Continental Shelf Case (Greece v. Turk.), 1978 I.C.J. 3 (Dec. 19).

⁹² *Id.* at 32-34.

⁹³ Treaty of Peace, signed at Lausanne art. 39, para. 2, July 24, 1923, 28 L.N.T.S. 11.

⁹⁴ *See, e.g.,* 1 TÜRK DIŞ POLİTİKASI KURTULUŞ SAVAŞINDAN BUGÜNE OLGULAR, BELGELER, YORUMLAR [TURKISH FOREIGN POLICY – FACTS, DOCUMENTS, COMMENTS SINCE THE WAR OF INDEPENDENCE] 225-31 (Baskin Oran ed., İletisim Publications, 10th ed. 2005); BASKIN ORAN, TÜRKİYE'DE AZINLIKLAR – KAVRAMLAR, TEORİ, LOZAN, İÇ MEVZUAT, İÇTİHAT, UYGULAMA [MINORITIES IN TURKEY – CONCEPTS, THEORY, LAUSANNE, DOMESTIC LEGISLATION, JURISPRUDENCE, IMPLEMENTATION] 61-80 (İletisim Publications, 3d ed. 2004); BASKIN ORAN, KÜRESELLEŞME VE AZINLIKLAR [GLOBALIZATION AND MINORITIES] 152-62 (İmaj Publications, 4th ed. 2001).

F. Sixth Issue

I need to explain this point in more detail. But do not worry you will not be bored. I have given the clues above already. The indictment on page 5 says, “Again, taking into consideration an application of the French State . . . will reveal the intent included in the report.”⁹⁵ Distinguished Judge, how come our “intent” interests the indictment? Where does the Prosecutor get this authority, from which legal text? From where?

Let me explain where it does *not* get this authority from. First of all, comparison by analogy in penal law is not permissible.⁹⁶ Therefore it can not get this authority from any text of penal law. How can it be possible to outline the “intent” of a Report by looking at the practice of a state or how can a similar expanding interpretation be provided while Article Two of the TPC prohibits comparison by analogy even among the provisions of law?

More importantly, as Dr. Sami Selçuk—honorary president of the Court of Cassation—wrote,⁹⁷ penal law does not deal with the purposes, objectives, intents or motives of individuals. Does not the Prosecutor know about this? There are two possibilities. First, this principle might have been recently introduced in the new TPC and our jurists might not have delved into it yet. But, no sir. This principle was defined 120 years ago in the Zanardelli Report⁹⁸ on the Italian Penal Law—which is the source for our penal law—as follows: “Investigating the internal motives of individual actions is not the task of the penal justice.”⁹⁹ 120 years is enough to learn about this. The second possibility is that the Prosecutor knows about this principle and he is do-

⁹⁵ Indictment, *infra* app B. at 82.

⁹⁶ Bülent Çiçekli, Assoc. Professor, *Introduction to Turkish Law and Legal System* (lecture notes), at Bilkent University (2004), at 78-79, available at http://www.turkaydanismanlik.com/en/docs/Introduction_to_Turkish_Law_and_Legal_System_Bilkent_University_Lecture_Notes.pdf (“The method of analogy . . . is not permissible in such fields of law as tax law and criminal law if it is not favourable for the defendant or tax payers. . . . [A]nalogy is not allowed” in “[t]he area of criminal law.”).

⁹⁷ Sami Selçuk, *Özlenen Hukuk / Yaşanan Hukuk* (Desirable Law, Existing Law), Ankara, Yeni Türkiye Yayınları, 2002, p.206, footnote 15)

⁹⁸ Franklin F. Russell, Comment, *The New Ethiopian Penal Code*, 10 AM. J. COMP. L. 265, 270 n.14 (1961) (“The evolution of the first unified penal code for Italy commenced in 1860, and was approved in 1889. It was called the Zanardelli Code, from the name of the Keeper of the Seals when the Code took effect on January 1, 1890. It remained in force until June 30, 1931.”).

⁹⁹ Selçuk, *supra* note 97 at 206.

ing it deliberately. These will be judged by your Court. However, I will not leave this matter of intent here. I will come back to this point.

The actual point I would like to make here is even graver. The Prosecutor, as I mentioned before, is delivering opinions on topics of international law which obviously is not one of its *forte* and is putting the Turkish Republic in a difficult position. Let us see how:

a) Provides misinformation.

First, it says that France did not sign the European Charter for Regional or Minority Languages. France signed it in 1999. It has even included a “statement of interpretation.”¹⁰⁰ It then brought before the Constitutional Council the issue of whether there was a need for any constitutional amendment prior to ratification. Upon decision by the Council ratification was postponed.¹⁰¹ Initialling, signing, ratification, transposition are all different processes.

b) Provides even more misinformation on the practice in France.

For example, talking about France’s reply to the European Council’s European Commission against Racism and Intolerance (“ECRI”), it refers to statements such as: “All citizens [in France] are equal before the laws without any discrimination based on ethnic origin, race or religion. Minority is a concept that is alien to the French laws.”¹⁰²

What do all these examples have to do with the indictment? What does it try to write? Are these its responsibilities? First of all this reference is incomplete. And just like everything that is incomplete it is wrong. It hides certain things. As the indictment puts forward, France has in fact said, “[m]inority is a concept that is alien to the French laws.”¹⁰³ However the indictment hides the very fact that “minority rights” are not at all alien to French law. Let’s clarify this point.

As I mentioned earlier, since the Prosecutor does not make any distinction between “existence of minority,” a sociological concept,

¹⁰⁰ See Report Calls on Turkey, France and Andora to Sign European Charter to Protect Minorities, TURKISH DAILY NEWS, Oct. 1, 2003, available at Lexis ACCNO: A200310104D-6032-GNW [hereinafter Call to Sign]; see also *World Flashes Column*, THE TORONTO SUN, May 6, 1999, at 48; European Charter for Regional or Minority Languages CETS No.: 148 (2006) [hereinafter Column], <http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=148&CM=&DF=&CL=ENG> [hereinafter European Charter].

¹⁰¹ See *id.*

¹⁰² Indictment, *infra* app. B, at 83.

¹⁰³ *Id.*

and “status of minority,” a legal matter; it is unaware of the fact that linguistic and religious minorities in France are granted minority rights.¹⁰⁴ In order to keep up the Jacobin appearances, the French Republic rejects the “concept of minority” with one hand and it grants full “minority rights” with the other hand. Let me prove what I have said through examples because mine is not an indictment but a statement of proof (*ispat-name*). This is what I promised at the very beginning of this counter-indictment and I will keep my promise until the very end.

1. Rights of Linguistic Minorities in France

Let me clarify this first. In order to provide a comparison with Turkey I will hereby describe only the Metropolitan France—which is French land in Europe as we know it. Otherwise if I include the “Outre-mer” as the French call it, where minority rights are practiced much more prominently and commonly, then those who consider France to be a centralist unitary state might have a heart attack. For example in New Caledonia, French is not the first language but the second; but I will not elaborate on it more.

At this point the indictment brings forward information picked up here and there, which are naturally wrong.

2. Concept of “Langues de France”

Article 2 of the French Constitution is as follows: “[t]he language of the Republic is French.”¹⁰⁵ This much should be pleasing for the Prosecution because it reminds us of the statement of “Its language is Turkish” in article 3/1 of our Constitution, referring to the Turkish State.¹⁰⁶ However, there is in France something else that the Prosecution does not know and would not be pleased to know: The concept of “Les Langues de France.”¹⁰⁷ If we had that concept in Turkey it would be “Languages of Turkey.”

¹⁰⁴ See generally Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices 2004, <http://www.state.gov/g/drl/rls/hrrpt/2004/41681.htm>.

¹⁰⁵ 1958 Const. art. 2.

¹⁰⁶ 1982 Turkish Constitution art. 3/1.

¹⁰⁷ Bernard Cerquiglini, *Les Langues de La France*, Report to the Ministry of National Education, Research and Technology and to the Ministry of Culture and Communication, April 1999, available at www.culture.gouv.fr/culture/dglf/lang-reg.rapport_cerquiglini/langues-frances.html. (A report prepared in preparation for ratification of the European Charter of Regional or Minority Languages.)

The public institution¹⁰⁸ under the French Ministry of Culture and Communication—previously known as “Délégation Générale à la langue française” and changed into “Délégation Générale à la langue française et aux langues de France” on October 16th, 2001—defines this concept as follows: “The concept of ‘Languages of France’ refers to regional or minority languages traditionally spoken by French citizens in the Land of the Republic, and which are not official languages of any other state.”¹⁰⁹ The number of these regional and minority languages is more than seventy-five including the Overseas Lands, while the number of those in the Metropolitan France is only sixteen, and they are divided into “Regional Languages” and “Non-territorial languages.”¹¹⁰ There are ten “Regional” Languages of France: Alsacien, Basque, Breton, Catalan, Corsican, Western Flemish, Moselle Françique, Francoprovincial, Languages of Oïl, Languages of Oc (occitan).¹¹¹ Additionally, there are six “non-territorial” languages: Dialectal Arabic, Western Armenian, Berbère, Judeo-Spanish, Roman (gypsy), Yiddish (Jewish).¹¹² The populace is completely free to speak, write, publish, produce arts, etc. in these languages.

“Deixonne” Law on Teaching Local Languages and Dialects—effected in 1951—stipulated that education in Breton, Basque, Catalan and Occitan was permitted (Article 10), and the said Law also identified the universities where these languages could be subject of education and research (Article 11).¹¹³ Corsican,—through the decree of January 16, 1974—and Alsacien—the minority language spoken in Alsace-Moselle, through an administrative decree (arrêt) of May 30,

¹⁰⁸ Violaine Eysséric Délégation Générale à la Langue Française et aux Langues de France, *Le Corpus Juridique des Langues de France 67* (2005), available at <http://www.culture.gouv.fr/culture/dglf/lgfrance/legislation/LDF.pdf> [*hereinafter* *Le Corpus Juridique*].

¹⁰⁹ Délégation générale à la langue française et aux langues de La France, <http://www.culture.gouv.fr/culture/dglf/>, click on “les langues de france” (last visited Nov. 16, 2006).

¹¹⁰ *Les langues de France: un patrimoine méconnu, une réalité vivante*, French Ministry of Culture and Communication, http://www.culture.gouv.fr/culture/dglf/lgfrance/lgfrance_presentation.htm (last visited Sept. 29, 2006).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Law Deixonne of January 11, 1951 (ABC of the French language), http://www.languefrancaise.net/dossiers/dossiers.php?id_dossier=45.

2003—were included among the languages that could be subject of education (l'objet d'un enseignement).¹¹⁴

Distinguished Judge, the Prosecutor may not know about this either. Because if you look at the dates given, these are developments that took place after his graduation from the Law School. However, to be unaware of these scientific developments is not an excuse just as being unaware of the law is not an excuse either. If it were an excuse, then failure to ask for information of these developments is certainly not.

Let me give brief information on Alsace-Moselle region as well as the minority language spoken there. I am sorry that some people will get gooseflesh but it is not me to blame. I am not the one who gave France as an example for comparison with Turkey. Located at the German border of France, this region—just as Alexandretta (Hatay) which was separated from Turkey between 1918-39 and then returned back or Kars-Ardahan which was under Russian rule between 1878-1918—is a part of Alsace-Lorraine which was given to Germany following the founding of Germany in 1871, and upon defeat of France by Germany was returned to France in 1918.¹¹⁵ This region, where the below-mentioned privileges for minorities are applicable, is composed of the entire province of Alsace and the Moselle division of the province of Lorraine. According to linguists the language spoken here is not a separate one but a dialect of German.¹¹⁶ Despite this fact, as I mentioned above, this dialect is accepted as a minority language within the scope of “Languages of France” and enjoys all privileges granted. As I will be explaining shortly, in this region of France people speak this language in their public and private lives and, though it might be difficult to believe, they practice German law.

Let me remind once again to avoid any mistakes. We are talking about France which the Indictment points out to Turkey as the best example of a unitary state. Provided that it is stipulated by the municipality regulation, dialect of Alsace is used at the municipalities. Associations established in the region use Alsatian as well in their activities. In 1993, the Colmar Court of Appeals, in a case filed on the grounds that the general assembly of an association was held in Al-

¹¹⁴ Arrêté du 30 Mai 2003 Fixant le Programme d'Enseignement des Langues étrangères Régionales à l'école Primaire, Arrêté du 30 mai 2003, J.O. 9818, June 11, 2003, *reprinted in* LE CORPUS JURIDIQUE, *supra* note 108, at 18.

¹¹⁵ See *Alsace*, in THE COLUMBIA ENCYCLOPEDIA 77 (Paul Lagassé ed., Columbia Univ. Press 2000), available at <http://www.bartleby.com/65/al/Alsace.html>.

¹¹⁶ *Id.*

sacian, rejected the cancellation of general assembly decisions.¹¹⁷ From then on it is considered that there are no barriers to using Alsatian in the associations.

Although “Toubon” Law of August 4, 1994 on the Use of French Language stipulates that French is compulsory in education, business transactions and public services, Alsatian is not prohibited in public offices in Alsace either.¹¹⁸ As a matter of fact, Article 21 of the said Law is as follows: “[p]rovisions of this law hereunder can not be applicable to regulatory documents on the local languages of France and can not constitute barriers to the use of these languages.”¹¹⁹ Therefore it was agreed that verbal use of the local language in the public offices of the region is not prohibited and this is the actual implementation.

In the region, posters for election campaigns and propaganda have been printed in French and German since 1919.¹²⁰ Since the circular of August 10th, 1979 and no. 1619, the German language, in addition to French, may be used on the highway road signs.¹²¹ In Alsace, names of streets are in both languages in the historical sites of Strasbourg.

3. State of Affairs in the Judiciary

This state of affairs is simply shocking for us. Presidential decrees of 1919, 1922 and 1928 stipulated that French, German or local dialect (Alsacien) could be used for defense in the courts. According to the said decrees, based on the parties’ statements that their French is inadequate, public notary documents can be issued in Alsacien. According to Article 23 of the new Code on Legal Procedure, “If the judge is competent in the [minority] language spoken by the parties he does not have to hire an interpreter,”¹²² and if the judge agrees, parties can communicate directly in the minority language.

¹¹⁷ Jean Marie Woehrling, “Quelques remarques sur le bilinguisme en Alsace” *Revue de Droit Local*, 1995, n°14.

¹¹⁸ Circulaire du 12 Avril 1994 Relative à l’Emploi de la Langue Française par les Agents Publics, J.O. 5774, Apr. 20, 1994, *reprinted in* LE CORPUS JURIDIQUE, *supra* note 108, at 68 (“The dispositions of the law of August 4th, 1994 are applied without prejudice to legislation and of regulation relating to the regional languages spoken on the national territory and not oppose and not apply to their usage.”).

¹¹⁹ Loi Toubon n94-665 du 4 Août 1994 Relative à l’Emploi de la Langue Française, J.O. 11392, Aug. 5, 1994, *reprinted in* LE CORPUS JURIDIQUE *supra* note 53, at 60.

¹²⁰ Interview with Samim Akgönül, Associate Professor, Max Bloch University in Strasbourg, France (Jan. 10, 2006).

¹²¹ LE CORPUS JURIDIQUE *supra* note 108, at 71.

¹²² *Id.*

4. State of Affairs in Education

The state of affairs in education is even more striking in that these minority languages are taught in private and public schools.¹²³ In private schools starting in kindergarten the minority languages can be freely taught to anyone interested if the language is spoken by at least 250,000 students in France, based upon the 2002 data from the Ministry of Education.¹²⁴ It is even possible for kindergartens and primary schools to adopt these languages in Basque and Alsace-Moselle as the medium of education; there is no legal barrier against that. The same is applicable in the secondary education. Some schools conduct education only in these languages.

Additionally, the State provides financial contributions to help cover the cost of this education. For example, Basque is financed seventy percent by the State and thirty percent by the parents in the region.¹²⁵ In both public and private schools,¹²⁶ these subjects are limited to two hours a week just like foreign language lessons. In accordance with the administrative decision of July 31, 2001, half of the subjects are taught in French and the other half in minority language in “bilingual” schools at all levels (kindergarten, primary and secondary).¹²⁷ In these types of schools there is a separate section called “regional languages.” Thus some schools in Alsace-Moselle provide training in German (Alsacien) and French half and half.

This is the case until the university. It is possible to attend Literature and Regional Languages Department at the university. There are higher education institutions in some regions which provide education merely in the minority language like L’Institut d’Etudes Basques in Bayonne.¹²⁸ Needless to say these subjects are included in the regular class hours everywhere in France.

¹²³ See generally, Christine Hélot, *Language Policy and the Ideology of Bilingual Education in France*, 2 *Language Policy* 255 (October 2003).

¹²⁴ Luc Bronner & Raphael Chamak, *Langues régionales: le gouvernement cherche à dépassionner le débat*, *Le Monde*, Oct. 4, 2003, at 13.

¹²⁵ *Le Basque en France*, Institut de Sociolinguística Catalana, www.uoc.es/euromosaic/web/document/basc/fr/i3/i3.html#3.1 (last visited Sept. 29, 2006).

¹²⁶ In France these private schools are called “sous-contrat” or “under-contract.”

¹²⁷ Arrêté du 30 Mai 2003 Fixant le Programme d’Enseignement des Langues étrangères Régionales à l’école Primaire J.O. 9818, June 6, 2003, *reprinted in* CORPUS JURIDIQUE *supra* note 108, at 18.

¹²⁸ *Le Basque en France*, *supra* note 125.

5. State of Affairs in Culture and Arts

The privileges enjoyed by regional and minority languages are not limited merely to the field of education. These languages are preserved and promoted in culture, training and education. They are financed by the French State in various fields such as music, books, theatre, ethnological heritage, archive, museum, movies.

For instance the “Library of Languages of France” programme was established in order to provide loans for libraries that admit books written in these “Languages of France” or research books on these languages, and also to provide financial incentives for the printing houses that would publish books in these languages.¹²⁹ There is a division of labor in France: the Ministry of National Education is responsible for the protection and development of French and the Ministry of Culture and Communication for that of “Languages of France.”¹³⁰

I wonder if you have noticed that I have not at all mentioned Corsican; I will be able to do it when I explain the autonomous administrative status of the Island. Let me say this much only: Corsican has been taught since 1974 at the primary and secondary schools as well as at the Corte University established in 1980.¹³¹ According to 1998 data eighty-five percent of the primary school students on the island learned Corsican in schools—particularly in eleven “bilingual” schools.

6. Religious Minority Rights in France

Contrary to the claim by the Prosecutor there are religious minorities in France as well. The subject of religion has followed a standard path after the Law of 1905 which separated Church and State, except for the Alsace-Moselle region.¹³² For example:

- (1) Compulsory or elective lessons of religion can not be taught in any primary or secondary public school anywhere in

¹²⁹ *Id.*; Centre National du Livre, Librairie des Langues de France: Programme Co-financé par le CNL et la DGLF, <http://www.centrenationaldulivre.fr/Librairie-des-langues-de-France.html> (last visited Nov. 17, 2006).

¹³⁰ *Les langues de France: un patrimoine méconnu, une réalité vivante*, *supra* note 110.

¹³¹ See generally, MERCATOR-EDUCATION: EUROPEAN NETWORK FOR REGIONAL OR MINORITY LANGUAGES AND EDUCATION, THE CORSICAN LANGUAGE IN EDUCATION IN FRANCE (2000), available at www1.faknaw.nl/mercator/regionale_dossiers/PDFs/Corsican_in_france.pdf.

¹³² Dominique Decherf, *French Views of Religious Freedom*, THE BROOKINGS INSTITUTE, July 2001, <http://www.brookings.edu/fp/cuse/analysis/relfreedom.htm>.

France.¹³³ (Interestingly, these schools are closed on Wednesdays so that parents can provide religious classes for their children, but on Saturdays schools are open. Private schools decide on their own about religious subjects.) However, lessons of religion are compulsory in the primary and secondary public and private schools in the Alsace-Moselle region.¹³⁴ Yet parents can decide which of the religious subjects (Catholic, Protestant, Jewish, or Ethics) their children would select.¹³⁵

(2) Religious leaders are not paid or appointed by the government anywhere in France.¹³⁶ They live on the donations of believers, and they are not included in the State protocol either.¹³⁷ However, in this region religious leaders of three religions and sects recognized in France (Catholicism, Protestantism, Judaism) are public servants paid by the government and are granted lodging by the commune.¹³⁸ The President of the Republic appoints the Archbishop selected by the Catholic congregation as well as the two recognized Protestant churches,¹³⁹ and the chief Rabbi selected by the Jewish congregation is approved by the governor. Beside the rabbis, the Sacrificateur

¹³³ Henri Astier, *The deep roots of French secularism*, BBC NEWS, Sept. 1, 2004, <http://news.bbc.co.uk/2/hi/europe/3325285.stm>.

¹³⁴ JEAN-LUC VALENS, LE DROIT LOCAL D'ALSACE-MOSELLE, 29 CHRONIQUE 275-79 (1998), reprinted in RÉPUBLIQUE ET PARTICULARISMES 46, 47 (Jacqueline Costa-Lascoux ed. Février 2005).

¹³⁵ *Id.* Jean-Luc Valens, *Le maintien d'un droit local en Alsace-Moselle*, Quand la France se nomme diversité, Partie 2, Problèmes politiques et sociaux, no.909, Février 2005, s.46-47.

¹³⁶ See Loi concernant la séparation des Eglises et de l'Etat of Dec. 9, 1905, Journal Officiel de la République Française [hereinafter Official Gazette of France], Dec. 11, 1905, art. 15, available at <http://www.legifrance.gouv.fr/texteconsolide/MCEBW.htm>.

¹³⁷ *Id.*

¹³⁸ *Id.* at art. 11; see, e.g., *Alsace*, in THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001-05), available at <http://www.bartleby.com/65/al/Alsace.html> (“[T]he Concordat of 1801 . . . had remained valid in Alsace-Lorraine although it had been ended in the rest of France in 1905.”); *Concordat of 1801*, in THE COLUMBIA ENCYCLOPEDIA (5th 2000), available at <http://www.bartleby.com/65/co/Concorda.html> (“Confiscated church property . . . was not to be restored, but the government was to provide adequate support for the clergy.”).

¹³⁹ See *Concordat of 1801*, in THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001-05), available at <http://www.bartleby.com/65/co/Concorda.html> (“Archbishops and bishops were to be nominated by the government, but the pope was to confer the office. Parish priests were to be appointed by the bishops, subject to government approval.”).

and the Circumciser (Mohel) are also paid by the government, and all religious leaders are included in the State protocol.

(3) There are no religious cemeteries anywhere in France; all cemeteries are managed by the municipality and people of different religions are buried together because it is forbidden to separate them.¹⁴⁰ For example, Yılmaz Güney¹⁴¹ is buried in Père Lachaise cemetery in eastern Paris along with all other deceased. However, in this region cemeteries are religious cemeteries and they belong to the religious edifice next to them. Therefore there are specific build-in Muslim burial areas “Muslim squares” in these cemeteries in Alsace-Moselle.¹⁴²

I would like to add so that the Prosecutor makes no further mistakes: the Ministry of Interior in “secular” France “that rejects the concept of minority,” is at the same time the Minister of State responsible for Religious Affairs. Though symbolic to a great extent in all regions other than Alsace-Moselle, these officially recognized faiths are under the actual and official auspices of the interior minister, in other words, of the State. This situation constitutes a religious privilege (additional rights) for religions and sects in this region, both financially and in terms of State protocol.

7. Legal and Administrative Minority Rights in France

I continue to dwell on the Metropolitan France, always excluding the Overseas Territories in order not to harm the health of some people. In France, which rejects the concept of “minority,” two minorities enjoy legal and administrative minority rights in their regions: the Alsace-Moselle region and Corsica island. “Religious and ethnic rights,” “special representation rights,” and “special administrative rights” are three groups of rights demanded by minorities. I will not elaborate on

¹⁴⁰ 2 Code General des Collectivites Territoriales (Partie Législative), 2d Partie, La Commune, 2.3 §1 Cimetières et opérations funéraires, art. L2223-1, available at <http://www.droit.org/code/CGCTERRL-L2223-1.html>.

¹⁴¹ “[Yil]maz Güney [(1937–1984)], was one of the most popular directors and actors of Turkish cinema. ... Born ... to poor Kurdish parents. ... As a militant Communist, he spent more than eleven years in Turkish prisons. Nevertheless, he acted in 111 films, directed 17, and wrote 53 movie scripts. ... Güney spent his last few years as an exile in Europe. The military government of Turkey expelled him from citizenship and banned and destroyed his films. ... Güney died of cancer and was buried in Père Lachaise cemetery in Paris.” *Güney, Yılmaz*, in ENCYCLOPEDIA OF MODERN ASIA (2001-06), available at http://www.bookrags.com/Y%C4%B1lmaz_G%C3%BCney.

¹⁴² Interview with Samim Akgönül, *supra* note 120.

theory and take your time. It is included in my text book which the Prosecution claims to have read; just let me comment on the conclusion only.

The third among these demands, “special representation rights,” is the most serious of all and nation-states do not like to grant them. Why not? Because it means self-administration of the minority and therefore its isolation from the “nation.” In such cases, the minority either takes the decisions on certain issues on its own, or extends it and practices this autonomy in a territorial manner in a specific region. What I mention here about Alsace-Moselle and Corsica is the most radical form of the most serious of these demands. There are a great deal of additional legal rights in Alsace-Moselle and direct administrative minority rights in Corsica. Let us see:

(1) Alsace-Moselle¹⁴³

(a) Following the return of Alsace-Lorraine to France in 1918, French penal code in Alsace-Moselle was immediately put into effect.¹⁴⁴ However, some of the local codes from the German Law were maintained. The French Court of Appeals wisely decided to gloss this matter, which is extremely strange for us to comprehend, declaring that “These codes have become French codes.”¹⁴⁵ The Court was very wise to do that. It is thanks to such pragmatic wisdom that there is no minority problem in Alsace-Lorraine today.

(b) Since Germany has started industrialization earlier than France, it has preceded its time in terms of social security measures. Following the transfer of the region to France, these legal rules were also maintained. For example, in this region an

¹⁴³ For further information on legal minority privileges in Alsace-Moselle, *see generally*, INSTITUT DU DROIT LOCAL ALSSACIEN-MONSELLAN, LE GUIDE DU DROIT LOCAL: LE DROIT APPLICABLE EN ALSACE ET EN MOSELLE DE A A Z (2002). For further information on minority rights in France *see*, NORBERT ROULAND ET AL., DROIT DES MINORITES ET DES PEUPLES AUTOCHTONES 307-45 (1966).

¹⁴⁴ Harold Callender, *Alsace-Lorraine Since the War*, 5 FOREIGN AFF. 427, 433 (1926-1927).

¹⁴⁵ *See generally*, H. Patrick Glenn, *Local Law of Alsace-Lorraine, A Half Century of Survival*, 23 INT'L & COMP. L.Q. 769, 781 (1974) (“This introduction of the totality of French civil legislation has meant that in case of doubt, French civil law is to be applied rather than local civil law.”).

additional social security system is in effect where the insured pays a contribution of ten percent instead of twenty percent.¹⁴⁶

(c) In 19th century Germany, the mayor held a fundamental administrative office. Even after the transfer of the region to France, the authority of mayors in Alsace-Moselle were larger than those of other mayors in France. The situation was balanced only after the Law on Local Administrations of 1982 went into effect.¹⁴⁷

(d) Associations in the region are subject to several articles of German Civil Code. For example an association established in accordance with the local law can function as a profit-making organization.¹⁴⁸

Here is one more example that will make you say “Now that is too much:” certain codes in effect in Alsace-Moselle such as the Code on Local Associations, are not even translated into French but are maintained in German.¹⁴⁹ In 1975 the Court of Appeals rejected an application made on the grounds that this code was in German.¹⁵⁰ On March 10, 1988 the French Court of Appeals stated, “[the] Law of June 1, 1924 maintains [that] certain local legal texts [only available] in German do not condition their practice [on] being published in French.”¹⁵¹ As such, certain laws applied in France today are only in German.

Let us continue: legal privileges of the region were approved by the Constitutional Council in France which “rejects the minorities;” the Council did not consider these privileges to be at variance with the principles of “indivisibility of the Republic” or “equality of citizens.”¹⁵²

¹⁴⁶ Frances Perkins, *Social Security Here and Abroad*, 13 FOREIGN AFF. 373, 377 (1934-1935).

¹⁴⁷ Glenn, *supra* note 145, at 771-72; *see generally*, Nick Swift and Guy Kervella, *A Complex System Aims to Bring French Local Government Closer to the People*, CITY MAYORS (2003), http://www.citymayors.com/france/france_gov.html (The law has the general effect of encouraging local commune governments to merge with other communes to form a cohesive government in a territory).

¹⁴⁸ Andrew D. West, *Legal Status and Administrative Control of Religious Organizations and Groups in France*, 33 CATH. LAW. 285, 303 (1990).

¹⁴⁹ *See* Glenn, *supra* note 145, at 771.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

(2) Corsica¹⁵³

We have come to the example that will surprise and disappoint the Prosecutor most. I think it will regret forever for using France as an example for comparison, because Corsica island is a unit subject to separate territorial administration. Its special status, inspired by different laws practiced in French colonies, is somewhere between Metropolitan France and these French Colonies, and it is the only example of its kind in France.

I will not take much of your time here either. I will not touch upon the changes Corsica went through with the Laws of 1982, 1991 and 2002. I will only give a picture of its current state. Corsica has its own legal existence, Assembly, and executive body.

(a) Territorial Collectivity of Corsica

The Island, named “Corsica Territorial Collectivity” (Collectivité Territoriale de Corse), is managed under a special status granted in 1991.¹⁵⁴ Think of the Marmara or Avsa islands being administered this way. The powers accompanying this status covers all fields one can think of: economy, development, financial affairs, agriculture, forestry, tourism, energy, housing, any kind of transport, education, higher education, research, professional qualifications, construction of schools of any type, environmental arrangement, environmental protection, local development, development of Corsican culture and language, art, culture, protection of historic structures which do not belong to the State.¹⁵⁵ All these fields are administered by offices which used to be of “national” nature, but now they are undertaken by local administrations that have “territorial” status.

¹⁵³ For references for minority privileges in Corsica *see*: Le Statut particulier de la Corse, www.corse.pref.gouv.fr/scripts/display.asp?P=COstatut (last visited Oct. 3, 2006); Collectivité Territoriale de Corse, www.corse.fr/institution/assemblee/?id=1&id2=47 (last visited Oct. 3, 2006); Présentation du statut de la Collectivité Territoriale de Corse, www.eurisles.com/Textes/presentation/PresStatut_CTC_FR.html (last visited Oct. 3, 2006); Vie Publique.FR – Découverte des institutions, La Corse, www.vie-publique.fr/decouverte_instit/approfondissements/approf_083.htm (last visited Oct. 3, 2006); La collectivité territoriale de Corse, www.corse.pref.gouv.fr/scripts/display.asp?P=COloi91legis (last visited Oct. 3, 2006).

¹⁵⁴ Le Statut particulier de la Corse, www.corse.pref.gouv.fr/scripts/display.asp?P=COstatut (last visited Nov. 14, 2006).

¹⁵⁵ *Id.*

(b) Assembly of Corsica

Since 1982, the problems of the Island are debated and decided by the “Assembly of Corsica,” elected by the Corsicans for a term of six years.¹⁵⁶ This Assembly holds two regular annual meetings which may last for three months each, and it can also hold extraordinary meetings.¹⁵⁷ This Assembly of fifty-one members makes its own internal status, adopts the budget and development plans of Corsica, and also supervises the “Executive Council,”¹⁵⁸ which I will explain later.

Before adopting bills and decrees that concern Corsica, the French Parliament has to consult the Assembly of Corsica.¹⁵⁹ The Assembly answers in one month; under urgent circumstances this term may be shortened to fifteen days upon the request of the Governor of Corsica.¹⁶⁰ The Assembly is empowered to make amendment proposals to the French Government with respect to laws and arrangements that concern Corsica. In case the Assembly can not function any more, French Government can dissolve it through a Cabinet decree.¹⁶¹ In that case, assembly elections can be launched in two months.¹⁶² Within this period, the Executive Council undertakes the current proceedings and its decisions are implemented subject to approval by the Governor of Corsica.¹⁶³

Discussions in the Assembly usually take place in French; however some members may prefer to speak in Corsican.¹⁶⁴ The Assembly made a decision on June 26, 1992, which declared Corsican as the official language of the entire Island (Article 1).¹⁶⁵ This decision also stipulated that Corsican—“the language of the Corsican people”—and French—“the official State language”—would be the two official languages of the Corsican Assembly (Article 2).¹⁶⁶ According to Article

¹⁵⁶ Collectivité Territoriale de Corse, www.corse.fr/institution/assemblee/?id=1&id2=47 (last visited Nov. 14, 2006).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Jean Chiorboli, *La langue corse*, <http://www.transcript-review.org/section.cfm?id=232&lan=fr> (last visited Oct. 3, 2006).

¹⁶⁵ Assemblée de Corse, *Motion de 26 juin 1992 sur l'officialisation de la langue corse*, www.tlfq.ulaval.ca/ax1/europe/corsemotion.htm (last visited on Nov. 14, 2006).

¹⁶⁶ *Id.*

5, students at all levels would have Corsican language courses maximum of three hours a week. However, there has been no implementation and since then this decision has had no consequences.

(c) Executive Council

The executive council is composed of a chairperson and six members, selected from among the members of the Corsican parliament.¹⁶⁷ The council is in charge of administrating the Corsican Territorial Collectivity in every field, and particularly in fields like economic, social, educational and cultural development as well as environmental arrangements.¹⁶⁸ The president and members of the Assembly can attend Parliamentary sessions and meetings, and the Assembly can overthrow the Council through a vote of no confidence.¹⁶⁹ But before this happens, in order to avoid any gaps, the political groups at the Assembly ought to have reached an agreement over a new Executive Council.

The president of the Executive Council represents Corsican Territorial Collectivity.¹⁷⁰ He is the disburser of the Island, presents an annual report to the Assembly, and is empowered to bring any kind of proposal to the Prime Minister of France concerning public services in the Collectivity.¹⁷¹ The Economic, Social and Cultural Council of Corsica serves as a consultative body to the Assembly.

To sum up, Distinguished Judge, the Corsican Island is like a state within a state. Alsace-Moselle is also a state within a state. It allows the use of German, the language of its historical enemy, at the court houses. It has a multi-legal system. This is unbearable for even the most tolerant nation-states. There is no mistake in analogy, but this is just like validating Arabic language and Syrian Law in Hatay, and Russian language and Muscovite Law in Kars and Ardahan. This is the kind of country which the indictment quotes as an example for Turkey.

¹⁶⁷ Présentation du statut de la Collectivité Territoriale de Corse, www.eurisles.com/Textes/presentation/PresStatut_CTC_FR.html (last visited Nov. 14, 2006).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

G. Seventh Issue

Let us go on. The Prosecutor makes another assertion on page five; this page is a very productive one indeed. This is also completely ideological. It says:

[The Report] create[s] a new minority definition along with a new application . . . other than the concept of ‘minority’ accepted with the Treaty of Lausanne [and] will cause chaos and . . . lead to a result that will endanger the unitary structure of the State, which includes a lot of ethnic groups within it, as well as the territorial unity and the integrity of the nation.¹⁷²

For the sake of law, I ask: It says it would cause chaos, destroy integrity. It again mentions an intent, a possibility. What do all these mean? What kind of criminal law is this? When one says “It’s cloudy” should we immediately conclude that it might rain, a lake might emerge, birds might come, and bird flue develop?

Let us go on. The Prosecutor mentions these important arguments in only three and a half lines, but does not elaborate on them. Of course, it does not prove them by giving examples from our Report. Although we published our Report seventeen months ago, Turkey has not yet encountered such hazards. I do not know what might happen in seventeen years.

But I do know that the Prime Minister Erdogan is constantly using the terminology and method of the Report to keep the Kurds happy: In Hakkari and elsewhere he said that all the sub-identities be they Kurdish, non-Muslim, Turk, Circassian etc. should be respected and that they are under the supra- identity of being a Citizen of Turkey.¹⁷³ What else was there to say? Who in Turkey knew about the notions of sub and supra identity before our Report?

But let’s continue to elaborate on the arguments of the indictment to show how incorrect they are and prove them wrong by giving examples from the Report. Let us show the Prosecutor how an indictment should not be written.

(1) First of all, just where did we propose a new definition of minority in our Report? Which sentence or which paragraph? There is no such sentence or paragraph.

¹⁷² Indictment, *infra* app. B, at 83.

¹⁷³ Arsen Avagyan, The Problem of Identify in Turkey, July 12, 2005, <http://www.newneighbors.am/news.php?cont=3&rg=2&date=07.12.2005&month=13&year=2005>.

Then, how can the Prosecutor see a thing which does not exist? The reason is that because it wears ideological eyeglasses it cannot see certain things. In addition, it does not know the difference between the “existence of minority” which is a sociological phenomenon and the “status of minority” which is a legal category.

Distinguished Judge, in our Report we did not say that Lausanne should not be implemented or should be amended. On the contrary, we argued that it is not implemented and that it should be.¹⁷⁴ This is exactly what we wrote in our Report. We have doubts whether the Prosecutor read the Report or forgot it because its investigation took exactly ten months.

(2) The Prosecutor wrote that we jeopardize the “unitary structure of the State . . . and the indivisible unity of nation” in our Report.¹⁷⁵

Let me ask the same question again: In which line and with which words did we do that? If the Prosecutor is unable to answer this question, it would set forth an unfounded claim. If an ordinary man had done what the Prosecutor did, this person would be called a “slanderer.” This is why this indictment has from the very beginning been nothing but an *Iftira-name* (calumniation).

Distinguished judge, we did exactly the opposite.

(a) The Report does not want to change the unitary structure of the State and it does not even include the word “unitary” as this is none of our business. In addition, although I don’t want to linger over this subject, I really don’t know where to start to correct this indictment. The indictment uses the word “unitary” in the wrong way and confuses it with the concept of centralism; furthermore, it also confuses centralism with indivisibility. These are completely different subjects. Let me explain.

The United States is not a unitary but a federal State. However it is not divided at all. Look at Iraq’s current situation; it was not federal but unitary. In both federal and unitary State structures, democracy and dictatorship can be seen. For example, the Union of Soviet Socialist Republics (“USSR”) was a federation but there was no democracy. Spain is not a federation but a unitary state; yet it is one of the most tolerant democracies of the world. Last month Mr. Aguado, the No. 2 general of the Spanish Land Forces, attempted to intervene in democ-

¹⁷⁴ Report, *infra* app. A, at 69.

¹⁷⁵ Indictment, *infra* app. B at 83.

racy; he was sentenced to house arrest first and then dismissed from his post. He will be retired in March.¹⁷⁶

(b) Further still, I am bored of telling this, and I hope you do not get bored of listening to me, but our Report does not include either the words federal or confederal even once. So, what is this all about? But that is what the indictment argues.

In the Report, we defended the indivisibility of the State/homeland because we base our arguments on the discipline of international relations which argues that if the States of the World are re-structured according to ethnic and linguistic lines, this will go on like mitosis division. Here is what we wrote in the Report word by word: "The State being an 'indivisible entity with its territory' is a very natural and undisputed point throughout the world."¹⁷⁷

Now, what is wrong with this sentence? Which part of our Report divides the country/homeland? This indictment is a statement of slander, is it not? Why is it so? What are we doing here? What are we summoned here for?

(3) The "integrity of the nation."¹⁷⁸

Distinguished Judge, political science rules that State/Homeland is "undivided" and nation is "united." In the same way that independence is an attribute of the State, freedom is an attribute of the nation. The nation is free, the State is independent.

"Undivided" refers to a whole without any parts and attachments. There is no nation which is not made up of parts, except maybe for Iceland, Korea, Portugal, and maybe one more. All nations are made up of different ethnic and religious groups. Even Japan is not homogenous. You cannot render a nation a "whole" by denying the existence of these groups. On the contrary you just tear it up and put it into pieces as each part has its own original personality, in other words, sub-identity. People cannot put up with the denial of their sub-identity. They rebel. People rebel when you give them a wrong tea cup; why would they not rebel when their identities are denied?

These various sub-identities might create "unity" only if there is a supra identity that embraces all of them and that does not reflect any

¹⁷⁶ Times Online, <http://www.timesonline.co.uk/article/0,,13509-1976805,00.html> (last visited Nov. 14, 2006).

¹⁷⁷ Report, *infra* app. A at 69.

¹⁷⁸ Indictment, *infra* app. B at 83.

particular ethnic or religious identity. That is why if you reduce nation into “oneness” you destroy the unity. Oneness is the enemy of unity.

No one can write an indictment without knowing this. If you do, the result is inevitably like this.

(4) I am thrilled when I read some parts of the indictment. It is as if the Prosecutor develops new laws and theories. It says the following—I’m trying to correct the sentence a little bit: “As the country has a central/unitary structure physically, people who live there have also a unitary structure.”¹⁷⁹ It says this for our Constitution.

The indictment starts writing a “Constitutional Law” book this time. But a completely wrong one. I don’t know where to start as there are too many mistakes:

(a) Again, it confuses centralism with unitary structure. I’ve given sufficient information on this issue.

b) Secondly, by writing “[that the] Turkish Republic is a unitary state with its country and nation” it applies the adjective of unitary to the nation, which is in fact an attribute of the State.

Distinguished Judge, let me explain this way: In cases of freedom of expression, your colleagues in Strasbourg reject any case if the defendant State argues and proves that “*national security* of the country” and/or “*territorial integrity* of the country” is at stake. However, when defendant State defends itself by arguing that “*integrity of the nation* is at stake,” the plaintiff wins the case and gets compensation according to Article 10 of the European Convention of Human Rights.

The reason is the following: When the issue is to limit individual rights, the notion of the “*integrity of nation*” is alien to European countries, although the first two concepts are respected there. Such a concept cannot be accepted because if it were, there would be no democracy. In the second half of the 19th century the definition of democracy was “the will of the majority,” and this definition became “*respect for sub-identities*” in the second half of the 20th century.¹⁸⁰ We are in the 21st century now.

(5) This indictment quotes the famous Article 2 of the Spanish constitution and does it with great imprudence.¹⁸¹ I do not know what to say about it. Let me cite you the said article and explain it: “The Constitution is built on the indissoluble unity of the Spanish nation,

¹⁷⁹ *Id.* at 83.

¹⁸⁰ Greater Democracy, <http://www.greaterdemocracy.org/archives/000015.html>; Unrepresented Nations and People Organizations, <http://unpo.org/article.php?id=4823> (last visited Nov. 14, 2006).

¹⁸¹ *See* Indictment, *infra* app. B at 85.

the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to autonomy of all the nationalities and regions of which it is composed, and solidarity amongst them all.”¹⁸²

Let me ask the question again: When we discuss whether our Report constitutes a crime—which should not be discussed due to freedom of expression—why use the Spanish constitution? The indictment at this point starts writing a “Comparative Politics” textbook this time.

Besides, it would be extremely reasonable if I, myself, had quoted this Article, as this three-line Article completely disproves the arguments of the Prosecutor but confirms mine in two points.

(a) Please pay attention: the adjective used for nation is “unity.” The adjective used for homeland is “indivisible.” This is just like I said two seconds ago, word for word. I do not understand at all why the Prosecutor included this Article which in fact disproves its arguments.

I cannot really believe that the indictment goes on as follows: “As can be seen, the Spanish Constitution, like the Constitution of the Republic of Turkey, includes the principle of the indivisibility of the nation.”¹⁸³ Would it be an exaggeration if I said that the Prosecutor is making fun of us? This is not an indictment but a statement of mockery.

(b) Please pay attention again: After a semicolon, Article 2 of the Spanish Constitution states that the nation is made up of autonomous nationalities and regions.¹⁸⁴

What did I say above? I gave a much lighter version of the same statement. I said that the nation is made up of various ethnical and religious sub-identities. Some call themselves Turks, some Muslims, some Kurds, some Alevis, etc. The Spanish Constitution takes a huge step further and says that the nation is made up of nationalities and autonomous regions which are guaranteed by the constitution itself.¹⁸⁵

Heaven forbid, if we had repeated this Article in our Report, in other words, if we had said that in Turkey the nation should be made up of autonomous nationalities and regions, what in the world would happen to us? The answer is very simple indeed: We would be separatists.

I will return to this point later. But before ending this issue, I have to show you what kind of Spain is cited by the Prosecution so

¹⁸² CONSTITUCIÒN [C.E.] [Constitution] art. 2§2 (Spain).

¹⁸³ See Indictment, *infra* app. B at 85.

¹⁸⁴ CONSTITUCIÒN [C.E.] [Constitution] art. 2 (Spain).

¹⁸⁵ See *generally* CONSTITUCIÒN [C.E.] [Constitution] (Spain).

that the Indictment is displayed for your eyes.¹⁸⁶ As previously mentioned, it states that “[t]he Spanish nation is composed of Autonomous Nationalities and Autonomous Communities.”¹⁸⁷ Furthermore, “Autonomous Communities can use their own languages along with Spanish.”¹⁸⁸ The Constitution also allows Autonomous Communities to “hoist their own flags on their public buildings”¹⁸⁹ along with the Spanish flag. It provides for representation of the autonomous communities in the Senate “in accordance with proportional representation principle.”¹⁹⁰ “Autonomous Communities shall have their respective assemblies, which -in addition to governing their own communities- may submit Bills to the Spanish Parliament.”¹⁹¹ The Constitution also empowers autonomous communities to levy taxes.¹⁹²

These autonomous communities have their specific statutes. For instance let us have a look at the Autonomy Statute of the Basque Country, dated 1979.¹⁹³

Article 17: To ensure order in the autonomous territory, there shall be an autonomous police force. The command of the police forces shall lie with the Government of the Basque Country. State security and armed forces are competent in cases with extra- or supra-Community nature (like entry into and exit from the State, foreigners, customs, airports, smuggling etc.)¹⁹⁴

¹⁸⁶ I thank my assistant Elçin Aktoprak for the fundamental information she provided concerning Spain (*European Minorities and Turkey* her Ph.D thesis in writing). Also see www.spainemb.org/information/constitucionin.htm; http://www.lehendakaritza.ejgv.euskadi.net/r48-2312/en/contenidos/informacion/concierto_economico/en_467/concierto_i.html; Pedro Ibarra ve Igor Ahedo, “The Political Systems Of The Basque Country: Is A Non-Polarized Scenario Possible In The Future?”, *Nationalism and Ethnic Politics*, Vol. 20, 2004, p. 355-386.

¹⁸⁷ CONSTITUCIÓN [C.E.] art. 2 (Spain).

¹⁸⁸ CONSTITUCIÓN [C.E.] art. 3/2 (Spain).

¹⁸⁹ CONSTITUCIÓN [C.E.] art. 4/2 (Spain).

¹⁹⁰ CONSTITUCIÓN [C.E.] art. 69/5 (Spain).

¹⁹¹ CONSTITUCIÓN [C.E.] art. 87/2 (Spain).

¹⁹² CONSTITUCIÓN [C.E.] art. 133/2 (Spain).

¹⁹³ THE STATUTE OF AUTONOMY OF THE BASQUE COUNTRY [Constitution] (Basque Country).

¹⁹⁴ THE STATUTE OF AUTONOMY OF THE BASQUE COUNTRY [Constitution], tit. 1, art. 17 (Basque Country).

Article 38/1: “The laws of the Basque Parliament shall be subject to the control of the Constitutional Tribunal concerning their compliance with the Constitution only.”¹⁹⁵

Article 40: “Basque Country shall have its own autonomous treasury and budget. In order not to distort the inter-regional balance in Spain, a portion of the budget shall be transferred to the central government to meet general expenses.”¹⁹⁶

Now let us come to Spain for the practice concerning mother tongue and education of mother tongue. I will only cite examples from the Basque Country and Catalonia.

Basque Country

Since the 1982 Act of Normalization of the Basque Language, four models have been implemented in the Basque Country:

1. Model A: The curriculum is in Spanish, some subjects are in Basque (*Euskara*).
2. Model B: Spanish and the Basque Language are used 50-50.
3. Model D: The curriculum is in Basque; Spanish language is one subject.
4. Model X: The curriculum is in Spanish.¹⁹⁷

In this system, the student can choose any model he wants.¹⁹⁸ The most commonly used two models are models B and D.¹⁹⁹ Model X appears to be fading away since in certain areas it is necessary to know the Basque language to find a job.²⁰⁰ On the other hand, the number of those who only speak Basque is almost none.²⁰¹

Catalonia

The Catalan language has been taught at primary schools in the Autonomous Community of Catalonia since 1978.²⁰² After 1982, tests on Catalan language were also included in the university examina-

¹⁹⁵ THE STATUTE OF AUTONOMY OF THE BASQUE COUNTRY [Constitution], tit. 2, art. 38/1 (Basque Country).

¹⁹⁶ THE STATUTE OF AUTONOMY OF THE BASQUE COUNTRY [Constitution], tit. 3, art. 40 (Basque Country).

¹⁹⁷ Estibaliz Amorrortu, *Bilingual Education in the Basque Country: Achievements and Challenges after Four Decades of Acquisition Planning* 12, www.rci.rutgers.edu/~jcamacho/363/amorrortu.pdf (last visited Oct. 21, 2006).

¹⁹⁸ *Id.* at 13.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1.

²⁰² Jude Webber & Miguel Strubell i Trueta, *The Catalan Language: Progress Towards Normalisation* 34, The Anglo-Catalan Society, 34 (1991).

tion.²⁰³ Since the Language Law of 1983, it is decided that at least one course will be taught in Catalan.²⁰⁴

In Catalonia, Catalan is the official language along with Spanish (Article 3 of the Autonomy Statute for Catalonia, dated 1979).²⁰⁵ The Catalan language—the “own language of Catalonia”—is the official language of all Generalitat,²⁰⁶ Catalan Territorial Administration, Local Administration, and all official departments of the Generalitat. Catalan and Spanish will be used as official languages by the Administration (Language Law of 1983, article 5).²⁰⁷

The documents that will be conveyed by the Generalitat to other official departments within Catalonia will be in the Catalan language. The documents that will be sent outside of Catalonia will be in Spanish, or where necessary, in the official language of that administration (Decree dated 1987 and numbered 254, article 5).²⁰⁸ All announcements, minutes and relevant documents that concern the meetings of local administration departments will be in Catalan, and no translation will be provided (Law dated 1987 and numbered 8, article 2).²⁰⁹

Judges, public prosecutors, other employees at courts, parties of court cases and their representatives can use the official language of the Autonomous Community in writing and verbally.²¹⁰ The court documents drafted in the official language of an autonomous community are valid without further need for translation into Spanish (Organic Law dated 1985 and numbered 6, articles 2, 3, and 4).²¹¹

The names of official places in Catalonia will only be in Catalan, except for Vall d’Aran (Language Law of 1983, article 12).²¹² Catalan is the language of education at all levels. In primary education, chil-

²⁰³ Dr. Thomas Jeffrey Miley, *The Constitutional Politics of Language Policy in Catalonia, Spain*, 29 ADALAH’S NEWSLETTER 2, Oct. 2006, available at <http://www.adalah.org/newsletter/eng/oct06/ar1.pdf> (last visited Nov. 16, 2006).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 56.

²⁰⁶ “Generalitat” is a concept representing the administration of Catalonia in general. It is used to cover the parliament, the president and the whole government. For this structure, see Generalitat de Catalunya, Institutional Map, <http://www.gencat.net/generalitat/eng/guia/mapainstit.htm> (last visited Oct. 6, 2006).

²⁰⁷ Webber & Trueta, *supra* note 202, at 60.

²⁰⁸ *Id.* at 61.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 64.

²¹² *Id.*

dren can choose between Catalan or Spanish, but they are obliged to learn them both (Language Law 1983, Article 14).²¹³

I just finished introducing a summary of the Spanish example given by the Office of the Public Prosecutor for indivisibility of nation. I think this summary is sufficient.

H. Eighth Issue

The Prosecutor on page seven of the indictment accuses us of using the term “*Türkiyeli*” (people of/from Turkey, citizen of Turkey) rather than “Turk” as a supra-identity.²¹⁴ Later it said, “In other words, here the word ‘Turkish’ is used not in a racial sense but in the meaning of a bond of citizenship.”²¹⁵

There are so many things here to say but again I don’t know where to begin. The best would be referring to them one by one.

(1) Why is the Prosecutor concerned with the proposal in our Report to use “*Türkiyeli*” rather than “Turk” as the supra-identity? I could not understand this at all. This is not a crime in Turkey. If it is a crime, then I would like to learn in which paragraph of which article of which law this is considered a crime.

The indictment cites no law violated; it only alleges that what we said is wrong. This is what the Prosecutor writes in its “Counter-Report.” If there is freedom of expression in this country, I can propose any term I like for any concept I like as long as it does not contain an insult or violence.

Am I interfering with the Prosecutor because it is not using “*Türkiyeli*?” Am I filing a criminal complaint against him with the demand of a 5-year imprisonment? I am not, because I believe that one cannot interfere with anyone else’s freedom of expression—as I keep repeating, as long as it does not incite to crime or violence or involve an insult—and I won’t allow anybody to interfere with mine. I will not, because I know that this is in line with the laws of the Republic of Turkey. I’m sure that at the end of this case, the Prosecutor too, will learn.

(2) The Prosecutor claims that in Turkey the term “Turk” is not used in the racial context. What is this analysis doing in this indictment? Does an indictment write theses? A Constitutional Law thesis?

²¹³ *Id.* at 64, 66.

²¹⁴ Indictment, *infra* app. B at 86.

²¹⁵ *Id.*

The indictment is saying completely incorrect things. In fact it is very seldom that one comes across so many wrongs put together in a single text. We wrote in the Report, and I explained to him in length, but it must have been in vain. Leave aside the fact that the term “Turk” is alienating for those who are not Turks or who do not consider themselves a Turk in this country. I am saying one more time clearly, the term “Turk” in this country is used both as the name of the supra-identity and also as the name of the dominant ethnic/cultural group. One can simply open the 12-volume Meydan Larousse Grand Dictionary and Encyclopaedia—which is the largest dictionary published in Turkey—and find under the entry “Türk,” the following sentence: “A person of Turkish race.”²¹⁶ It is as simple as that.

But I do not think this is a simple thing. If the term “Turk” is not the name of an ethnic group, then the Prosecutor must answer the following four questions:

(a) What does “Domestic foreigners (Turkish citizens)” mean? This term was used in the “Regulation For Protection Against Sabotages” dated December 28, 1988, as it listed which categories were most likely to carry out sabotages. If this did not mean non-Muslim citizens, then what did it mean? Did the Prosecutor not claim that the term “Turk” was used for citizenship only?²¹⁷

(b) What does “of Turkish origin and of Turkish citizenry” mean? This term is used to describe the characteristics of the Deputy Principal to be assigned by the Education Ministry to a foreign or minority private school, as listed in Article 24/2 of the Law Number 625 still in force now.²¹⁸ Once you say “of Turkish citizenry” why do you repeat it by saying “of Turkish origin?” Did not the indictment claim that the term “Turk” was used for citizenry only?

(c) What does “Turkish citizen with foreign nationality” mean? This term was used in the Istanbul Administrative Court Number 2 decision, dated April 17, 1996.²¹⁹ Whom did the court mean when it used this term? It was our Greek Orthodox citizens. Did the indictment not claim that the term “Turk” was used to indicate citizenship only? Has anybody in this court room or in entire Turkey heard of a stranger “legal” term than this? A person is either a foreigner or a citizen.

(d) What does “Foreigners are not permitted to acquire immovable property in Turkey” mean? This sentence is from the Court of Cass-

²¹⁶ 19 MEYDAN LAROUSSE DICTIONARY AND ENCYCLOPAEDIA 471 (1986).

²¹⁷ Indictment, *infra* app. B at 86.

²¹⁸ Law No. 625 art. 24/2 (Turk.).

²¹⁹ Istanbul Admin. Court No. 2 (April 17, 1996) (Turk.).

ation Grand Chamber dated May 8, 1974. Who did the Court of Cassation have in mind while using it? It used it for the administrators of the Balikli Greek Orthodox Hospital Foundation established by our Greek Orthodox citizens. Did the indictment not claim that the term “Turk” is used to indicate citizenship only?

I’m passing this since there are many more things in the indictment.

(3) Again about the supra-identity, the Prosecutor gives examples from some countries and says very interesting things. It says, “In Spain, the State calls its citizens Spanish [Ispanyol] and not ‘people from Spain’ [Ispanyali].”²²⁰ Has an ethnic group called “Spanish” been discovered in Spain that I do not know about? If the answer is negative, what is the difference between “Spaniard” and “Spanish” or “from Spain?”

The Prosecutor said, “The State of France calls its citizens French, not people from France.”²²¹ Sorry, but what is the difference between the two? Or was an ethnic group called “Frank” that I did not know about recently discovered in France? In fact the Ottomans used to call the citizens of France “Fransevi” and this is the very same word with “Fransiz” (French).

Further, the Prosecutor claimed, “England calls its citizens English, and not people from England.”²²² Distinguished Judge, this is really one of the peaks of the indictment. It is such a highlight that it dazzles one’s eyes since the term “English” used by the Prosecutor is not used by the people in England. Since Wales united under one parliament with England in 1707,²²³ the people in England says “I’m British.” This was 300 years ago.

I did not call this indictment an *Icat-name* (invention) for nothing. I recommend that anyone travelling abroad and stopping by England never ask a citizen of England on the street “Are you English?” Because if they do not realize that you are a foreigner who does not know the land at all, they can make you suffer dearly. Because unless he belongs to the English ethnic group, this person would harshly respond: “No, I’m Scottish/Welsh/Irish!” Because for the Irish, Welsh

²²⁰ Indictment, *infra* app B at 86.

²²¹ *Id.*

²²² *Id.* at 87.

²²³ Act of Union, Eng.-Wales, 1536; Act of Union, Eng.-Scot., 1707, http://Encarta.msn.com/encyclopedia_761568020/Act_of_Union.html (last visited Nov. 14, 2006).

and Scottish elements of this country, being called an Englishman is a pure insult and may lead to major incidents.

In this country, all sub-identities are united under the British supra-identity. "English" is a mistaken term that some in Turkey think is the supra-identity of that country. It is used to indicate the sub-identity of those who are of English origin only. Indeed using the sub-identity is not in the interest of the English-origin people because they are afraid to provoke people of other sub-identities. Asking a person "Are you English?" in that country is the same as asking a man on the street in Turkey "Are you a Kurd, an Alevi?" Indeed it is much worse.

Also in the indictment this country is referred to as England, but its name is the United Kingdom of Great Britain and Northern Ireland. If it had used only Great Britain or only United Kingdom it still would be acceptable, but England does not work. Don't listen to those who are chanting "England, England" in soccer games. Those are the Skin-heads.

Indeed the most comprehensive encyclopedia published in Turkey was AnaBritannica (Encyclopedia Britannica) and it says the following in the first sentence for the entry "England": "The prominent country of the Great Britain and the United Kingdom of the Northern Ireland." The encyclopedia article continues: "One cannot talk about the Constitutional existence of England Scotland and Wales have their own ministries and Northern Ireland is autonomous in its domestic affairs, England does not have its own rights or institutions. Official statistics on foreign trade, tax and defence are part of the statistics of the United Kingdom. The only institution that is English is the Anglican Church."²²⁴ Then how can people, who lack even this encyclopedic information, put forward convictions, introduce examples, introduce rules and then demand five-year imprisonment for us for writing an academic report?

I'll not continue since there is a lot more to talk about. Let me just say the following and thus we will mention something that the Prosecutor said right among all these wrongs. His last example is correct. In fact the German state calls its citizens German (Alman) and not of/from Germany (Almanyalı).²²⁵

There are two ways to nation-building: the French Method and the German Method. The first one is also called the "territorial method" or

²²⁴ 11 ANABRITANNICA [Encyclopaedia Britannica] 571 (1988).

²²⁵ See *Alman*, in *DICTIONARY OF PHRASE AND FABLE* (1898), available at <http://www.bartleby.com/81/539.html>.

“Renan method.”²²⁶ Indeed the term “*Turkiyeli*” in our Report is a pure reflection of this method. The second one is the German Method and is also called the “Blood Method.”²²⁷ I don’t know whether explaining this much is enough. Let me finish this point by saying: The situation in Germany has changed. As the number of people from Turkey only has reached 2.5 million,²²⁸ and the number of minorities and foreigners increased in Germany, the German State had to dilute the Blood Method. For example, now not only those born to German parents but those who were born on German soil (territorial method) can get citizenship as well.²²⁹

Here the important question is: What do we call a Turk who assumes German citizenship by applying or by being born there? Do we call him a “German Turk?”

Indeed, there cannot be such thing as a Bulgarian Turk but a Turk of Bulgaria, not a Greek Turk but a Turk of Greece. What kind of a response would you get if you call, say, a Turk who emigrated from Bulgaria to Turkey a “Bulgarian Turk?” Indeed these people strongly protested Fikret Bila, the Ankara representative of daily *Milliyet* for using the term “Bulgarian Turk” in his column.²³⁰

Here, Distinguished Judge, for all these reasons, one cannot say Turkish Armenian but Armenian of Turkey, not Turkish Greek but Greek of Turkey, not Turkish Kurd but a Kurd of Turkey. But *Türkiyeli* suits just fine, like Iranian, Iraqi, Syrian, Laotian, American, Thai,

²²⁶ Geoff Eley and Ronald Grigor Suny, *Becoming National: A Reader* 41-55 (Oxford U. Press 1996). In a lecture in 1882, Ernest Renan summed up his views on what constitutes a nation. “A large aggregate of men, healthy in mind and warm of heart, creates the kind of moral conscience which we call a nation. So long as this moral consciousness gives proof of its strength by the sacrifices which demand the abdication of the individual to the advantage of the community, it is legitimate and has the right to exist.” Ernest Renan, *Qu'est-ce qu'une nation?* (What is a nation?), Lecture at Sorbonne, (March 11, 1882), available at <http://www.tamilnation.org/selfdetermination/nation/renan.htm>. The territorial approach, in sharp contrast to the blood approach, centers on the idea that all citizens living between the borders of a given state are equal, regardless of their ethnic or religious belonging.

²²⁷ The German Method to nation building defines the concept in terms of ethnicity. Paul Halsall, *Music and Nationalism* (1997), <http://www.fordham.edu/halsall/mod/NATMUSIC.html>.

²²⁸ American Renaissance, Turkey Splits Germany, http://www.amren.com/mtnews/archives/2004/12/turkey_splits_g.php (last visited Nov. 14, 2006).

²²⁹ Veysel Oezcan, *Germany: Immigration in Transition*, <http://www.migrationinformation.org/Profiles/display.cfm?id=235> (last visited Nov. 15, 2006).

²³⁰ Derya Sazak, *The Ombudsman of the Readers*, DAILY MILLIYET, Mar. 28, 2005 available at <http://www.milliyet.com/2005/03/28/ombudsman/aokur.html> (last visited Feb. 23, 2007).

Austrian, Canadian, or Chinese. Yes, Chinese. In China, there is no ethnic group called Chinese.²³¹ The name of the ethnic group that constitutes ninety-two percent of the people is the “Han” group.²³² “Chinese” is the supra-identity of this country that was drawn by the territorial method. Just like the term *Türkiyeli*.

Leaving everything aside, I wonder whether the Prosecutor has ever thought of the following. What if the Greek Parliament said: “If the word Turk is not an ethnic term, then in our country, too, everybody is Greek because this is not an ethnic term either.” What if, God forbid, Greece introduces an “Article 66” [of the Turkish Constitution]²³³ to its Constitution and says: “Everybody who is tied by citizenship to the Greek state is a Greek?” What will then happen to the 120,000 Western Thrace Muslim Turks? Are they going to become “Greek”?

More interestingly, when we keep saying: “There is no Kurdish issue but a Southeast issue,” or, when we tell people who call themselves Kurds: “No, you are not Kurds, you are Southeasterners (*Güneydogulu*)” we think we are saving the country from getting divided. Then are we dividing the country when we talk on a bigger scale and use the term “*Türkiyeli*”? Is it not very clear that then and only then we are actually saving the country? What kind of a double standard is this? Where is the logic? This is all what the Report was about, Distinguished Judge.

I earlier said that I would come back to the “intent” issue. I return now because the Prosecutor invents intent on every page. As I repeatedly said before, a jurist cannot question intent. He has no such authority. On page eight of the indictment, it says: “When suggesting that the term *Türkiyeli*, a territory-based term, instead of Turk, is the Report unaware that the name of the country, Turkey (*Türkiye*), also has an ethnic association, or is it yet too early for such a warning?”²³⁴

How can a man of law say such a thing? Making such a warning requires great courage for two reasons:

(1) While saying “Is it too early to make such a warning yet?” the Prosecutor openly implies: “The report writers actually wanted to

²³¹ Chinese Culture Center of San Francisco, Ethnic Minorities in China, <http://www.c-c-c.org/chineseculture/minority/minority.html> (last visited Nov. 14, 2006).

²³² *Id.*

²³³ “Everyone bound to the Turkish state through the bond of citizenship is a Turk.” Turkish Constitution art. 66.

²³⁴ Indictment, *infra* app. B at 87.

name this country Kurdistan but since they don't have the courage to do so now, for the time being they are satisfied with the term '*Türkiyeli*.' When the time comes, they will suggest Kurdistan as well." Should I here remind of the Zanardelli Report again?

This is abuse of duty. No one is allowed to do that. At the end of my remarks, we will certainly return to this.

(2) The second reason may be more interesting. The indictment claims that the term "*Türkiyeli*" has an ethnic connotation. Again we are in the world of symbols, projections, probabilities, and dangers. Unfortunately, the only missing thing is criminal law itself.

Fine, but did the Prosecutor not repeatedly say that the term "*Türk*" had no ethnic meaning at all? If the term "Turk" does not have an ethnic meaning, then "*Türkiyeli*" won't either. How can the Prosecutor openly contradict himself between pages seven and eight of the same text?²³⁵

To sum up, we introduced the term "*Türkiyeli*" for the sake of this country, and we did something very good. This is the only concept that embraces all citizens of the Republic of Turkey without making any discrimination. We are all *Türkiyeli* here. Those who like it will use it, and those who do not like it will not use it. But one cannot interfere with those who use it. Can anybody say something to a person who says "I'm a Turk?" If he says he is a Turk then that is it.

But what if he does not? What if he cannot? What if he is not a Turk or considers himself a Turk? What shall we do? Kill him? Or shall we force him to say that he is a Turk? Let me ask the Prosecutor which one should we do? The first one, the second, which one? Whether we use "Turk" or "*Türkiyeli*" is for the country to discuss and come to a decision in time. How can the indictment attempt to restrict our freedom of expression? From which article of which law does it draw this authority? Is the Prosecutor opening a case against us because it did not or could not open cases against the bullies who tore our scientific and official Report in front of TV cameras?

On this issue the indictment also refers to Ataturk. Fine. In fact I, too, wanted to come exactly to this. Let me ask the Prosecutor now: Does it think that it was us who introduced the term "*Türkiyeli*" for the first time in Turkey?

Let me inform him: That person was Ataturk. Was the Prosecutor aware of this? Please consider the following articles:

²³⁵ See generally, Indictment, *infra* app. B at 87.

(1) “Article twelve: Except for exceptional circumstances in Turkey the Turkiyelis are free to travel.”

(2) “Article thirteen: Education is free. Every Turkiyeli is eligible to take public and private education.”

(3) “Article fourteen: Schools and all such institutions are subject to supervision and inspection of the State. The education of the Turkiyeli must be in unity and order.”

(4) “Article fifteen: All Turkiyelis are eligible to establish all types of companies to be involved in commerce, industry and agriculture in line with laws and regulations.”

What are these? From where were they taken? The date was July 1923. These are from the first draft Constitution amending some articles of the 1921 Constitution and mentioning, for the first time, that the administrative form of the State is a “Republic.” This is in Mustafa Kemal Pasha’s own handwriting.²³⁶ If there is separatism in saying “*Turkiyeli*”, it was first initiated by Mustafa Kemal. I’m not making a comment; I’m only presenting this to the attention of the Prosecutor.

I. Ninth Issue

Let us come to the section in our Report concerning the Constitutional Court.

I believe the Prosecutor is unjust to us when he claims that we presented the Constitutional Court as an obstacle to democracy.²³⁷ We did the same with the Court of Cassation, the administrative courts and the Council of State as well. We stated that some decisions by these institutions were discriminatory and thus were hurting democracy in Turkey.²³⁸ How did the Prosecutor miss these points? Is this not neglect of duty?

Distinguished Judge, I’m an academician. I can say anything I like without insulting or inciting to crime or violence. I can make any criticism I like. This is why I get a salary from the State.

²³⁶ TÜRKİYE CUMHURİYETİ İLK ANAYASA TASLAĞI [FIRST CONSTITUTIONAL DRAFT OF THE REPUBLIC OF TURKEY] (Istanbul, Boyut Yayın Grubu [Dimension Publication Group], October 1998). This draft was discovered by Can Dündar’s team as they were conducting a research at the Cankaya Palace Library for a documentary film and later published with a prologue by Dr. Dündar; it was originally conveyed to me by my “accomplice” professor Ibrahim Kaboğlu.) See www.candundar.com.tr. Dr. Dündar is the best known documentary maker, TV and press journalist, and columnist in Turkey.

²³⁷ See Indictment, *infra* app. B at 84.

²³⁸ Report, *infra* app. A at 69.

I did not commit a crime. But the indictment here commits 3 crimes:

(1) Abuse of duty. Criticizing the Constitutional Court decisions is not a crime. The Prosecutor attempted to silence criticism only because it did not suit his ideology. This is a crime, and akin to a pure dictatorship mentality.

(2) Neglect of duty. If these comments were denigrating the Constitutional Court, then why were they published in the Supreme Court's 2003 "Constitutional Law" periodical, pages 61-93? The Prosecutor should have filed a lawsuit against this Court also. This is neglect of duty.

(3) Denigration of the Constitutional Court. My remarks, which were interpreted as denigrating the judicial organs of the State, were quotes that I took from the paper that I read in the presence of the President and members of the Constitutional Court on April 25th, 2003, at the symposium organized to the honor of the 41st anniversary of the Court. Now the Prosecutor seems to say, "You, Constitutional Court. This person humiliated you. You are not even aware of it. What kind of carelessness is this? I'm immediately saving your honor and filing a lawsuit." How did the Constitutional Court not get the message when the Prosecutor did? So the Constitutional Court was unable to make a complaint all these years? Is the Prosecutor acting as a caretaker of the Court?

J. Tenth Issue

Distinguished Judge, finally let me say why I call this pseudo-indictment an *Itiraf-name* (document of confession).

(1) The Prosecutor says at the end of page ten,

The demands put forward as regards minorities in this document have a great deal of similarities with those provisions of the Sevres Treaty, which led to the invasion of our land. In the presence of such similarities, there is no point in finding it odd being carried away by the Sevres Paranoia.²³⁹

The last sentence is the climax of the indictment: "In the face of such a resemblance, one should not find it strange that one falls for the Sèvres paranoia." This is an unbelievable sentence Distinguished Judge. This is a sentence that would tremendously ridicule not only the Prosecutor, but anybody in Turkey. The Prosecutor, also reflecting the

²³⁹ Indictment, *infra* app. B at 91.

general atmosphere of the entire indictment, finds itself close to the Sèvres paranoia! Of course this is up to him. I personally would not want to say, not even think of, such a thing. The indictment does so.

(2) On the other hand, the indictment accuses our Report of resembling the minority provisions of the Sèvres Treaty. Let me repeat. Even if for a moment this should be the case, why would this be a matter for the indictment? The Sèvres Treaty was made in 1920 and was buried in history in 1923. Even if there were similar language with such a historical text, why should this bother the Prosecutor? Who says this is a crime?

But this is such a case that I will not drop it here with only this much. Here there is an invention again. I am asking the Prosecutor: Which sentence of the Report resembles which provision of the Sèvres Treaty on minorities? Can the Prosecutor cite one single article? It cannot. If it could, it would have already done so in the indictment.

This leaves only two possibilities: One, the Prosecutor read the Sèvres Treaty's articles on minorities but could not find any resemblances to our Report. Or two, the Prosecutor was so affected by the Sèvres Paranoia environment that he did not have the courage to read the Treaty. Since the Report was also repellent, the Prosecutor thought it would be similar to the Sevres Treaty, and decided to claim that one "resembles" the other.

I am leaving it up to the esteemed court to decide which possibility is stronger. But let me draw the attention of the esteemed court to the fact that the Prosecutor kept repeating such void allegations throughout the indictment. It claimed that the Report resembled Sèvres but the indictment is mute when we ask which sentences resembled which articles. It claimed that the Report introduces a new minority definition but the indictment remains mute when we ask in which sentence this was proposed. It claimed that the Report was endangering the unitary structure and integrity of the country but the indictment remains mute when we ask in which sentence this was implied. It claimed that the Report was committing a crime by introducing the term "*Turki-yeli*" rather than "*Türk*" as the supra-identity, but when we ask which article of which law makes this a crime, the indictment remains mute. It claimed that the Report was denigrating the Constitutional Court but when we asked in which sentence and with what word have we done so, the indictment remains mute. It claimed that the Report was inciting animosity and hatred among people but when we ask with which sentence we did that, the indictment remains mute. We are all tired now. I will not give any more examples.

Because of all this, this is not an indictment but a *pseudo-indictment*. This style of indictment in our country was left behind back in the military coup periods.

For all these reasons, Distinguished Judge, this pseudo-indictment reminded me of great novelist Yasar Kemal's²⁴⁰ "Akcasaz'in Agalari" series. It reminded me of what Mr. Dervis said in the "*Demirciler Carsisi Cinayeti*" (Murder in the Ironsmith Market) story. Dervis Bey had Akkoyunlu Mustafa Bey's brother killed. Mustafa Bey is a feudal lord in Cukurova (Cilicia) just like himself. In response, Mustafa Bey should have Dervis Bey himself killed because the latter has no brother. Since Dervis Bey never leaves his house, Mustafa Bey can not have him killed. So instead, he gets somebody burn the heap of grain of one of Dervis Bey's laborers. Upon this incident Dervis Bey says, "You are not going to starve. Everybody will be paid for his damages. I'm not complaining about this. My complaint is that I did not deserve such a rival. I feel sorry for this."

I do not feel sorry for all the time that I could have devoted to my students and to my wife. I feel sorry that such an indictment was written against me. I think that I am qualified to be subject to a better indictment. I believe that I deserve better than a document which tries to undermine a scientific thesis but which puts itself in a worse situation in every step. I believe that I deserve a better indictment than this indictment, which invents both the action and the law and later wants me to be prosecuted according to those inventions.

If the criminal theory has lost its fundamental basis so much in this country, and if the elements of crime have been hurt so much, then I am afraid there is nobody who can do anything and there is no place left to take refuge.

But I cannot accept that there is none left. There must be some, and this counter-indictment should be a proof of that.

²⁴⁰ "Yashar Kemal (born 1922) was the most successful and widely known of modern Turkish novelists. His works which . . . include [novels, poems, articles,] short stories and essays, are local in color and infused with the spirit of Turkish folk traditions. They show the influence of world classics from Homer to Stendal, Steinbeck, and Faulkner." *Yashar Kemal*, in *ENCYCLOPEDIA OF WORLD BIOGRAPHY VOL. 8* (Gale Research 1998), available at <http://www.bookrags.com/biography/yashar-kemal/>. His Akcasaz'in Agalari series "centers on the problems of" landlords and shows the effects of the breakdown of the feudal and tribal orders." *Id.* Most importantly, Kemal tells, in the style of an epic, the story of Turkish transition from feudalism to capitalism in rural areas.

K. Conclusion

So that no other indictment attempts to do something similar again, I demand that the Prosecutor be punished in a way it deserves. I want to list the crimes he committed in this indictment and I want to file the following criminal complaint against it.

With this indictment many articles of laws were violated by ignoring the rule of law that respects human rights as stipulated in Constitutional Article 2²⁴¹ and in line with the principles of a democratic state.

1) Academic freedom and autonomy as described in the Constitution and in Art.15/3 of the 1966 UN International Covenant on Economic, Social, and Cultural Rights²⁴² were violated and the interests of the State were undermined.

2) The lawsuit filed violated the freedom of expression which is under the guarantee of the Constitution and of the European Convention.²⁴³

3) The TPC was violated by the indictment because it attempted to make analogies and also because it questioned the “intent.”²⁴⁴

4) The court was denigrated because of a very carelessly prepared file.

²⁴¹ CONSTITUTION OF THE REPUBLIC OF TURKEY art. 2 (Turk.). “The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”

²⁴² CONSTITUTION OF THE REPUBLIC OF TURKEY art. 26 (Turk.). “Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. . . .” International Covenant on Economic, Social, and Cultural Rights art. 15, Dec. 16, 1966, 993. U.N.T.S. 3. “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”

²⁴³ CONSTITUTION OF THE REPUBLIC OF TURKEY art. 26 (Turk.). “Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. . . .” Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 1, 1998, Europ. T.S. No. 155. “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

²⁴⁴ See, e.g., Turkish Penal Code [T.P.C.] art. 301/4 (Turk.) (“Expressions of thought intended to criticize shall not constitute a crime.”).

5) While the Republic of Turkey's main objective has been to become a part of the European Union, Europe has been portrayed as the enemy. This indictment and this case will serve as an obstacle to Turkey's entry into the EU. From this angle too the basic interests of the State of Turkey were hurt.

6) The indictment was written with the logic of *Millet-i Hakime* (Dominating Nation). It divides the nation in two and tries to revitalize the basic order of the Ottoman Empire that collapsed.

7) The indictment abused its duty by putting forward alternative ideological theses known to be ultra-nationalist.

8) The indictment neglected its duty by not filing in certain lawsuits against us.

9) The indictment denigrated the Constitutional Court, a judiciary organ of the State.

10) By stating that the term "*Turkiyeli*" incited people to hatred and animosity and that it is a divisive term, the indictment insulted M.K. Ataturk who first used it in four separate articles in the first draft Constitution in July 1923.

11) By attacking the freedom of expression the indictment attempted to eliminate the democratic State based on that freedom.

12) The indictment committed the crime of separatism by dividing the nation into basic (Muslim) and secondary (non-Muslim) elements.

APPENDIX A

THE HUMAN RIGHTS ADVISORY BOARD THE
MINORITY RIGHTS AND CULTURAL RIGHTS
WORKING GROUP REPORT

October 2004

(The report which was updated and approved by the General Assembly on 1 October 2004 (signed by Working Group members on July 2003)

Presented to the Prime Ministry on 22 October 2004.

1) THE CONCEPT AND DEFINITION OF MINORITY IN THE
WORLD

The concept of minority has been used in the world from the sixteenth century down to the present day. When the form of government called absolute monarchy was founded and when, approximately in the same period, religious minorities came into being (Protestants in Catholic monarchies and Catholics in Protestant monarchies), it became necessary for these minorities to be mutually protected and only then did the concept of minority emerge. After 1789, the concept of national minority was to be added to that of religious minorities.

After the European states internally settled the question of protecting these minorities, they turned outwards and engaged in efforts to protect the non-Muslims within the Ottoman Empire and thereby to intervene in Ottoman affairs. As a result, European countries came into conflict with each other and this led to the emergence of the Eastern Question.

These international protection efforts started in the form of unilateral edicts of protection (for example, the 1598 Edict of Nantes) and bilateral treaties (for example, the 1699 Treaty of Karlowitz), and moved in the nineteenth century to the phase of multilateral treaties (for example, the 1856 Treaty of Paris) and, finally, the foundation of the League of Nations in 1920 ushered in the period of "minority protection under the guarantee of an international organization." The

world continues to be in that phase, and the international mechanism of minority protection is conducted under the umbrella of such organizations as the United Nations, the Council of Europe, the European Union and the OSCE.

2) THE CONCEPT OF MINORITY IN TURKEY, ITS DEFINITION AND CULTURAL RIGHTS

Ever since the period of the League of Nations, the concept of minority has been defined by three criteria: ethnic, linguistic and religious. However, in 1923 in Lausanne, Turkey refused to accept all three of these criteria and managed to have it accepted that its non-Muslim citizens alone constituted a minority and were therefore entitled to international protection of minorities.

Nevertheless, as nearly eighty years have passed since then and the concept, definition and rights of minorities have considerably developed in the meantime across the world, Turkey is now faced with serious difficulties. Moreover, since 1990, minority rights have further widened and strengthened in terms of both space and quality.

These difficulties arise not only from the limited definition in the Treaty of Lausanne. By some sort of reservation it makes to international conventions to which it accedes, Turkey asserts an even narrower principle. In accordance with this "Statement of Interpretation," Turkey asserts in the international arena the restrictions imposed by the 1982 Constitution as well as those in the Treaty of Lausanne and declares the rights granted by conventions to which it accedes shall not apply in Turkey if they extend to any minorities other than those recognized in the Treaty of Lausanne, or if prohibited by the 1982 Constitution. Turkey's difficulties in this area can be summed up in two points.

1) This restrictive position of Turkey is increasingly at variance with the current trend in the world. After the interpretation of the UN Human Rights Committee in 1990's, the trend is not asking a country whether there are any minorities in that country but accepting that there are minorities in that state if there are groups who "differ in ethnic, linguistic or religious terms and consider such difference to be an inseparable part of their identity." However, it is up to the discretion of the nation-state whether or not to recognize them as minorities.

Here, we should immediately note the European Union has no demand whatsoever on Turkey to give minority status and rights to different cultural groups. The only requirement is equal treatment to all citizens of different cultures. This point should be well understood.

2) Turkey does not duly implement the Treaty of Lausanne either and thus even violates some of the provisions of this founding treaty of its own.

To start with, the rights granted to the non-Muslims are not fully implemented. These rights are allowed only to the three major minorities (namely, the Armenians, Jews and Greeks) and denied to other non-Muslims (for example, the right of education in Article 40 for the Syrians), while the rights granted - albeit without international protection - by Part III of the Treaty of Lausanne, to people other than these non-Muslims are effectively ignored by the State.

One example of the former case is the so-called "1936 Declaration" and one example of the latter case is the situation regarding Article 39/4 of the Treaty of Lausanne, which provides "all Turkish nationals" with the right "to use any language they wish in commerce, in public and private meetings and in all types of press and publication media". In other words, government offices are the only exception to that right. On this subject, for example because nobody was allowed to make radio and TV broadcasts in any language they wished, the third Package of Harmonisation was adopted on August 3, 2002, but, since it could not be implemented either, it became necessary to adopt a seventh Package on July 30, 2003. By the end of November 2003, the Radio and Television High Board drafted a regulation on this issue, which also envisions restrictions as to time and space.

However, if Article 39/4 of the Treaty of Lausanne is implemented, this would automatically put an end to the troublesome controversies such as those over the issue of Kurdish broadcasting, which are unnecessarily wasting Turkey's time. Such a step would bring great benefits to Turkey in four respects:

1) It is certain that Turkey will soon have to abandon the "Statement of Interpretation," which has not been of benefit to Turkey, anyway. It is important - for the concept of national sovereignty - for Turkey to do so at her own will rather than as a result of EU pressure, and this would be done by implementing the provisions of the Treaty of Lausanne, which is Turkey's own founding treaty.

2) It is inevitable that one day everyone will be able to make broadcasts in any language. In transition, rather than trying to pass new and controversial laws, providing the justification that the provisions of the Treaty of Lausanne, which already have at least constitutional effect, have been implemented would make life much easier for the State.

3) It is obvious that, in order not to create internationally protected minorities in Turkey, it is necessary to grant as wide freedoms as possible to all citizens, and this should apply to “all nationals of the Republic of Turkey.”

4) There is no doubt that it would be greatly beneficial for the unity and cohesion of the country if the Turkish State treats its own people more humanely. A country of compulsory citizens is a weak one. Ensuring the happiness of its people and turning them into voluntary citizens would strengthen the State itself. A citizen to be feared the least by the State is a citizen whose rights it acknowledges.

3) RELEVANT LEGISLATION AND PRACTICE IN TURKEY

The legislation on minorities and therefore on cultural rights in Turkey is more restrictive than the concept of minority and the minority rights in the country. The main source of this is Article 3/1 of the Constitution: “The Turkish State, with its territory and nation, is an indivisible entity. Its language is Turkish.”

The State being an “indivisible entity with its territory” is a very natural and undisputed point throughout the world. However, the concept of the “indivisible entity of the nation” is quite alien to a Westerner although it comes natural to us. Because it implies the nation is monolithic, effectively denying the various sub-identities that make up the nation, therefore contravening the essence of democracy. In the area of international human rights, the criteria used in the restriction of rights include national “security” and “territorial integrity” but not the “indivisible entity of the nation.” In cases brought to it, the European Court of Human Rights (ECHR) passes judgements of violation on grounds that “asserting the existence of minorities in the country” cannot be prevented.

In addition, it is entirely impossible to understand the phrase “Its [the Turkish State’s] language is Turkish.” A State does not have a language, but an official language. Citizens of that country speak in various languages and broadcast in these languages in addition to using that official language in their relations with the State. As a matter of fact, in the 1961 Constitution this is expressed by the words: “The official language is Turkish” (Article 3).

When the principle of the “indivisible integrity of the State with its territory and nation,” which is repeated in countless articles of the Constitution and laws, is interpreted in such a way as to reject cultural sub-identities, the legislation in Turkey becomes one that tends to as-

sume that “recognition of sub-identities” is meant to disturb the said identity, and therefore to charge those who do so with separatism and subversion. Important laws such as the Law for the Fight Against Terrorism, the Law on the Duties and Powers of the Police, the Radio and Television Law, the Law of Associations and the Law of Political Parties heavily punish “creation of minorities by asserting the existence of minorities based on ethnic and linguistic differences.”

When the Constitution is such, certain laws and regulations can bring provisions which are not compatible at all with the way in which the term “Turkish” was understood by Atatürk. For example, while listing those who may be involved in acts of sabotage, the Regulation Concerning Protection from Sabotage, issued on December 28, 1988 and applied until 1991, included non-Muslim citizens of Turkey by referring to them as “local foreigners (of Turkish nationality) within the country and people of foreign race”. Article 24/2 of Law no. 625 on Private Education Institutions, which concerns the appointment of Turkish chief deputy principals to private schools established by foreigners, is applied also to the schools of minority who are Turkish citizens. Moreover, Article 24/2 stipulates that this chief deputy shall be of Turkish origin and Turkish nationality. This provision is still in force.

The fact that non-Muslim citizens were recorded in the book of foreigners until the 1940s, that such citizens were taxed more heavily than Muslims under the Wealth Tax Law of 1942 by implementing a list “G” (the initial letter of the Turkish word for “non-Muslim”) which was not in the Law, and that admission into military schools and even civilian institutions was subject to the condition of “being a Turkish national and a member of the Turkish race” until the 1950s, all this is not simply a thing of the past. Even today, one does not encounter any non-Muslim civil servants in state institutions, including especially the Turkish Armed Forces, the Ministry of Foreign Affairs, the Police, and the National Intelligence Agency, excluding universities. These practices seriously prevent Turkey from achieving the position it deserves in the twenty-first century, and damage national unity within the country, because they reflect the usage of the term Turk in the context of race and even religion.

4) RELEVANT COURT JUDGEMENTS IN TURKEY

The Constitutional Court and Decisions for the Banning (Closing) of Political Parties

With such legislation, the Constitutional Court often adopts decisions to ban political parties.

Nevertheless, it is also true that the Constitutional Court, while making interpretations, ignores certain fundamental concepts of law thus causing further damage to democracy in Turkey.

For example, in its decision to ban the DEP in June 1994, while stating "it would not be meaningful to turn unlimited rights into limited rights and being part of the nation into being a member of a minority," the Court ignored the distinction between "negative/individual rights" (equal rights granted to all citizens) and "positive/group rights" (additional rights granted only to disadvantaged citizens). Moreover, that statement by the Court is such as to regard citizens who belong to the majority as first-class and those who belong to a minority as second-class.

Similarly, in its decision to ban the TEP, the Constitutional Court first stated that it was possible to speak of the existence of different identities but maintained its former position by immediately adding afterwards that the assertion of different identities would lead to "a tendency to break away from the whole in the course of time" (Decision banning the TEP, Case: 1979/1, Decision Number: 1980/1).

This attitude stems from a fear that recognition of the existence of people from different ethnic, religious, cultural, etc. backgrounds in Turkey would result in the fragmentation of the State.

Relevant Judgements by the Court of Cassation and the Council of State

Unfortunately, some citizens in Turkey are perceived as "foreigners." In addition to such a mistake among ordinary people, it is observed that the Court of Cassation also made (and even insisted on) this serious mistake in its judgements on the so-called "1936 Declaration" concerning non-Muslim foundations.

As a matter of fact, in a judgment delivered in 1974, the Court of Cassation General Assembly of Civil Law Departments stated that "...foreigners are prohibited from acquiring property in Turkey" and thus decided that the Balıklı Greek Hospital Foundation, which is a non-Muslim Turkish establishment, was not entitled to acquire property. After the defense lawyers pointed to this mistake, the same As-

sembly then said “It is indeed mistaken to refer in our judgement of approval to ‘the laws prohibiting foreigners from acquiring property in Turkey’ given the fact that the defendant foundation was established by Turkish citizens”, but added: “Therefore, it is now decided that the phrase in question should be removed from the judgement by way of correction, but otherwise... the appeal should be rejected” (The General Assembly of Civil Law Departments, Case: 1971/2-820, Judgement: 1974/505, Date: May 8, 1974). In other words, the Court of Cassation effectively insisted on its mistake. However, such mistakes are highly damaging to the concept of nation and bring discredit to Turkey in the international area.

Although this question of the “1936 Declaration” was corrected in the fourth EU Harmonisation Package which was adopted on January 2, 2003, the injustice still continues in practice. As a matter of fact, it became necessary to deal with the same issue in the sixth Harmonisation Package which was adopted on June 19, 2003. In practical terms, no result has yet been achieved.

Finally, although the 1936 Declaration has been abolished, it is simply grave that the Treasury, in the legal action it brought in February 2003 against the Surp Haç Armenian High School Foundation, based its claims on a decision of the “Minorities Sub-Committee at the Ministry of Interior.” When it is a question of property owned by citizens whose religion happens to differ from the majority religion, reference is made to such a sub-committee, which is not part of the legal order of the State. It is probably difficult to find a more striking example of ethnic and religious discrimination.

As for the administrative judiciary, the Second Administrative Court of Istanbul referred to a Turkish citizen of Greek-Orthodox origin as a “Turkish citizen of foreign nationality” (Case: 1995/1271, Judgement: 1996/552, Date: April 17, 1996). Moreover, when this very interesting term, which was the basis of the Court’s judgement, was brought to the attention of the Twelfth Department of the Council of State, it was not regarded as a valid ground for appeal, and the Department unanimously upheld the judgement of the local court (Case: 1997/2217, Judgement: 1997/4256, Date: December 24, 1997).

5) BACKGROUND OF THE SITUATION IN TURKEY

It is clear that the question of minorities analysed in this Report is handled from a very narrow and deficient perspective in Turkey. The fundamental reasons for this viewpoint may be summarised as follows:

- 1) Rather than keeping track of developments in the world with regard to the minority concept and law, Turkey is stuck with 1923 and moreover interprets the Treaty of Lausanne incorrectly/deficiently.
- 2) Recognition of the different identities of a minority and granting minority rights are considered/assumed to be the same. However, the former implies an objective situation while the latter is a matter of discretion for the State.
- 3) "Internal self-determination," which means democracy, is considered identical with "external self-determination," which means fragmentation, and consequently the recognition of different identities is treated to be the same as the territorial fragmentation of the State.
- 4) With respect to nation oneness and unity are considered to be the same and they are not aware of the fact that the former is gradually destroying the latter.
- 5) While speaking of the Turks as a nation, it is not realized that the term Turkish also denotes an ethnic (even religious) group.

These facts have two causes, one of which is theoretical and the other historical/political.

The Theoretical Cause: The Relationship between the Supra identity and Sub identities in the Republic of Turkey

While replacing the Ottoman Empire after it collapsed, the Republic of Turkey completely inherited the sub identities that existed within it (the various ethnic, religious and other groups). However, while the supra-identity in the Empire (the identity accorded by the State to its citizens) was Ottoman, it emerged as Turk in the Republic of Turkey.

This supra-identity tends to define the citizen with race and even with religion. For example, when our kinsfolk abroad are mentioned, people of ethnic Turkish origin are meant. In addition, it is clear one must be a Muslim in order to be considered a Turk because our non-Muslim compatriots are referred to not as Turks but simply as "citizens." In Turkey, nobody uses the word "Turk" when talking about, say, a Greek or Jewish citizen because they are talking about a non-Muslim citizen. Regrettable examples of this in state practices are sufficiently given above.

This situation alienated the other sub-identities who do not consider themselves of the Turkish race and created problems. This wouldn't have happened had the supra-identity been *Türkiyeli* ("being

from Turkey”). Because then it would have embraced all sub-identities equally without involving ethnic, religious etc. aspects, since it is fully based on “territory” and completely ignores “blood.”

The definition of citizenship in the 82 Constitution is much narrower than the one in the 1924 Constitution of Atatürk. The 1924 Constitution used the term the “people of Turkey.” This definition recalls the supra-identity which we named as “Türkiyeli,” since it also refers to the territories on which the people live. This supra-identity will embrace all sub-identities living on these territories without any exception and it will ensure that the concepts of “nationality” (being of a particular ethnic origin) and “citizenship” (the legal bond between the individual and the State) are taken up as separate and independent concepts, which used to be considered as identical terms. There is no doubt that a nation composed of “voluntary” citizens would be much more willing to embrace the State.

The Historical and Political Cause: The Sèvres Syndrome

It is known that in the early 1990s Turkey suffered from a “Sèvres Syndrome” that the country was about to disintegrate. It is disturbing, and weakening the nation, that such an argument is still put forward and even turned into paranoia. Those who argue that a Pontus State will be founded in the Eastern Black Sea region, that Turkey is governed by the Converts, or that the Phanar Patriarchate seeks to establish a Vatican-like state in Istanbul, are trying to create such an atmosphere of paranoia.

This atmosphere results in interpreting even the most innocent demands for identity in Turkey as a desire to divide Turkey and wants to immediately suppress them. This situation also invites interventions by the major Western countries because it is contrary to democracy, which Turkey has willingly agreed to implement effectively in order to join the EU. Delaying of democracy in one’s own country through such paranoia is not a service to Turkey. In particular, when it is a question of reforms to be introduced concerning the use of Kurdish, there is immediately talk about the fragmentation of Turkey, it is said that this will give new life to terrorism, and efforts are made to prevent all types of reform in such an atmosphere of paranoia. And those who do so fail to see that some circles could again be led into perceiving terrorism as the only option if reforms are hindered.

Nevertheless, the process of preparations for EU membership has brought the question of minority rights in Turkey into a very positive process despite everything. This process is a direct extension of the

legal reforms that Kemalism introduced in the 1920's and 1930's by top-down revolution to modernise the country.

Just as violent bottom-up reactions were displayed against the Kemalist top-down revolution in those years, reactions are arising today to the Harmonisation Packages. The mentality that feeds on the Sèvres Paranoia is fiercely resisting the reforms.

Anatolia, which has been home to very different cultures for many centuries, is also a cradle of great cultural and historical wealth. Following the Ottoman period with its concept of Islamic brotherhood and with a variety of identities, considerable steps were taken to create a homogenous nation with a single culture in Turkey. However, the different identities and cultures have continued to exist as a rich mosaic on the territories of Anatolia.

That policy, which was very natural in the 1920's and 1930's when the Kemalist revolution was made, is now outdated as a requirement of Atatürk's own thesis of Contemporary Civilisation. Today, contemporary civilization is not the Europe of the 1920's and 1930's but the Europe of the 2000's. Now, it is essential to review the existing concept of citizenship and to adopt the multi-identity, multi-cultural, democratic, free and pluralistic social model of contemporary Europe.

Accordingly, it is necessary to define the political and legal status of free, independent individuals who can easily use their creative capacities and cultural rights and who are conscious of their rights and obligations. This definition, which is sought to be made in a piecemeal fashion through the EU Harmonisation Laws, is possible by screening all of our laws and putting into practice the principles of:

- a- The right to individual freedoms,
- b- The right to enjoy freely economic and social opportunities,
- c- The right to participate in government, and
- d- The right to cultural pluralism.

In the context of implementing these principles:

1) The Constitution of the Republic of Turkey and all related laws must be rewritten so as to have a liberal, pluralistic and democratic content and with the participation of all organizations of civil society.

2) The rights of people with a different identity and culture to protect and develop their identities (such as the rights of publication, self-expression and education) based on equal citizenship should be guaranteed.

3) The central government and local governments must be made transparent and democratic, based on public participation and control.

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4) International conventions and basic instruments that include the universal norms of human rights and freedoms, particularly the Framework Convention of the Council of Europe, must be signed, ratified and implemented without reservation. From now on, no reservations or statements of interpretation that would mean a denial of the sub-identities in Turkey must be made to international conventions.

APPENDIX B

REPUBLIC OF TURKEY

ANKARA

OFFICE OF THE CHIEF PUBLIC PROSECUTOR

Bureau of Press**Press Investigation No** : 2004/2868**Press Case No** : 2005/815**Press Indictment No** : 2005/250*INDICTMENT**TO THE ANKARA PENAL COURT OF FIRST INSTANCE*

Litigant : Public lawsuit

Suspects : 1- Baskın ORAN, (Citizenship No: 3318783 0306) the child of Hüseyin Ekrem and Zehra, DOB: 26/07/1945, birth registry at Izmir province, Konak district, Alsancak neighbourhood, Volume 1, family no: 732, no: 7, address: Zekai Apaydın sok. No: 24 Oran, Çankaya/ Ankara.
2- Ibrahim ÖZDEN KABOĞLU, (Citizenship No: 13096627396) the child of Hüseyin Avni and Yadıkar, DOB: 10/04/1950, birth registry at Artvin province, Borçka district, Demirciler village, Volume 15, family no: 111, no: 15, address: Cevatpaşa sok. No:26 Koşuyolu, Kadıköy/Istanbul.

Legal Counsels : 1- Attorney Oya AYDIN, Ankara Bar Association, Necatibey cad. 6/145 Kızılay/Ankara.
2- Kazım GENÇ, Ankara Bar Association.

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Informants	: 1- Mahir AKKAR, the child of Cemal and Melek, DOB: 09/07/1952, 66 sok. 14/14 Emek Çankaya/ANKARA 2- Fethi BOLAYIR, Chairman of the Association for Social Thinking (Toplumsal Düşünce Derneği)
Offense	: Inciting the people to enmity and hatred Open denigration of the judicial organs of the State.
Date of offense	: 07/10/2004, 22/10/2004
Articles whose enforcement is requested	: Article 216/1 of Law No: 5237 (for both suspects) Article 301/2 of Law No: 5237 (for both suspects)
Place of Crime	: Ankara
Evidence	: Witness testimonies, decoding of a tape and minutes of the meeting.

Following the investigation conducted:

At the time of the crime, Baskın ORAN – one of the above listed suspects - was the press officer and a member of the Human Rights Advisory Board and the Minority Rights and Cultural Rights Commission, which is one of the sub-committees of the Board; and İbrahim Özden Kaboğlu - the other suspect - was a member and the chairman of the Human Rights Advisory Board.

During its session held on October 1, 2004, the Human Rights Advisory Board voted on the Report of the “Minority Rights and Cultural Rights Working Group”, which had been drafted by the “Minority Rights and Cultural Rights Commission” and is currently subject to investigation, and the Report was adopted with 7 votes against, 24 votes for and 2 abstentions. After being adopted, the Report was initially made public by suspect Baskın Oran and later on the revised version of the Report which was submitted to the Prime Ministry was made public once again on October 22, 2004, this time by both of the suspects.

In this case, it is first necessary to set out the legal basis, the establishment, duties and working principles of the Human Rights Advisory Board.

The Human Rights Advisory Board has been established based on Additional Article 5 which has been added to the “Law Amending the

Decree No: 3056 on the Organization of the Prime Ministry” through Law No: 4643 adopted on April 12, 2001.

Accordingly;

The Human Rights Advisory Board has been established to ensure communication between the relevant public institutions and the NGOs on issues relating to human rights and to function as an advisory body on national and international issues in this area. The Board shall be affiliated with a State Minister to be designated by the Prime Minister. The Advisory Board shall consist of representatives of ministries, public institutions and bodies and professional associations relating to human rights, representatives of human rights NGOs and persons who have publications and works in this field. The Advisory Board shall be chaired by a person to be elected from among them. The secretariat services of the Board shall be performed by the Human Rights Presidency. The expenses of the Board shall be met from the budget of the Prime Ministry. According to tentative Article two of Law No: 4643;

“The principles and procedures relating to the establishment, duties and functioning of the Supreme Board of Human Rights, the Human Rights Advisory Board and the delegations to be appointed to investigate human rights claims shall be laid down in a regulation to be issued by the Prime Ministry within four months following the entry into force of this law”. Following this provision, on 23.11.2003 the regulation laying down the principles and procedures relating to the establishment, duties and functioning of the Human Rights Board entered into force.

According to Article 5 of the Regulation, the duties of the Board are as follows:

- a) To issue an opinion and recommendation, as well as to give advise and to submit reports on issues relating to the promotion and protection of human rights;
- b) To issue an opinion and to advise administrative measures in order to ensure that the existing legislation and draft bills are brought into line with the fundamental principles of human rights, and the international instruments and mechanisms in this area;
- c) To ensure communication among the relevant State institutions, universities and civil society organisations on issues relating to human rights;
- d) To act as an advisory body on national and international affairs encompassing human rights;

- e) To take up the issues requested by the Supreme Board, and to conduct the necessary work and to submit an opinion;
- f) To submit reports to the Minister and the Supreme Board on the general situation of human rights violations throughout the country and prohibition of torture, freedom of thought, freedom of association as well as on other issues in the field of fundamental human rights;
- g) To submit an opinion to the Minister and the Supreme Board on international affairs relating to human rights, including racism, all forms of discrimination and xenophobia.

Again according to Article 6 of the Regulation, the working principles of the Board are as follows:

- a) The Board convenes three times per year during the first week of February, June, and October;
- b) Where necessary in emergency situations, the Board can convene upon the call of the Minister or the Chairman;
- c) The term of office for the board members is three years. After the completion of this period, they can be re-assigned;
- d) In its first meeting, the Board shall elect a chairperson, two deputy chairpersons and one reporter from among its members. The office terms of the chairman, his deputies and the reporter are three years. Those who complete their terms in office can be re-elected;
- e) In the absence of the chairperson, the Board shall be chaired by the Deputy with the highest number of votes;
- f) The meetings shall be held with one more than half of the members. The decisions shall be made with the votes of one more than half of the participating members. The Chairperson's vote shall count for two where there is equality of votes;
- g) If a board member does not attend three subsequent meetings without an excuse, it shall be considered that he has withdrawn from membership. In order to replace a withdrawn member or a member who is considered to have withdrawn, the same assignment procedures shall apply;
- h) The secretarial work of the Board shall be performed by the presidency;
- i) The expenses of the Board shall be met from the Prime Ministry's budget;
- j) The resolutions of Board meetings shall be conveyed by the Chairman to the Minister and the Supreme Board as a report.

In light of these provisions, quorum for the meetings of the Board is half of the total number of members of the Board plus one, and for

the decisions it is half of the members participating in the meeting plus one.

The number of members of the Human Rights Advisory Board (to which the suspects are also members) was 78 on 01.10.2004, according to the letter dated 23.12.2004 of the Human Rights Presidency of the Prime Ministry. In such case, according to Article 6/f, quorum for the meetings is at least 40 members, and quorum for decisions is at least 21 persons if at least 40 members have participated in the meeting.

Also according to Article 5 of the Regulation, following its activities the Board has to issue its opinion, make recommendations and report to the Minister and the Supreme Board. Apart from meeting its expenses, the Prime Ministry does not have any relation or link with Board.

The parts of the Report of the working group on minority rights and cultural rights which are subject to investigation have been cited below. However, they will also be taken up and analyzed in detail, later on.

The Report has been subject to investigation due to the following reasons;

- a) Under part 2 of the Report entitled 'The Concept of Minority in Turkey, Its Definition and Cultural Rights', it is claimed that Turkey faces serious difficulties in relation to the definition made for minorities and that Turkey has breached the provisions of the Lausanne Treaty;
- b) In the part under the heading 'Relevant Legislation and Practice in Turkey', it is claimed the principle of "national integrity" is wrong;
- c) In the part under the heading 'Relevant Court Judgments in Turkey', it is claimed the Constitutional Court undermines democracy;
- d) In the section on 'The Theoretical Cause: The Relationship between the Super Identity and Sub-identities' under the heading of 'Foundations of the Situation in Turkey', instead of the super identity of being a Turk the super identity of being from Turkey is recommended.

Below is the analysis of the Report in light of the parts mentioned above.

1- The Report claims there are mainly three types of minorities according to their ethnic origin, religion and language, that Turkey rejected all three in Lausanne and is facing difficulties in view of the developments in the definition and rights of minorities, and further-

more, that Turkey is violating the Lausanne Treaty. As an example, Article 39/4 of the Treaty has been cited in the Report. This Article grants all citizens the right to use the language they choose; however, the Report states that the implementation of this Article is restricted.

The Lausanne Treaty, which was signed on 24 July 1923 and was adopted by the TGNA on 23 August 1923 through laws numbered 341, 342, 343 and 344, is a founding document that is still valid and in force, and it is the document which certifies the independence of the Republic of Turkey in international law. The issue of minorities was the most debated issue of the Treaty, and it was taken up in 5 meetings of the first committee and 16 meetings of the sub-committee on minorities. Particularly, during the discussions of the sub-committee, attempts were made to include all minorities under the scope of the term minority, as is the case in the Report subject to investigation. So, contrary to what is alleged in the Report, there is no evolution in the definition of the term minority in terms of religion, ethnic origin and language, and the definition of the term minority was being made on the basis of these three grounds at that time as well. Despite that, according to Part 3 of the Lausanne Treaty on the "Protection of Minorities," contrary to what is claimed in the Report the minorities in Turkey are non-Muslim citizens who are identified on the basis of religious differences. Furthermore, Article 45 of the Treaty states that "the rights conferred on the non-Muslim minorities of Turkey will be similarly conferred by Greece on the Muslim minority in her territory", thereby clearly noting who is considered to be a minority in Turkey. So, in Turkey minorities are the non-Muslim citizens. Apart from them, there are no other minorities based on ethnic, religious or linguistic grounds. All citizens who are outside of the scope of the mentioned group, who have played a role in the establishment of this State and who are within these borders are the constituent elements of this State and not minorities. It is worth noting that contrary to the Report which states that the definition of a minority is based on religious, ethnic and linguistic grounds, Greece also considers religion as a criterion like Turkey.

Likewise, Article 39/4 of the Treaty of Lausanne, which is claimed to be applied insufficiently, does not cover all Turkish nationals as claimed in the report. Articles from 37 to 45, in which Article 39 is also included, are articles composed under the title "Protection of Minorities," and they are all articles that cover the arrangements related to minority rights accepted for Turkey in the Treaty. Moreover, the phrase "the provisions of the present section" also indicates these articles are applicable solely for the minorities.

On the other hand, in a communication sent to the executive secretariat after the acceptance of the OSCE Copenhagen document, Turkey has made references to the Treaty of Lausanne by explaining that “the concept of national minority included herein covers only the groups whose statuses are determined via bilateral and multilateral international instruments, and the arrangements of the Copenhagen document will be applied in accordance with the Constitution and the internal legislation”; Germany, Greece and Bulgaria have also followed the same method.

Again, taking into consideration an application of the French State will make a significant example at this point and will reveal the intent included in the Report.

The European Commission against Racism and Intolerance (ECRI) which operates under the European Council has, in a report it prepared in the year 2005, warned France about minorities and has asked France to sign the Framework Convention for the Protection of National Minorities and the European Charter for the Protection of Regional and Minority Languages. It has also criticized France for not legally accepting the concept of minority. In her response, France, the only EU member country not to sign the Framework Convention for the Protection of National Minorities, has said:

“France is an indivisible, secular, democratic and social Republic. All citizens are equal before the laws, without any discrimination based on ethnic origin, race or religion. Minority is a concept that is alien to the French laws. Conferring collective rights is contrary to the principles of indivisibility, equality and unity on which the country has been founded. A rigid handling of the concept of protection of minorities may lead to unfavourable results.”

Therefore, to make or create a new minority definition along with a new application thereof other than the concept of “minority” accepted with the Treaty of Lausanne will cause chaos, and will lead to a result that will endanger the unitary structure of the State, which includes a lot of ethnic groups within it, as well as the territorial unity and the indivisible unity of the nation.

The Report which is the subject of enquiry is a document prepared by Baskın Oran, one of the suspects. In the article titled “*Globalization and Minorities*” written by the suspect in the year 1994, the same opinions on the Treaty of Lausanne and the minorities were put forward. However, in his work named *The Western Thrace Question in Turkish-Greek Relations*, the suspect introduces a different interpretation to the issue of minorities, and says:

“Turkey resisted these requests relentlessly. In the end, she accepted the minority protection obligations of the same type applied to other countries of Eastern Europe (and also to Greece) on the condition that they would be applicable only for the non-Muslim minority. These minority protection obligations constitute articles 37-44 of the Lausanne Peace Treaty. Article 45, which is the last article of Section III Protection of Minorities, says:

‘The rights conferred by the provisions of the present Section on the non-Muslim minorities of Turkey will be similarly conferred by Greece on the Muslim minority in her territory.’ Hence, the young Turkish State has, in addition to not conferring any minority rights other than those conferred by the other countries, also kept the Muslim minority out of the scope of the concept of minority and has once again provided assurance for the Muslims of the Western Thrace (despite the existence of the Greek Sevres) with the last article of the section. As will be recalled, severe provisions beyond these standard articles were included in the Ottoman Sevres. The Turkish committee at the Lausanne Conference objected with an unrelenting stance to the non-standard minority protection provisions such as establishment of a minorities commission in Istanbul, which was attempted to be imposed upon the young Turkish state. In addition, they managed to get two very significant compromises. In addition to ensuring that only the non-Muslim minorities were included in the Treaty, they introduced another provision which was not included in the standard minority protection treaties of the League of Nations period, and with Article 45 Turkey consented to provisions of Articles 37-43 only on the condition of reciprocity with Greece.”

As can be seen, in this work written by the suspect, it is clearly stated that in Turkey the concept of minority exists only on the basis of non-Muslims, and that Articles 37-45 of the Treaty of Lausanne should be applicable only to these minorities; hence, there are no errors or violations in the implementation of the treaty articles, and therefore there is nothing which requires the filing of a lawsuit.

2- In the Report, it is said: “. . . [H]owever, the concept of the “indivisible entity of the nation is quite perverse to a Westerner although it comes naturally to us. It implies the nation is monolithic, effectively

denying the various sub-identities that make up the nation and therefore contravening the essence of democracy. In the area of international human rights, the criteria used in the restriction of rights include national security and territorial integrity but not the indivisible entity of the nation. When the principle of the “indivisible integrity of the State with its territory and nation,” which is repeated in countless articles of the Constitution and laws, is interpreted in such a way as to reject sub-identities, the legislation in Turkey becomes legislation that tends to assume the recognition of sub-identities is meant to disturb the said identity, therefore charging those who do so with separatism and subversion.

In Article 3/1 of our Constitution which is still in force, it is said “the Turkish State, with its territory and nation, is an indivisible entity.” As known, nation is one of the elements that form the state. The indivisible unity of the nation, which is one of the fundamental tenets of the Republic of Turkey, was described by Atatürk:

“The form of our state today has been established in the most developed way which disposes of the old forms going back to centuries. The common bond which the nation considers between its members in order to continue its existence has changed its centuries old form and nature, in other words, the nation has been gathered under the individuals with a bond of Turkish nationality in stead of a religious or sect-based bond.”

The general principles included in Section I of the Constitution which also include this Article constitute the fundamental tenets of the Turkish state. According to this, the Republic of Turkey is a Unitarian state with her territories and nation. Here the term nation is not one ethnic origin but a community made of citizens who live in that country, who have a common history, with all the elements that make up that nation. In other words, it is emphasized that the country physically has a central/Unitarian structure, just as those who live in that country also have a Unitarian structure. Therefore, there is no denial of sub-identities. Hence, there is no contradiction between the principles of the indivisibility of the nation and cultural diversity.

In this section of the Report, it is expressed that the concept of indivisible entity of the nation is quite perverse for a Westerner. However, Article 2 of the 1978 Spanish Constitution says: “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.” As can be seen, the Spanish Constitution, like the Constitution of the Republic of

Turkey, includes the principle of the indivisibility of the nation. It is obvious that desiring the abolishment of one of the fundamental tenets that form the existence of a State under the pretext of protecting the minorities will disturb the unity, and the existence of such a tenet will not be hard for Westerners to understand.

3- The Report includes this opinion: "...nevertheless, it is also true that the Constitutional Court, while making interpretations, ignores certain fundamental concepts of law and thus causes further damage to democracy in Turkey."

As known, according to Article 146, the Constitutional Court is one of the supreme courts, and its duties are listed in Article 148. In addition, in accordance with Article 18/4 of the Law numbered 2949 on the Establishment of the Constitutional Court and its Trial Procedures, the Constitutional Court also has the duty to hear the cases related to banning political parties. Discussion of a decision rendered by a judicial body on a legal basis is a very common, even an essential practice for law. However, the Report not only discusses and criticizes the decisions given by the Supreme Court, it also shows the Constitutional Court as an obstacle in the realization of democracy. Yet, with many of its decisions the Constitutional Court has made contemporary interpretations which clear the path for democracy and freedoms in Turkey.

4- Again, in the Report it is suggested under the title "The Theoretical Cause" that as a result of the emergence of the sub-identity of being Turkish as a super-identity, the other sub-identities have been alienated, and suggests the super-identity should be *Türkiyeli* (being from Turkey) in stead of being Turkish.

First of all, it should be clarified that the word Turkish here is not used in an ethnic-sociologic meaning. It covers all the citizens of the Republic of Turkey regardless of their ethnic origins in a legal sense. Similarly, as in Article 88 of the 1924 Constitution, Article 66 of the current Constitution of the Turkish Republic includes the provision that "everyone bound to the Turkish state through the bond of citizenship is Turkish." These transparent arrangements make it clear that the essential thing is the bond of citizenship. In other words, here the word Turkish is used not in a racial sense, but in the meaning of a bond of citizenship. On the other hand, the fact that the word Turkish connotes a nation not a race is also included in international conventions. As expressed above, the Treaty of Lausanne is an instrument with which the existence of the Turkish State in the international arena has been affirmed. It is still in force and valid. For instance, articles 38, 39 and 40 of the Lausanne Treaty use the term Turkish citizens, not citizens

of Turkey. Again, in Article 38 of the Constitution of the Republic of Turkey which regulates the oath of the President of the Republic of Turkey, the phrase “against every danger which may menace the Turkish state” also uses the expression Turkish state.

Again in the Report, it is said the citizenship definition of the 1982 Constitution is narrower than that of the 1924 Constitution, the 1924 Constitution uses the term “the inhabitants of Turkey.” This term only refers to the inhabited territories, and brings to mind the super-identity of being from Turkey. Yet, this definition does not bring to mind the definition of being from Turkey as claimed in the Report. Because, the term inhabitants used here means people. That is, it defers to the people of Turkey, and even this definition emphasizes the unity of the people, that is the inhabitants composed of more than one ethnic origins.

Likewise, England calls its citizens English, not people from England. The state of Germany calls its citizens German, not people from Germany. The state of Spain calls its citizens Spanish, not people from Spain. The state of France calls its citizens French, not people from France. The people living in these countries are not composed of a single race.

For example, the French nation, that is the ethnic elements forming France, consists of Celts, the Flemish, Alsatians, Catalans, Basques, Bretons, Normans and others. It does not cause any problems for a French citizen to say he is French when saying “Je suis Français” nor does an English citizen saying “I am English” create any problems. What is the reason behind asking that a Turkish citizen calls himself/herself a *Türkiyeli* (a person from Turkey), or is it pertinent to expect it? When suggesting that the term *Türkiyeli*, a territory-based term, instead of Turk, is the Report unaware that the name of the country, Turkey (*Türkiye*), also has an ethnic association, or is it yet too early for such a warning?

On the other hand, the concepts examined individually above are the most fundamental, essential elements of the Turkish state, and various institutions of the State have been charged with the duty to protect these elements through many laws, particularly the Constitution.

Implementation of law provisions that are in favour:

On the date of the offense, which is October 17, 2004 and October 22, 2004, the Turkish Penal Code numbered 765 was still in force.

Whereas on the date when the suit was filed, the penal code numbered 5237 which became effective on June 1, 2005 was in force.

The offense of provoking people to resentment and hostility, which is claimed to have been committed by the suspect is included in Article 312/2 of the Law numbered 765 and provides for a penalty of imprisonment for 1 year to 3 years.

Article 312/1 of the law numbered 765 has been arranged in Article 216/1 of the Law numbered 5237, and provides for a penalty of imprisonment for 1 to 3 years for such actions.

Again, the offense of public humiliation and degradation of the intangible entity of the judiciary is regulated in Article 159/1 of the Law numbered 765, and provides for a penalty of imprisonment for 1 year to 3 years.

Article 159/1 of the Law numbered 765 has been arranged in Article 301/2 of the Law numbered 5237, and provides for a penalty of imprisonment for 6 months to 2 years.

Since the penalties provided for the offense of provoking the public into resentment and hostility are the same in both laws, Law no. 5237 does not constitute a situation in favour of the case in terms of penalty. However, the element of the offense in Article 312/2 of Law no. 765 is "in a way that will be dangerous for public order." Whereas in Article 216/1 of Law no. 5237, the element of the offense is provided for as "emergence of a clear and imminent danger for public security." In that regard, in terms of the elements of the offense, the application of Article 216/1 of Law no. 5237 are in favour of the suspects.

However, as the upper and lower limits of the penalty provided for in Law no. 5237 for the offense of insulting the intangible entity of the judiciary are lower, the application of Law no. 5237 would be in favour of this action.

The assessment of the procedural aspects of voting and adoption of the Report

According to the result of the voting, there were thirty-three participants in the meeting where the Report was voted on October 1, 2004. Although this number means that quorum had been achieved (twenty-one being sufficient for a decision), it should be noted that the number should have been forty in order for the meeting to be held. This means the number of participants foreseen in the regulation in order for a meeting to be held was not observed, and despite that fact, the Board convened with a number of members less than envisioned.

Despite the lack of compliance with this procedural condition, the meeting was held.

Although in their defense, it was expressed that all meetings of the Board had been open to press and public opinion, and the issues in the Report had previously been expressed in a similar environment, therefore not constituting an offense. The opinions put forward during the work of the Board were never made a subject to any investigation. What leads to an offense here is the approval of the Report despite the lack of quorum and despite this having been voiced by some members, thus making the Report appear as if it were valid and its approval had had complied with the procedures, and then announcing the Report as if it were prepared by the Prime Ministry and as if it included the confessions of the State although the Board had no relation with the Prime Ministry. Additionally, during the announcement of the Report to the public through a press statement, it was presented as the corrected form, aiming at the creation of the image that it had been written by the will of all board members. However, according to the minutes of the meeting held on October 1, 2004, there were oppositions to the Report and the scope and extent of the modifications needed on the Report were not concretely clear. That is to say, it is not clear which modifications made in the second Report have met which demands of which members; since after the modifications, the Report was not re-voted. Despite all these points, the Report was presented to the public opinion as if it had been corrected, as if it had met all the demands and had been voted in favour despite the lack of quorum. In the same sense, the e-mail sent by suspect Baskın Oran on October 4, 2004 to the Sovereignty of Law Association, the chairperson of which is a member of the Board, says:

“The Report has not been given its final form. Therefore, it has not been right to have sent it. I will give it its final form within a few days and send it to you. To avoid reactions, could you please tell the members that it is not the finalized form yet. Because this is how we talked in the last meeting.”

This shows that not only it is openly accepted the Report, which had been voted and claimed to have been adopted despite the lack of quorum, was not the finalized version. Also it could lead to reactions in the current form. Even though this was the case, the Report was announced to public without being re-negotiated and as if it were the final version.

Assessment as regards Article 159/last paragraph of Law No 765 and Article 301/last paragraph of Law No 5237:

In both article 159/last paragraph and article 301/last paragraph, it is stipulated that expressing opinions for the purpose of criticism does not constitute an offense. However, what is done in the Report is not mere criticism or expression of opinion but something beyond. The fundamental elements of the Republic of Turkey have been targeted; and in doing so, the Report was presented as if it had been prepared by the Prime Ministry.

Discussing the offense of inciting people to Enmity and Hatred:

This offense, which has been regulated under both article 312/2 of Law No 765 and article 216/1 of Law no. 5237, is a dangerous offense. Like it is stipulated in the judgment of the General Penal Board of the Court of Cassation (2004/8-201 merits, No 2005/30): “It is sufficient for the offense to include a clear and present danger; and danger is a concept linked with probability. Or danger is nothing but a probability. Similarly, the instant when the danger materializes is the time when it can be considered to present a clear and present danger exceeding the level of disturbances and disorder that can be seen under normal conditions of public order so that the State has the right to interfere with the situation. In the definition of the adjectives clear and present: clear refers to something so evident there is no doubt about the existence of danger, whereas present refers to the closeness of the possibility of the creation of a damage.

A word of Persian origin, kin (grudge, hatred) is defined as “furious enmity against a person or a thing, which necessitates vengeance; rancor.” Again a word of Persian origin, düşman (enemy) means “a person who has mal-intentions towards another, who hates him, and who tries to harm that person” whereas “düşmanlık” (enmity) means “the feeling of grudge against the subject nurtured hostility to, aiming at giving harm to or defeating that subject through deliberate act and consideration.” Therefore, it is sufficient for the perpetrator to only incite hatred and enmity against a fraction of the society.

The concept of society expressed in the article should be considered as “a group of people that gather around common sentiments, interests, ideologies and moral ideals or share the same values” in accordance with the criminal law.

To incite means “an explicit psychological pressure imposed on others to act in a certain way”. It refers to a behaviour which has the objective of setting a person into action, and which aims at a direct

psychological effect on the person's will". Both in article 312/2 of Law no. 765, and article 216/1 of Law no. 5237, the act of inciting should be conducted in a way to create danger for the public order.

On the other hand, the act of inciting should be performed openly thus explicitly.

In conclusion, when universal principles and criteria are taken into account, in order for the offense laid down in article 312/2 of Law no. 765 and in article 216/1 of Law no. 5237 to take place:

- People should be incited to enmity or hatred against one another;
 - This act of inciting should be based on social class, race, religion, sect or regional differences,
 - The acts undertaken during the act of inciting should be such that there may be a potential disruption of public order;
- And finally,
- The perpetrator should have the intention to commit that offense.

When the reactions and the indignation after its announcement are taken into account, all these elements exist in the Minority and cultural rights Report prepared by the suspects.

DEFENSE:

İbrahim Özden Kabaoğlu, one of the suspects, used his right to remain silent in his statement while the other suspect, Baskın Oran, rejected the accusation, defending that there were no elements of criminal nature in the content of the Report.

On the other hand, the Report, which constituted the subject of the investigation, mentions the Sevres Paranoia. The Sevres treaty is the treaty terminating the Ottoman State. With this treaty, the country's territory was partitioned and invaded. However, this Treaty is not recognized by the Republic of Turkey. Therefore, sensitivity towards such a document [the minority Report] should not be considered odd. The demands put forward as regards minorities in this document have a great deal of similarities with those provisions of the Sevres Treaty, which led to the invasion of our land. In the presence of such similarities, there is no point in finding it odd being carried away by the Sevres Paranoia.

For the motives expressed above, on behalf of the public, it is demanded that suspects Baskın Oran and İbrahim Özden Kaboğlu be tried and punished with the penalties below which correspond to their aforementioned acts:

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1. On charges of inciting people to hatred and enmity: according to article 216/1 of Law no. 5237, which corresponds to their acts;
2. On charges of openly denigrating judicial organs of the State: according to article 301/2 of Law no. 5237, which corresponds to their acts;

14/11/2005

(signed)

NADI TÜRKASLAN 27591

Public Prosecutor

Note: It has been concluded that no additional prosecution was necessary about suspects Ahmet Telli and friends on charges of taking on an offense.