



(In) Effective Remedies from Strasbourg

Turkey and the European Court of Human Rights

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Introduction

On 5 March 2018, the Conference entitled “Turkey and the ECtHR: (In)effective Remedies from Strasbourg” was held in Germany bringing together leading commentators from across Europe including: 70 lawyers, judges, NGO representatives, and academics. The group met to debate the question of whether the Court is providing appropriate remedies to Turkish citizens who have suffered violations of their rights since the attempted coup of July 2016.

The conference was structured in two parts: first, it addressed whether the ECtHR could provide effective remedies to address injustices committed in the Turkish legal system, following the declaration of a state of emergency (SoE); and, second, it considered what approaches the Court should adopt concerning tens of thousands of cases that had been struck out as being inadmissible, due to the existence of what are regarded as effective domestic remedies in Turkey.

Ulrich Schellenberg, President of the German Bar Association (Deutscher Anwaltverein, DAV) opened the conference. The first panel comprised of Riza Türmen, former judge of the European Court of Human Rights; Michael O’Boyle, former Deputy Registrar of the ECtHR; and Başak Çalı, professor of the Hertie School of Governance, Center for Global Public Law at Koç University Istanbul. The second panel was constituted by Francoise Hampson, Emeritus professor of the University of Essex School of Law.

This report provides is not only a written record of the discussion; but it also provides some recommendations for the ECtHR and lawyers to consider when responding to the existing crisis in Turkey.

Conference Sponsors

This conference was co-organised and co-sponsored by the following organisations:

- German Bar Association (DAV)
- European Association of Lawyers for Democracy and World Human Rights
- The Law Society of England and Wales
- Lawyers for Lawyers
- Observatoire International des Avocats

Assistance was also provided by lawyers Ayse Bingol (Media Legal Defence Initiative & Middlesex University, Turkey Litigation Support Project) and Zeynep Kivilcim (Assoc. Prof. of Public International Law, Fellow at Berlin Institute for Advanced Study).

Conference Programme

13:45 – 14:00 Welcoming speech

- Ulrich Schellenberg, President of the German Bar Association

14:00 – 15:00 First Panel

“Does the ECtHR provide an effective remedy to the citizens of Turkey in applications concerning the events relating to the attempted coup and the subsequent declaration of a state of emergency?”

- Riza Türmen, former judge of the ECtHR
- Michael O’Boyle, former Deputy Registrar of the ECtHR
- Başak Çalı, Hertie School of Governance, Center for Global Public Law, Koç University Istanbul

15:00 – 15:30 Coffee Break

15:30 – 16:15 Second Panel

“Should the Court adopt a different approach, and if so, what should it be?”

- Françoise Hampson, University of Essex
- Piers Gardner, Monckton Chambers, ECHR-Specialist

NB: Due to unforeseen circumstances, Piers Gardner was unable to attend the Conference. His prepared remarks are attached to this report in Appendix A

16:15 – 17:00 Questions and Answers

17:00 Closing remarks

- Tony Fisher, Chair of the Human Rights Committee at the Law Society of England and Wales

Reception

Panelists

Başak Çalı



Başak Çalı is Professor of International Law at the Hertie School of Governance and Director of the Center for Global Public Law at Koç University, Istanbul. Her research interests are international law, human rights law, and the prospects of global public law in a multi-level legal order. Çalı is the Secretary General of the European Society of International Law, Editor-in-Chief of Oxford University Press United Nations Human Rights Case-Law Reports, a Fellow of the Human Rights Centre of the University of Essex and a Senior Research Fellow at the Pluricourts Centre at the University of Oslo. She has been a Council of Europe expert on the European Convention on Human Rights (ECHR) since 2002. She has trained members of the judiciary and acted as a litigation advisor and trainer to non-governmental organisations and lawyers on European and comparative human rights law. She received her PhD in International Law from the University of Essex in 2003.

Francoise Hampson



Francoise Hampson taught at the University of Dundee from 1975 to 1983 and has been at the University of Essex since. She was an independent expert member of the UN Sub-Commission on the Promotion and Protection of Human Rights from 1998-2007. She has acted as a consultant on humanitarian law to the International Committee of the Red Cross and taught at Staff Colleges or equivalents in the UK, USA, Canada & Ghana. She represented Oxfam and SCF (UK) at the Preparatory Committee and first session of the Review Conference for the Certain Conventional Weapons Convention. Professor Hampson has successfully litigated many cases before the European Court of Human Rights in Strasbourg and, in recognition of her contribution to the development of law in this area, was awarded Human Rights Lawyer of the Year jointly with her colleague from the Centre, Professor Kevin Boyle. She has taught, researched, and published widely in the fields of armed conflict, international humanitarian law and on the European Convention on Human Rights. She is currently working on autonomous weapons, investigations into alleged violations in situations of armed conflict and on the use of an individual petition system to address what are widespread or systematic human rights violations.

Michael O'Boyle

Born in Northern Ireland. Deputy Registrar of the European Court of Human Rights 2016-2015.



He has extensive experience working with the ECommHR and ECtHR in different legal capacities since 1977. He was educated in Queen's University, Belfast, the Harvard Law School (Kennedy Scholar), and the International Institute of Human Rights, Strasbourg. He is also a Barrister-at-Law and former Lecturer in Public Law, Faculty of Law, Queen's University. Co-author (with Professors Harris, Bates and Buckley) of *The Law of the European Convention on Human Rights*, Oxford University Press in 2014 (fourth edition forthcoming September 2018). He is Honorary Bencher of the Inn of Court of Northern Ireland and Honorary LLD conferred by Queens University Belfast in 2015. He was appointed Special Adviser on human rights to the Government of Georgia on behalf of the SG of the Council of Europe in March 2015.

Rıza Mahmut Türmen



Rıza Mahmut Türmen (born 17 June 1941, Istanbul, Turkey) is a former judge of the European Court of Human Rights and currently an MP for Izmir in the Turkish Parliament, with the Republican People's Party. He graduated from Istanbul University law faculty in 1964. He took a Master's degree in at McGill University, Montreal, before doing his doctorate at the Faculty of Political Science at Ankara University. Türmen has held various positions at the Turkish Ministry of Foreign Affairs, which he joined in 1966. In 1978, he was appointed Turkey's representative to the International Civil Aviation Organization. He was ambassador to Singapore in 1985. From 1989 to 1994, he worked in Ankara as the Director General responsible for the Council of Europe, United Nations, Organization for Security and Co-operation in Europe and human rights. From 1995 to 1996, he was ambassador to Switzerland at Bern. Between 1996 and 1997, Türmen was the Permanent Representative of Turkey to the Council of Europe. From 1998 to 2008, he was the Turkish judge for the European Court of Human Rights. Since his retirement, he has written a column for the Turkish newspaper Milliyet. Rıza Türmen is also known as a campaigner for the independence of the judiciary.

Moderator: Tony Fisher



Tony Fisher is the Chair of the Human Rights Committee at the Law Society of England and Wales and senior partner at Fisher Jones Greenwood LLP. He has acted as an advocate in many cases in Strasbourg under the European Convention on Human Rights, including two Grand Chamber cases and a large number of cases involving Turkey. He is a fellow of the Human Rights Centre at the University of Essex and a member of the Advisory Board of the Essex Business and Human Rights Project. He is also a member of the Law Society Council representing Essex and a member of the Law Society International Committee.

Opening Keynote and Introduction

Ulrich Schellenberg, President of the German Bar Association provided the opening remarks outlining the events that had taken place since the attempted coup.

At present, hundreds of lawyers have been detained, and around 150,000 civil servants have been dismissed in Turkey following the coup of July 2016. The Council of Bars and Law Societies of Europe (CCBE) has reported that, as of November 2017, 555 lawyers had been jailed in Turkey, with more in the past half year.¹

The ECtHR can only act after domestic remedies have been exhausted, a hurdle made more difficult with Turkey's establishment of a "State of Emergency Inquiry Commission" in 2017 to investigate claims arising from the emergency decrees passed during the state of emergency. The ECtHR received over 92,000 petitions from Turkey during 2017 and had dismissed over 27,000 as inadmissible. In comparison the Inquiry Commission, comprised of only seven members, has received over 100,000 cases since being established in 2017. Of those processed (some 6,400 to date), only 100 (less than 2% of the concluded cases) applicants have been reinstated in their job, while all remaining applications were rejected, which questions whether its establishment was purely to prevent ECtHR taking jurisdiction for claims.

Many commentators had complained that the reticence of the ECtHR to accept claims overlooked the reality that the Turkish justice system was unable and/or unwilling to provide effective remedies. The Constitutional Court (TCC) has been refraining from challenging actions under state of emergency decrees, and has a huge backlog of cases. Even when the TCC does make a relevant ruling, Turkish criminal courts have shown resistance in terms of implementing such rulings. This was most noticeable in the Mehmet Altan and Sahin Alpay cases, where lower courts ignored the TCC's rulings to release the two journalists, claiming the higher court lacked jurisdiction.²

Similarly, Turkey used the state of emergency to derogate from its obligations under the European Convention of Human Rights (ECHR) on 21 July 2016. Article 15 of the ECHR allows governments "the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention" in exceptional circumstances.³ However, there must be a situation threatening the life of the nation that merits the call for such a declaration. In addition, the measures taken under the state of emergency must be directly related to the state of emergency as well as proportionate. However, the state is not exempt from fulfilling other obligations under international law or their obligations under the ECHR. Turkey extended the state of emergency a further six times, notifying the Council of Europe (the CoE) each time that its notice of derogation is still valid. This has been causing many to believe that the coup was used as a "convenient excuse" to bring harsh and unjust measure into effect.

¹ <https://ahvalnews.com/rule-law/turkey-jailed-555-lawyers-european-bars-say-letter-erdogan-their-release>

² See postscript for a commentary on the judgments in these two cases which were published after the conference.

³ European Court of Human Rights (ECtHR), "Derogation in time of emergency," https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf

Mr. Schellenberg noted that the current state of affairs made it difficult for the ECtHR to gain the trust of Turkey and Turkish citizens, and thanked the conveners for providing an opportunity to discuss remedies.

Panel I: “Does the Court provide an effective remedy to the citizens of Turkey in applications concerning the events relating to the attempted coup and the subsequent declaration of a state of emergency?”

Riza Türmen

Riza Türmen, former judge of the ECtHR, discussed two questions in response to the panel topic:

1. Are remedies to victims of SoE decrees effective, and
2. How does the Court protect the principles of democracy and human rights as being the main purpose of the Convention system?

The Court does not apply same criteria, as other international courts do, for exhaustion of domestic remedies. The African Convention of Human Rights specifies that the existence of “pervasive human rights violations” obviates the exhaustion requirement. In the Rome Statute, which guides the International Criminal Court, the exhaustion requirement is fulfilled when a state is unable or unwilling to carry out a prosecution. This may include proceedings for the purpose of shielding the allegedly guilty person, unjustified delay, or proceedings not conducted independently or impartially.

(In-)Effective Domestic Remedies

In response to the first question posed, Dr. Türmen questioned the domestic remedy offered by the Inquiry Commission. Of the seven members, three were appointed directly by the Prime Minister, one by the Minister of Justice, one by the Interior Minister, and only two by a council of judges and prosecutors - a group also tightly controlled by the government. A spokesperson for the government announced in March 2018 that of the 105,151 applications received by the commission, 1,562 had been decided, with only 41 resulting in the applicant being returned to their job.⁴

Dr. Türmen noted that time was also a concerning feature when determining the effectiveness of a domestic remedy. In the nine months since the Inquiry Commission had been established, only 1.5% of cases had been decided. Considering the number of applications made, at the current rate, it would take 45 years to complete the remaining applications lodged with the Inquiry Commission to date. Dr. Türmen consequently rejected the claim that the Commission provided a reasonable prospect of success or an effective remedy.

Dr. Türmen also questioned the TCC as an effective remedy, due to the fact that it decided it had no jurisdiction to evaluate emergency decrees. The TCC had also dismissed two of its members based solely on “the information of the social circle”. Finally, the 11 Jan 2018 Altan and Alpay decisions, which relate to unlawful detention and violation of the freedom of the press, indicated the lack of legitimacy as an effective remedy, given that the court of first instance refused to implement its decisions.

In spite of this, in the past four cases, the Court has determined that an effective remedy is still available, declaring Turkish cases, which have resulted from the coup and state of emergency,

⁴ Other reports suggest that the Commission has now processed some 6,400 claims with just over 100 being reinstated <https://turkeypurge.com/emergency-rule-commission-approves-100-job-reinstatements-6400-report>

inadmissible. However, the *Köksal* case⁵ had left the door open to the possibility of further evaluation of the domestic remedies at a later date.

State of Emergency Decrees as a Limit to ECtHR Jurisdiction

Dr. Türmen noted how the SoE decrees adopted by the government and currently in place were not in compliance with Article 15 of the ECHR, or Articles 15⁶ and 121⁷ of the Turkish Constitution. Decrees are required to be limited to the subject matter of the state of emergency under international law and the Turkish Constitution, but the current SoE decrees have been related to everything in Turkey. The Government is directly legislating through the SoE decrees bypassing the Turkish Parliament's powers as the legislating body of the system. Similarly, under the Turkish Constitution, decrees must be in compliance with state of emergency law, and comprised of an exhaustive list of measures. These do not include the dismissal of government officials or protesting academics. Under Article 15 of the Turkish Constitution, the decrees must also be strictly required by the exigencies of the situation, and be both necessary and proportional, neither of which are the case.

If the ECtHR determined that the state of emergency decrees were in violation of Article 15 of the ECHR, or the Turkish Constitution, then the measures adopted under it would also be unlawful. It is possible the Court may choose to make such a decision in the near future.

Application of the ECHR to a non-democratic state

It is the policy of the Court to recommend that states create new legal remedies to respond to issues that had in the past been sent to the ECtHR. In the case of Turkey, the Secretary General of the CofE proposed the creation of an independent ad hoc body for the examination of individual cases of dismissals subject to subsequent judicial review.⁸ Türmen, however, questioned how the Court could apply the Convention if the contracting state was not democratically governed.

⁵ ECtHR (decision) 06/06/2017 - *KÖKSAL c. TURQUIE* – No 70478/16 (available only in French <http://hudoc.echr.coe.int/eng?i=001-174629> “La Cour souligne toutefois que cette conclusion ne préjuge en rien, le cas échéant, d’un éventuel réexamen de la question de l’effectivité et de la réalité du recours instauré par le décret-loi no 685, tant en théorie qu’en pratique, à la lumière des décisions rendues par la commission en question et les juridictions nationales, ainsi que de l’exécution effective de ces décisions. » § 29) and in Turkish. A Press release is available in English <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5742178-7297626&filename=Decision%20K%F6ksal%20v.%20Turkey%20-%20dismissal%20of%20Turkish%20civil%20servants%20after%20the%20attempted%20coup%20d%u2019etat.pdf>.

⁶ “Suspension of the exercise of fundamental rights and freedoms” in times of war or state of emergency; https://global.tbmm.gov.tr/docs/constitution_en.pdf

⁷ “Martial law, mobilization and state of war”, Repealed 16 April 2017; https://global.tbmm.gov.tr/docs/constitution_en.pdf

⁸ *Excerpt of the Press release concerning the Venice Commission’s opinion on Turkey:*

<https://wcd.coe.int/ViewDoc.jsp?p=&id=2449431&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE&direct=true>)

Dr. Türmen referenced Paul Mahoney's article in the Human Rights Law Journal on the margin of appreciation doctrine⁹ at the ECtHR, which allows a latitude of derogation from the ECHR only if the preliminary conditions of normal democratic governance have been shown to exist. The Court's recommendation to states to create new legal remedies means giving greater margins of appreciation, but this should only be allowed on the condition that these states are ruled by democracy and the rule of law. If there exists no rule of law or independent judiciary, then the Court should not defer human rights violations to national authorities, and this latitude becomes meaningless.

The Court has instruments available to take a more lenient attitude to victims of non-democratic governments. There should be no obligation to exhaust remedies that are ineffective. Similarly, the Court could recognise special circumstances where domestic remedies do not have to be pursued first. Finally, in the case of repetitive violations and intolerance, the Court could decide to absolve applicants from exhaustion of the domestic remedies condition. Failure of the Court to protect founding values may cause a greater damage to the reputation of the Court.

Michael O'Boyle

Michael O'Boyle, former Deputy Registrar of the ECtHR, argued that the panel's question of whether the Court provided an effective remedy was not the correct question to ask. Instead, the panelists should consider when and under what circumstances the Court would offer such a remedy, since there was no real reason to doubt its ability to do so.

The Court's ability to provide an effective remedy had been constantly proven since the adjudication of the Turkish cases in the 1990s concerning torture, killings and disappearances. Mr. O'Boyle questioned whether there were now reasons to believe that the Court had abandoned its traditional role of oversight and protection. Two arguments had been presented - one legal and the other political.

The legal argument is based on the fact that the Court has rejected four applications, which have raised issues concerning the dismissal of judges and civil servants in 2016 and 2017 for non-exhaustion of domestic remedies. The cases are *Mercan* (Nov 2016),¹⁰ *Zihni* (Nov 2016),¹¹ *Catal* (March 2017)¹² and *Koksal*. The dates are relevant because the last decision that considered the TCC to be an effective remedy was in March 2016 and the attempted coup took place in July 2016.

Mr O'Boyle felt that *Koksal* is the most significant decision because the Court required the applicant to first bring his complaint to the new Inquiry Commission, which was tasked with the role of examining dismissals individually and having powers of reinstatement. The Inquiry Commission was at the point of being set up as a result of the initiative of the Secretary General

⁹ In general terms, it means that a state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right" - Harris et al, Law of the ECHR, P 14, Third edition, OUP (2014).

¹⁰ ECtHR (decision) 8/11/2016 - No 56511/16 - MERCAN c. Turquie (available only in French <http://hudoc.echr.coe.int/eng?i=001-169094>).

¹¹ ECtHR (decision) 29/11/2016 - No 59061/16 - ZİHNİ c. TURQUIE (available only in French <http://hudoc.echr.coe.int/eng?i=001-169704>).

¹² ECtHR (decision) 07/03/2017 - No 2873/17 - ÇATAL c. TURQUIE available only in French <http://hudoc.echr.coe.int/eng?i=001-172247>)

(SG) of the Council of Europe and the Venice Commission. Rejections by the Inquiry Commission can be appealed to the administrative court and then the Constitutional Court. For the Court mere doubts as to the prospects of success of these remedies was not sufficient to excuse the applicant from having recourse to them.

Mr. O'Boyle confirmed that these decisions have provoked considerable criticism and bewilderment in certain quarters and have been even dubbed as politically motivated to pacify Turkey. These decisions could also be construed as examples of excessive formalism in the face of a dire situation. He felt that they could doubtless be criticised on various grounds: the applications had not been communicated to the Government for observations; there was no real discussion as to what might be called the chilling effects of the emergency regime on the independence and impartiality of the remaining members of the Turkish judiciary, which involves the suspension and arrests of thousands of judges and prosecutors, including two members of the Constitutional Court.. The Commission is a non-judicial body that had not actually come into force when *Koksäl* was decided.

However, Mr. O'Boyle pointed out that none of these applicants sought any remedy in their own courts before taking their cases to Strasbourg because in three of the cases, they were complaining that they did not have access to a court to test their suspensions. Why was this so? Mr. O'Boyle surmised that after the declaration of the state of emergency they no longer trusted their own courts. But, he did not feel that this is a valid excuse in such situations. The European Court's case law is clear that only in highly exceptional cases has it been prepared to find that there are special circumstances, excusing applicants from seeking a domestic remedy.

The exhaustion rule is a jurisdictional norm of the highest importance in the Court's case law and is a central component of the foundational notion that the Court's role is subsidiary to that of the national courts. It is the national courts which must first be given the opportunity to examine allegations of human rights violations. It is a first order principle in the Convention, Art 35 para 1 of which states that the Court shall not deal with complaints where domestic remedies have not been exhausted in accordance with generally recognised principles of international law. Many very high-profile cases have fallen at this hurdle.

Mr. O'Boyle acknowledged that one could take the view that when there are gross violations of human rights remedies tend to be side-stepped or rendered ineffective by the difficulties of securing probative evidence. This was the position taken by the former Commission in the Greek case in the 1960's. However, it is difficult for the Court to assume that there are gross violations or administrative practices in breach of Convention rights when these issues have not yet been determined by the Court. There needs to be clear evidence that the court system is not functioning properly as there was in the Greek case. Mr. O'Boyle felt that this evidence is only beginning to emerge now in early 2018 but not in 2016 and 2017 when these decisions were taken. He pointed out that these cases have not occurred in a conflict or war zone such as south east Turkey in the 1990's or Chechnya, Nagorno Karabakh, Transnistria or Greece under the dictatorship of the colonels in the 1960s - where real impediments including the risk of reprisals existed to accessing the courts to seek remedies. He also pointed out that, in many judgments and decisions prior to July 2016, the Court has recognised that the TCC Court provided an effective remedy to be exhausted before taking a case to Strasbourg. He posed the question: "is it realistic to expect the Strasbourg Court to suddenly change its case law so soon after the coup - even a year after the coup - without having a solid objectively established basis on which to do so?".

Mr. O'Boyle went on to refer to a significant development that suggests that the Constitutional Court has remained an independent body, even if at the end of the day its judgment was ultimately thwarted. The TCC (in a judgment of January 2018) found in favour of two journalists

- Mehmet Altan and Sahin Alpay - holding that their detention contravened the freedom of the press and ordered their release.

Mr. O'Boyle felt that there are other factors that must be borne in mind when assessing these decisions. The first is that Strasbourg has not shut its doors irrevocably to these applicants. It remains open to their lawyers to file new complaints in Strasbourg if they lose before the Turkish courts. The second is that the Court has made it clear in the *Koksal* decision that it will keep under review in the light of experience whether the Inquiry Commission that has been set up is Convention compliant. So, the burden remains on the government to demonstrate in future cases that this remedy actually works effectively in practice.

The two remaining arguments Mr. O'Boyle felt were essentially political arguments. They suggest that the decisions are politically motivated. The first emphasises that Turkey has become a vital ally for Europe and is entitled as any other state to defend itself from attacks from within. Turkey's support is vital in the fight against ISIS and in coming to terms with the refugee crisis. It is currently host to 3.2 million refugees, which is probably the largest number of refugees in any European country. There is thus a certain pressure to be more tolerant to the internal political problems that Turkey is facing and its emergency responses. The second political argument is institutional in nature. The Court is under pressure from the member states to adhere to the principle of subsidiarity - a key feature of which is the requirement to exhaust domestic remedies. By rejecting these four cases the Court was able to reject in summary form more than 30,000 similar cases.

Mr. O'Boyle felt that both of these arguments can be easily countered. The Court is not a political body. It is not composed of political actors. The judges take an oath to behave independently and impartially just like judges in national courts. It has earned its badge of independence over many years in dealing with high-profile cases coming from Chechnya, Northern Ireland, Russia, Turkey, Ukraine and Georgia, - to name but a few. When the Court adjudicates on a case it does so on the basis of its legal merits with reference to what has been decided in previous cases just like a national court. The exhaustion of domestic remedies rule has not been invented to help the Court with its case docket (even if it has this effect) or to avoid taking difficult unpopular decisions. It is a rule of the Convention set out in Art 35 para 1 as Mr. O'Boyle had already explained and has been the subject of extensive interpretation since the system was set up sixty years ago.

Mr. O'Boyle felt that if the Court wished to avoid taking unpopular decisions it would not be the subject of such recurrent attacks from politicians in certain Convention-allergic countries. In conclusion, Mr. O'Boyle returned to his opening argument that the only question of relevance is when and under what conditions the Court can provide a remedy for Turkish citizens. He felt that today we may have an answer to that question although an answer that comes from the fruit of a poisoned tree! He pointed out that the Court has a large number of Turkish detention cases on its docket. Many of these concern journalists who complain of violations of Articles 5 and 10. The Court considers these cases to have priority because the vital watchdog functions of the press are imperiled when journalists are imprisoned especially in an emergency situation where many of the traditional safeguards of the rule of law have been suspended.

The fate of these cases depended on the outcome of the case brought to the Turkish Constitutional Court by the applicants Mehmet Altan and Sahin Alpay. He repeated that to its credit the Constitutional Court found in favour of these applicants, but astonishingly a lower court considered that the Constitutional Court did not have jurisdiction to order their release. Accordingly, in these types of cases, the effectiveness of the Constitutional Court remedy can now be called into question (but whether in all cases remains to be seen). He pointed out that it

would appear from several press articles by Turkish journalists, based on leaked information, that the Court will soon go to judgment in these cases and perhaps find violations of press freedoms. He felt that if it did that would give the lie to the idea that the Court has turned its back on Turkey.

Başak Çalı

Başak Çalı, from the Hertie School of Governance, Center for Global Public Law at Koç University Istanbul responded to Mr. O'Boyle's speech by discussing the issues that must be dealt with, and the responsibilities lawyers and judges had in future cases. She noted that the relationship between Turkey and the ECtHR was not a one-way relationship, as cases taken by Turkish citizens against their government in previous decades had transformed the jurisprudence of the ECtHR. In the current situation, referring to the ECtHR and Turkey she stated that "either [they] will fall together or they will rise together".

Professor Çalı submitted that the ECtHR and Turkish lawyers needed to coordinate and innovate, rather than exclusively relying on previous case law. *Koksal*, for example, acted as a "preemptive pilot judgement", and pointed to a remedy not yet in existence. It represented a case of the Court and Turkish applications falling together. Instead of focusing on *Koksal*, lawyers should look to make substantive changes (with signals pointing to the possibility of this occurring at the 20 March ruling) focusing on circumstances when the Court admits cases.¹³

Once Turkish cases are given access in the ECtHR, further problems must be considered. First, in the case of pre-trial detention, the fast-moving nature of the Turkish courts may result in judgments becoming irrelevant by the time ECtHR cases had concluded. This was seen in the Azerbaijani case of Mammadov, where the Court asked for the applicants release from pre-trial detention on bad faith jurisprudence but only after he had been convicted by the domestic court and was no longer in pre-trial detention. Therefore, the judgement of the ECtHR was ineffective. Turkey, perhaps recognising this loophole, had begun to fast-track convictions, or change the grounds of conviction to limit the impact of potential ECtHR applications. If this continues, the 20 March 2018 decisions may be of less relevance.

Second, the Court must evaluate their response to bad faith jurisprudence under Article 18 of the ECHR¹⁴. As shown in the case against Georgia¹⁵, the Court had proven to be timid in using bad faith articles. As it stood, either Article 18 would change as a result of future Turkish cases, or Turkey would lose out. As of the conference, it was unclear whether the Court would use necessity or proportionality to review the state of emergency decrees. Use of only proportionality analysis would result in the Court and Turkey falling together. In order to be effective, the Court must look at both proportionality and necessity.

Finally, Professor Çalı questioned what Turkish lawyers should look to get out of the Court substantively, and what remedies should be asked for or expected. Cases should not be seen as cases purely about Turkey, but as cases about the future of Strasbourg as well.

¹³ See Postscript

¹⁴ "Limitations on the use of restrictions of rights": Article 18 of the ECHR limits the derogations a government can take in a state of emergency to only those whose purpose "for which they have been prescribed"

¹⁵ Merabishvili v Georgia - [https://hudoc.echr.coe.int/eng#{"itemid":\["001-178753"\]}](https://hudoc.echr.coe.int/eng#{)

Panel II: "Should the Court adopt a different approach, and if so, what should it be?"

Francoise Hampson

Francoise Hampson, from the University of Essex, provided some recommendations for the ECtHR, and lawyers appearing before the Court, on how to respond to the situation in Turkey. She pointed to several lessons of the Kurdish cases of the 1990s that dealt with killing, torture, and disappearances, which succeeded in part because of a dialogue between cases, the Courts, and the former Commission. Subsequent cases reacted to the cases that had come before them, rather than stating the same message more loudly and expecting the same result. She also clarified a point made by Mr. O'Boyle, that the ECtHR should be given time to respond to the situation, and not take a rigid approach to remedies.

The early Kurdish cases also felt their way slowly, changing their approach over time. Significant jurisprudential changes that came out of the final cases took time to achieve. An evolution in the Court's approach must be accepted. However, there were certain factors in the current situation that seemed to show lawyers should have less optimism of the result than the early Kurdish cases.

The current backlog of cases at the ECtHR was considerably larger than that of the 1990s, prior to the cases from new states that emerged after the early Kurdish cases. Currently, members of the Court are panic-stricken at the backlog of 50,000 cases, and it should be understood why the Court might be less flexible. Lawyers should treat the Court like an enemy to be forced to their way.

Professor Hampson specified three types of judges in the current situation: First, there were judges who believed there were effective remedies, or that Turkey should be given the opportunity to make them effective, as they had not yet shown bad faith. Second there were judges who were aware that there were many cases in which there was no effective remedy, but felt that they were swamped by the backlog of cases on the docket. These judges were likely to continue as usual except in cases where "they cannot look themselves in the mirror". Within that group, there were judges who were embarrassed by some of the decisions taken by the Court, but thought it was important to take a common ground position, or thought it was too early to rule.

Professor Hampson listed several ways to address these issues. What judges perceived as 50,000 individual cases were actually far fewer than that. Lawyers should share information on the cases to see the overall positions and understand which ones could go through the domestic inquiry commission, and which would be effective in the ECtHR. The creation of a database to categorize issues (pre-trial detention, pre-trial detention plus subsequent detention, firing of civil servants, etc.) would minimize perceptions of the number of cases to a manageable scale. By doing this, the Court could join similar cases. This would require third party interventions during the admissibility stage to deal with the work of coordinating the cases and compiling the issues each one raised into a single database. A coalition of bar associations, individual lawyers, and NGOs with different jobs and responsibilities should be relied upon, with one group's job to "mobilize the Parliamentary Assembly of the Council of Europe (PACE)".

Lawyers should also rely on the "forgotten string". Pressure from NGOs was helpful to fuel internally created pressure and form a cohesive narrative around the cases. Similarly lawyers should use the PACE, whose membership is comprised of members of national parliaments, to create leverage across European states and change the narrative.

As cases go before the Court, lawyers should continue to keep an eye on decisions within the broader narrative. If they show no sign of learning or adaptation over time, lawyers should look to adopt alternative strategies that respond to the concerns or queries of the Court.

Question and Answers

The panelists responded to the following questions from audience members:

Question One: Fulfilment of the Exhaustion Principle

In the 1990s cases, the ECtHR did not look for the specific existence of internal remedies. More recently, the cases that were rejected as inadmissible by the Court have also been rejected by the TCC for lack of jurisdiction over state of emergency decrees. Due to the Inquiry Commission's backlog, these cases are unlikely to be reviewed for years. Taking this into account, can the ECtHR look at the same cases again in the context of the new situation?

This question was asked by a former Turkish professor, now a refugee in Berlin after being dismissed from his job following the coup attempt. He had previously sought a remedy in the ECtHR, but his case was dismissed for failure to fulfil the exhaustion principle.

Michael O'Boyle: The ECtHR can provide a remedy, but it will take some time. Lawyers and those with cases before the Court should coordinate their efforts to mount a concerted effort on the notion that the remedies are functioning as they ought to. They need to establish the significant objective, factual evidence that the domestic remedies are ineffective. Cases that marshal this evidence and present it to the Court are more likely to have success.

Francoise Hampson: It is incorrect to say that the Kurdish cases did not need to prove exhaustion of remedies, but we could point to why specifically applicants did not need to do more than they had already done. As a result of previous cases, it became routine but it still needed to be addressed to some degree. Additionally, a claim that remedies are ineffective is not enough, applicants must provide evidence to prove that they are. To do so they will need a central entity to look at all the cases and prove systematically the ineffectiveness of the remedies, which will require the cooperation of all lawyers acting in all cases.

Riza Türmen: The problem with the Inquiry Commission decisions is that they are neither transparent nor publicised. Consequently, it is difficult to provide reasons to show how applicants object to the Inquiry Commission's decision in the administrative court. The ECtHR made a judgement in Koksal without looking at the effectiveness of the remedy. Instead, the ECtHR must look at whether the composition of the Inquiry Commission *allows* it to be effective. In addition to Prof Hampson's comments, we must consider that the Court in Turkish cases has called into question whether the exhaustion of remedies principle is a good procedure for evaluation. PACE should hold a conference or seminar to discuss whether the exhaustion requirement is proportionate to the needs of the scenario.

Başak Çalı: Lawyers should be concerned about a pilot judgement being used in Turkey, which might be used to defer decision to another court. If the Commission is determined to be ineffective, the Court cannot deliver a pilot judgement.

Question Two: Rule 39 Interim Measure Applicability¹⁶

Do you see any possibility of the ECtHR, in extreme cases, making an interim measure order (under Rule 39) e.g. in cases concerning dismissed public officials? They are deprived of any means of subsistence as are their family (no severance pay, no unemployment benefit, no social assistance, no health insurance, prospect of finding another job). Would these be seen sufficient by the ECtHR to make an interim measure under Rule 39?

Michael O'Boyle: There are a whole category of cases against Turkey where Rule 39 is being used today. In particular, interim measures were granted in five 'curfew cases' recently where people had been prevented from going to hospital to receive urgent treatment. Mr. O'Boyle did not consider that 'dismissal' cases lent themselves to interim measures in the current situation. Traditionally Rule 39 has applied to cases concerning Articles 2 and 3 of the Convention such as cases where the removal of a person from the country will give rise to irreparable damage (for instance, death or torture). Dismissals don't fall into this category. However, media outlets could consider the possibility of seeking a Rule 39 interim measure because the shutting of a major newspaper could arguably cause irreparable damage to that outlet and the general public. This could constitute a major blow to press freedom. Recently Rule 39 had been applied in a Georgian case – *Rustavi 2*¹⁷ – concerning the transfer of ownership of a television and radio station. But as a general rule, an interim measure is considered to be exceptional and may not be repeated in other scenarios.

Riza Türmen: Rule 39 has a very narrow application, as it is just a rule in the rules of procedure, not an article in the Convention. This is probably why the Court is reluctant to apply it. However, the criteria for irreparable damage could be made in the cases of an academic who is dismissed, has his passport seized, and has no other means of subsistence, or in the case of a newspaper being closed. Perhaps the application of Rule 39 should be reviewed.

Question Three: POSSIBILITY OF Interstate Cases PARTICULARLY E.G. IN RELATION TO Refugees

Are there any additional admissibility rules for people living in Germany as refugees, but who have been dismissed and would be forced to live in inhuman circumstances if they go back to Turkey?

Francoise Hampson: There are no additional admissibility rules, but there is perhaps an alternative remedy. In the *Buldan* case, the applicant, based in Germany, was the brother of someone who had been killed. The German government joined the case to claim reimbursement for the costs of refugee status caused by the state. In this scenario, the case would be an interstate application, not just individual. The possibility of an interstate case has survived the notion of administrative remedies. The lack of interstate cases was the downside of the right of individual petition. They are unusual, because states were not representing their citizens or acting in self-interest, but acting in the interest of the people of Europe. Now, states are less inclined to take

¹⁶https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

¹⁷ RUSTAVI 2 BROADCASTING COMPANY LTD AND OTHERS v. GEORGIA – No 16812/17 - Communicated Case 28/11/2017 <http://hudoc.echr.coe.int/eng?i=001-179679>, see paras. 122 ff.

this course of action because of the amount of work it requires, and the ability for individuals to bring individual petitions.

Michael O'Boyle: There is currently no interstate case against Turkey. Interstate cases immediately signal that there is a major human rights problem that has been recognized by other states.

Question Four: Turkish Legal Procedure

In Turkish legal procedure, after the Inquiry Commission and administrative court stage, is there another Turkish court of appeals needs to be exhausted before the TCC?

Riza Türmen: After the Turkish administrative court, the case can go directly to the TCC, or it can go to the conseil d'état. (Differing views were expressed from the audience).

Question Five: Turkish Disregard of Court Judgements

If the Court would act very quickly on these matters, and deliver an argument that demands a response, remedy, or remediation from Turkey, wouldn't this result in the Turkish government ignoring the ECtHR in entirety?

Başak Çalı: There are already a large number of unimplemented judgements from ECtHR. To say "if the Court passed a judgement, the Turkish government wouldn't implement it" is a moot point.

Francoise Hampson: Two wrongs do not make a right. To some extent, legitimacy relies upon the judge clearly applying the same standard and in a proper legal way. The Court would lose legitimacy everywhere if they just accepted that the Turkish remedies do not work. Passing judgements would place the responsibility to correct the wrong on Turkey. In this case, it would become the state's fault that the remedies are ineffective, not the Court's for not effecting it.

Question Six: Likelihood of Interstate Cases

When was the last interstate case? It seems highly unlikely for an interstate case to take place against Turkey.

Francoise Hampson: The last interstate case was last week. It has increasingly "become fashionable" again. There are currently three interstate cases involving Ukraine. However, interstate cases taken by states with no direct axe to grind are not going to happen. The only possible scenario would be a situation like the 1997 Danish case, where the state was taking over an individual's case.

Michael O'Boyle: The right of individual petition has its limitations. There are some human rights situations that are so serious or overwhelming affecting many different rights that they cannot be adequately addressed through individual applications. Such situations amount to threats to the 'public order' of Europe and can be brought to the Court by way of an inter-state case. Additionally, the last 10 years have seen the emergence of a new form of interstate case: the quasi-interstate case. This is where the individual applicant is supported by his/her state that intervenes in the case as a third party. Examples include cases connected with the conflict in

Nagorno Karabakh, where Azerbaijan and Armenia intervened in individual cases brought by their nationals against these states – *Chiragov and others v Armenia* (application no. 13216/05) and *Sargysan and others v Azerbaijan* (application no. 40167/06).

Başak Çalı: This is an area to lobby governments on. It is highly unlikely to be used, but lawyers and all stakeholders should lobby anyway.

Question Seven: PACE and NGO Mobilization

How can PACE and NGO communities mobilize and use “caviar diplomacy”?

Francoise Hampson: Caviar diplomats will be working anyway. Russia’s view of Turkey seems to change a lot. If states can be shown there exists a legal issue, specifically the destruction of the rule of law, it will undermine the values of the Council of Europe. Additionally, parliamentarians wear two hats. They have a responsibility to raise the issues raised in PACE domestically as well.

Riza Türmen: PACE sees the Court as its own domain. Turkey has been reintroduced to the monitoring system of PACE, so the European Parliament should make use of that to hold them accountable.

Question Eight: The ECtHR’s Role in Ongoing Violations of Human Rights

What is the role of the Court on *ongoing* violations of human rights? Does the Court have a moral responsibility to take measures in relation to ongoing systemic and grave violations of human rights as it is the situation in Turkey now? Do you think that it is the right approach for the Court to merely send the applicants back to the domestic courts while the violations are ongoing and becoming escalating? It was mentioned that for the media outlet closures, the prospects of a successful Rule 39 application were higher. Wouldn’t the cases on closures of NGOs be the same as the closure of the media outlets? Irreparable harm has been done to the human rights works they were carrying on and the damage is just as substantial?

Michael O’Boyle: The principle of exhaustion of remedies is considered to be a fundamental rule of the Convention system. The Court is obliged to look at domestic remedies, but it can also look at the evidence that cast those remedies in a different light, for example, by revealing them to be inadequate and ineffective. The burden is therefore on the lawyers to demonstrate why those internal remedies do not work. It should not be forgotten that the Court does not solve political issues such as the Cyprus-Turkey dispute or the Nagorno-Karabakh dispute. It did not solve the problems in Northern Ireland either. Its role is concerned with highlighting violations of human rights. However, such determinations can then be used by political groups or politicians in their efforts to bring about political solutions.

Riza Türmen: The situation in Turkey is very clear. It makes no sense to require Turkey to establish a new legal mechanism under these circumstances.

Francoise Hampson: Cooperation is needed to draw conclusions that prove these scenarios. Cooperation, and the establishment of a database would afford protection in cases where a lawyer is detained, because they can nominate someone else to take over the case when the information concerning the case is already shared. The TCC could still be seen as effective, but the courts of first-instance are clearly not. With regard to the use of Rule 39 interim measures, NGOs could also apply, but applications would be stronger if they involve the media outlets.

Lawyers should focus on the strongest arguments first, because applying to the ECtHR without following such a strategy might undermine the overall success of all cases. Lawyers must cooperate to ensure the cases are being dealt with in the right order, because the wrong order could mean setting a bad precedent. Finally, the ECtHR only deals with cases after the fact. It is not within its role to prevent violations. However, PACE should be involved particularly where law is in issue with Human Rights *ergo omnis*, because it impacts all subsequent cases. This is distinct from individual cases, where the facts of the case matter more.

Başak Çalı: the ECtHR is not the right place to deal with gross and systematic violations as they change things on the ground right now.

Question Eight: Foreign Involvement and Assistance

French organizations would be interested in assisting with lawyers in Turkey, but need something concrete to work on. How can they get more involved?

Francoise Hampson: There already exists committees nationally of NGOs and Bar Associations to integrate and coordinate national efforts. Further assistance is necessary to establish a database of facts and cases for applications before the ECtHR.

Closing Remarks: Tony Fisher

Tony Fisher, Chair of the Human Rights Committee at the Law Society of England and Wales and conference moderator, gave the closing remarks. He emphasised the need for “a strategy of cooperation and collaboration” to ensure the best chance of success and provide a united front across Europe. In particular, he noted the importance of the cases that went through the ECtHR in the 1990s, which materially advanced the jurisprudence of the ECtHR.

The early cases in the 1990's in Turkey presented a tapestry of cases advancing differing issues. At that time the litigation itself was the main strategy. To bring attention to what was going on. Following a similar collaborative strategy, may now establish key rulings, which others could follow and expand upon as the jurisprudence develops. Collaboration between lawyers in Turkey and across Europe was necessary to ensure both the effectiveness of individual cases, and the strength of the larger argument against injustice in the Turkish courts. While systematic or cultural changes could not be assured, and perhaps is not achievable through the Court, the ECtHR could be an effective way to mobilise political pressure in order to achieve change.

The difficult situation of those currently pursuing cases through the domestic courts was recognized, but it was agreed that “the dam will break”, when the ECtHR may be forced to reevaluate, and recognize that domestic remedies were no longer effective. Collaboration and cooperation between lawyers, the NGO community and lawyers professional organisations was needed to achieve this and must be followed, or the system set up to assist people would be undermined to the detriment of others following behind.

Annex 1: Postscript on the Altan and Alpay Judgements

On 20th March 2018 the European Court of Human Rights handed down its judgements in the cases of *Altan v Turkey* (application no. 13237/17) and *Alpay v Turkey* (application no. 16538/17) which had been referred to during the course of the remarks made, in particular by Mr. Michael O'Boyle, at the conference.

The Court found in both cases that the applicant's continued pre-trial detention, after the Constitutional Court's clear and unambiguous judgment of 11 January 2018 finding a violation of Article 19 § 3 of the Turkish Constitution, could not be regarded as "lawful" and "in accordance with a procedure prescribed by law" as required by the right to liberty and security. In that connection the Court observed, in particular, that the reasons given by the Istanbul 13th Assize Court in rejecting the application for their release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. The Court held that for another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications ran counter to the fundamental principles of the rule of law and legal certainty, which were inherent in the protection afforded by Article 5 of the Convention and were the cornerstones of the guarantees against arbitrariness.

The Court emphasised that the fact that applicants had been kept in pre-trial detention, even after the Constitutional Court's judgment, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention.

However, as matters stood, the Court did not depart from its previous finding that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in cases brought under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the first-instance courts, in particular the assize courts, regarding the authority of the Constitutional Court's judgments.

The cases do, therefore, materially advance the argument that Turkey has little time left to prove the effectiveness of its domestic remedies in relation to those citizens, particularly those in custody, who have been arrested and detained since the attempted coup. The "dam" however has not yet been broken and the Court is not yet ready to commit to any statement that the remedies have been shown to be ineffective. The focus of both judgements however is the failure of the lower courts to follow decisions of the Constitutional Court rather than the effectiveness of the right to petition the Constitutional Court itself. In this respect they will be a disappointment to many commentators.

The judgements were significant for another reason. The Court found a violation of Article 10 of the Convention in both cases, on the basis that the pre-trial detention of anyone expressing critical views produced a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, would inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices, and a chilling effect of that kind could be produced even when the detainee was subsequently acquitted.