Die Zulässigkeitsentscheidung der Europäischen Menschenrechtskommission im Fall der Staatenbeschwerden Frankreichs, Norwegens, Dänemarks, Schwedens und der Niederlande gegen die Türkei vom 6. Dezember 1983

Einführung

Am 12. September 1980 ergriff das Militär in der Türkei die Macht. Die Verfassung vom 27. Mai 1963 wurde außer Kraft gesetzt[1]. In der Folgezeit wurde der Türkei eine Vielzahl von Menschenrechtsverletzungen vorgeworfen. Dies war für fünf Mitgliedstaaten des Europarates Anlaß, am 1. Juli 1982 eine Staatenbeschwerde gegen die Türkei gemäß Art. 24 der Europäischen Menschenrechtskonvention (EMRK) zu erheben. Die nachstehend abgedruckte Entscheidung der Kommission über die Zulässigkeit dieser Beschwerden vom 6. Dezember 1983[2] behandelt über den konkreten Anlaß hinaus wichtige Fragen der Staatenbeschwerde allgemein, die neben der Individualbeschwerde nach Art. 25 der Konvention zahlenmäßig in den Hintergrund tritt[3]. Daß für die Erhebung von Staatenbeschwerden politische Erwägungen eine Rolle spielen, zeigt die Begründung der Bundesregierung für die Entscheidung, sich den Beschwerden gegen die Türkei nicht anzuschließen: »Sie ist ... der Ansicht, daß sie auf Grund ihrer

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[1] Vgl. dazu näher C. Rumpf, Zur Einführung in die neue Türkische Verfassung, Beiträge zur Konfliktforschung 13 (1983), S. 106f.

[2] Beschwerden Nr. 9940/82 – 9944/82 vom 1.7.1982.

[3] Zu Zahlenangaben vgl. J. A. Frowein, Der europäische Grundrechtsschutz und die nationale Gerichtsbarkeit (1983), S. 8f.; siehe dort auch die Aufzählung der bisher für zulässig erklärten Staatenbeschwerden in Anm. 4.

politischen Kontakte eine bessere Möglichkeit hat, sich für den Schutz der Menschenrechte in der Türkei einzusetzen«[4].

Die Kommission hat die Beschwerden, die sich auf eine Verletzung der Art.3, 5, 6, 9–11 und 15 Abs.3 der EMRK stützen, für zulässig erklärt. Die von den Beschwerdeführern vorgenommene Beschränkung der Beschwerden auf Vorkommnisse im Zeitraum vom 12. September 1980 bis zum 1. Juli 1982 ist nach Auffassung der Kommission nicht unvereinbar mit der Konvention (Ziff.4 der Gründe). Auf die Bedeutung der Entwicklung in der Türkei nach dem 1. Juli 1982, insbesondere der Parlamentswahl vom 6. November 1983, wird die Kommission erst bei der Prüfung der Begründetheit eingehen (Ziff.4).

Das Vorbringen der Türkei, die Beschwerden erbrächten keinen hinreichenden Beweis bzw. Beweisangebote für eine Verletzung der Konvention, hat die Kommission veranlaßt, zu dieser Frage in Bezug auf das Staatenbeschwerdeverfahren grundsätzlich Stellung zu nehmen: In diesem Verfahren ist für eine Zulässigkeit weder ein voller noch ein *prima facie*-Beweis einer Konventionsverletzung erforderlich. Dieses Ergebnis wird aus dem Text der Konvention[5] und ihrer Systematik[6] begründet (vgl. Ziff.6ff.). Demgegenüber hatte sich die Türkei auf eine aus der Praxis des Internationalen Gerichtshofs und der Organe der Amerikanischen Menschenrechtskonvention ableitbare allgemeine, im Rahmen der Staatenbeschwerde anwendbare Regel des Völkerrechts berufen, daß zumindest eine vorläufige Prüfung der Begründetheit erfolgen müsse. Dies lehnt die Kommission unter Hinweis auf den Charakter des Art.27 EMRK als Spezialvorschrift ab (Ziff.11). Immerhin läßt sie offen, ob eine Regel besteht, wonach eine Abweisung erfolgen muß, wenn das Beschwerdevorbringen völlig unsubstantiiert ist; dies sei jedenfalls hier nicht behauptet worden. (Ziff.12).

Danach blieb allein die Frage zu entscheiden, ob die Beschwerden wegen fehlender Erschöpfung des innerstaatlichen Rechtsweges (Art.27 Abs.3 in

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[4] Antwort der Staatsministerin Hamm-Brücher vom 16.7.1982 auf eine schriftliche Anfrage, Bundestags-Drucksache (BT-Drs.) 9/1870, S.2; vgl. dazu auch den Bericht der Bundesregierung vom 2.12.1982 zur Entwicklung in der Türkei, BT-Drs. 9/2213 (sowie Lindemann, Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1982, ZaöRV 44 (1984) Heft 3, Nr.10 und 38d).

[5] Vgl. Art.24; die deutsche Übersetzung der Konvention (»angebliche(n) Verletzung«) ist insoweit nicht eindeutig. Die Kommission stützt sich insbesondere auf den französischen Text, siehe Ziff.7.

[6] Art.27 Abs.1 und 2 gelten nur für Individualbeschwerden, während Abs.3 für »jedes Gesuch« gilt.

Verbindung mit Art.26) unzulässig sind. Unproblematisch ist dies, soweit die Verletzung der Konvention direkt durch Gesetz behauptet worden war, weil Art.26 für solche Fälle nach ständiger Rechtsprechung nicht anwendbar ist (Ziff.15). Dies ist eine Folge der Tatsache, daß in den meisten Mitgliedstaaten der Konvention eine unmittelbare Überprüfung von Gesetzen nicht möglich ist[7]. In der Türkei wurde die bis dahin zulässige Überprüfung beim Verfassungsgericht durch Gesetz vom 27. Oktober 1980 abgeschafft[8]. Schwieriger ist der Verzicht auf die in Art.26 genannte Voraussetzung zu begründen, soweit sich eine Beschwerde gegen Verwaltungsmaßnahmen richtet. Dies trifft hier insbesondere auf den Vorwurf der Folter zu. Unter Hinweis auf die Rechtsprechung der Konventionsorgane hält die Kommission aber auch hier die Erschöpfung des innerstaatlichen Rechtsweges für entbehrlich, wenn eine konventionsverletzende »Verwaltungspraxis« vorgetragen wird. Dieser Begriff umfaßt die Elemente der wiederholten Handlung und der offiziellen Duldung (Ziff.19). Als Fortbildung bzw. Klärung ihrer bisherigen Rechtsprechung unterstreicht die Kommission die Pflicht der Regierung des Staates, in welchem eine solche Verwaltungspraxis besteht, Gegenmaßnahmen zu ergreifen, die eine Wiederholung verhindern bzw. den Kreislauf der Verletzungshandlungen unterbrechen (Ziff.19).

An dieser Stelle taucht erneut das Problem auf, wieweit die Verwaltungspraxis substantiiert behauptet oder gar nachgewiesen werden muß. Dabei stellt die Kommission klar, daß für die Nichtanwendung des Art.26 EMRK die bloße Behauptung einer solchen Praxis nicht ausreicht. Das Bestehen einer solchen Praxis muß vielmehr durch einen substantiierten Vortrag untermauert werden (Ziff.21). Ein solcher »substantiierter Beweis« braucht im Rahmen der Zulässigkeitsprüfung nur *prima facie* geführt zu werden (Ziff.22). Dabei ist das Vorbringen beider Parteien zu berücksichtigen. Hier hält die Kommission sowohl wiederholte Verletzungshandlungen als auch eine Duldung im soeben definierten Sinne für gegeben. Die Hinweise der Türkei auf ihre Bemühungen, den Folterpraktiken durch gesetzliche und Verwaltungsmaßnahmen entgegenzuwirken, bewertet die Kommission als teilweise Bestätigung des Sachvortrages der Beschwerden (vgl. Ziff.27 und 30).

Die Kommission lehnt es ausdrücklich ab zu prüfen, ob die Maßnahmen der Regierung in der Zeit nach der Beschwerdeerhebung Wirkung erzielt

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[7] Vgl. den Überblick zum Rechtsschutz in den Mitgliedstaaten bei Frowein (Anm.3), S.8f.

[8] Siehe dazu Rumpf (Anm.1), S.107.

haben, weil die Beschwerden sich nur auf den davor liegenden Zeitraum beziehen. Der Hinweis auf den »derzeitigen Stand des Verfahrens« läßt es als naheliegend erscheinen, daß eine solche Berücksichtigung im Bemühen um einen freundschaftlichen Ausgleich gemäß Art.28 b) EMRK aus der Sicht der Kommission durchaus möglich, ja sogar wünschenswert ist (vgl. Ziff.31). Darin kann ein Appell an die Türkei erblickt werden, die eingeleitete Demokratisierung fortzusetzen[9].

Schließlich setzt sich die Kommission mit dem – nur die Beschwerde Frankreichs betreffenden – Argument auseinander, diese sei wegen des französischen Vorbehalts zu Art.15 Abs.1 EMRK (Notstandsklausel) unzulässig. Die Kommission stellt – ohne zwingenden Grund – zunächst heraus, daß sie nicht über die Vereinbarkeit dieses (tatsächlich sehr weitgehenden, vgl. Ziff.37) Vorbehalts mit Art.64 der Konvention[10] zu entscheiden habe. Es handele sich nicht um ein Problem des *estoppel*-Grundsatzes, sondern der Gegenseitigkeit (Ziff.38). Dieser völkerrechtliche Grundsatz könne aber auf das Rechtsschutzsystem der EMRK wegen seines objektiven Charakters nicht angewendet werden. Das Verfahren der Sicherung der Einhaltung der Konvention beruhe auf einer kollektiven Gewährleistung durch die Vertragsstaaten. Geltend gemacht werden könnten nicht deren eigene Rechte, sondern allenfalls ein »europäischer *ordre public*« (Ziff.39f.). Wo die Konvention die Anwendung des Gegenseitigkeitsprinzips zulasse, sei dies ausdrücklich geregelt (vgl. Art.46 Abs.2). Dieser objektive Charakter der Konvention sei auch bei Vorbehalten zu berücksichtigen.

Die Türkei hat sich nicht gemäß Art.46 EMRK der Gerichtsbarkeit des Straßburger Menschenrechtsgerichtshofes unterworfen. Das Verfahren kann daher mit einer gütlichen Einigung gemäß Art.28 b) oder mit einem Bericht der Kommission fortgesetzt werden. Die Entwicklung der Lage in der Türkei dürfte dabei eine bedeutende Rolle spielen.

Hans-Heinrich Lindemann

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[9] Kritisch zur bisherigen Entwicklung W. Damkowski, Die neue türkische Verfassung – »Fahrplan zur Demokratie«?, Europäische Grundrechte Zeitschrift 11 (1984), S.1ff.

[10] Vgl. dazu R. Kühner, Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art.64 MRK am Beispiel der schweizerischen »auslegenden Erklärung« zu Art.6 Abs.3 *lit.*e MRK, ZaöRV 42 (1982), S.58ff., sowie ders., Die »auslegende Erklärung« der Schweiz zu Art.6 Abs.3 *lit.*e der Europäischen Menschenrechtskonvention. Anmerkung zum Bericht der Europäischen Menschenrechtskommission im Fall Temeltasch vom 5. Mai 1982, ZaöRV 43 (1983), S.828ff.

COUNCIL OF EUROPE
EUROPEAN COMMISSION OF HUMAN RIGHTS

Decision of the Commission as to the Admissibility

Application No. 9940/82
France v. Turkey

Application No. 9941/82
Norway v. Turkey

Application No. 9942/82
Denmark v. Turkey

Application No. 9943/82
Sweden v. Turkey

Application No. 9944/82
Netherlands v. Turkey

The Law

1. The Commission has examined the respondent Government's objections to the admissibility of the applications in the following order:

I. The objection that the applications are not sufficiently clear and precise;

II. The objection that there is no *prima facie* evidence;

III. The objection that domestic remedies have not been exhausted;

IV. The objection concerning the French reservation under Art. 15;

V. The objection that the acts complained of are justified under Art. 15 of the Convention;

I. As to the objection that the applications are not sufficiently clear and precise

2. The respondent Government submit that applications to the Commission must indicate the subject matter with the clarity and precision which are necessary for a proper determination of the case. They consider that the present applications do not meet this test.

3. The Commission observes that the applicant Governments complain of specific legislation and alleged practices, during a defined period (12 September 1980 to 1 July 1982), as violating certain Articles of the Convention. It finds that the contents and scope of the applications, the written submissions having been clarified at the hearing, are sufficiently clear and precise for a judicial examination under the Convention.

4. The Commission notes in this connection that the applications refer to alleged

acts during a period in the past and that they take no account of more recent developments in Turkey, invoked by the respondent Government. This limitation in time of the application is not incompatible with the Convention.

The relevance of the respondent Government's submissions which relate to subsequent events as showing a progressive restauration of democracy in Turkey, by the election of the Turkish Parliament on 6 November 1983 and measures taken thereafter, will be considered by the Commission in its examination of the merits of the application.

II. As to the objection that there is no prima facie evidence

5. The respondent Government argue that an application under Art.24 must show the existence, or at least adduce *prima facie* evidence, of a breach of the Convention; they submit that this condition has not been satisfied in the present case.

The applicant Governments reply that Art.24 does not make it a condition for bringing an application that a breach of the Convention is established.

6. The Commission observes, as regards full proof of a breach of the Convention, that this is not required for an application under Art.24. It follows both from the English text ("alleged" breach) and from the French wording («qu'elle croira pouvoir être imputé») that the allegation of such a breach is in principle sufficient under this provision.

7. The Commission further notes that the English text of Art.24 ("may refer to the Commission ... any alleged breach") does not, as regards the allegations required, clearly indicate whether they must emanate from the applicant Party or whether determination could also be sought of allegations coming from other persons or organisations than the Parties, which are reported, but not adopted, by the applicant. The French text, however, clarifies the legal situation. The words «qu'elle croira» show that only allegations of the applicant Party can be submitted for examination.

The present applications fulfil this condition. It is true that, in support of their case, the applicant Governments also refer to allegations contained in reports of individuals and organisations. But the complaints submitted in the applications for examination are clearly identified as emanating from the applicant Governments.

8. The Commission has next examined the question, raised by the respondent Government, whether the Convention requires that an application under Art.24 adduces *prima facie* evidence of a breach of the Convention. It here recalls that Art.27 distinguishes, as regards the scope of the examination to be undertaken by the Commission at the admissibility stage, between applications by individuals under Art.25 and applications by States under Art.24. According to the clear terms of Art.27 only the grounds for inadmissibility provided for in para.(3), in conjunction with Art.26, apply to both categories of applications while the grounds stated in paras.(1) and (2) govern only applications by individuals under Art.25.

9. The Commission has therefore consistently held that, in inter-State cases, it is not its task, at the admissibility stage, "even to carry out a preliminary examination of the merits", since the provisions of Art.27 (2) – empowering it to declare inadmissible "any petition submitted under Art.25" which it considers either "incompatible with the provisions of the Convention" or "manifestly ill-founded" – "apply, according to their express terms, to individual applications under Art.25 only", and that, consequently, any examination of the merits of the application must in such cases be "entirely reserved for the post-admissibility stage" (Application N° 8007/77, *Cyprus* v. *Turkey*, Decisions and Reports 13, 85, at pp.154 – 155 = Yearbook 21, 100, at pp.242, 244, with further references).

10. The respondent Government attack this view. They refer to the rules and practice on questions of admissibility of the International Court of Justice and the Inter-American Commission of Human Rights as evidence of a general rule of international law, applicable in the present case, requiring a preliminary examination of the merits as part of the determination of admissibility.

11. The Commission observes that Art.27 constitutes a specific regulation of admissibility in proceedings under the European Convention on Human Rights, which takes precedence over general rules of international law. It follows that, in inter-State cases, brought under Art.24, it cannot be the Commission's task to carry out a preliminary examination of the merits of the case at the admissibility stage in the same way as in proceedings relating to individual applications under Art.25 of the Convention.

12. The Commission has nevertheless examined whether, in inter-State cases, Art.27 leaves room for the application of a general rule providing for a preliminary examination of the merits at the admissibility stage at a more restricted scale than in cases brought by individuals. It finds that the wording of Art.27 (1) and (2) only makes reference to Art.25 but that on the other hand the Article does not exclude the application of a general rule providing for the possibility of declaring an application under Art.24 inadmissible if it is clear from the outset that it is wholly unsubstantiated or otherwise lacking the requirements of a genuine allegation in the sense of Art.24 of the Convention.

However, this question does not in the Commission's view arise in the present applications, which cannot be so described. It is here to be observed that the applications relate, firstly, to specific legislation the existence of which, during the relevant period (12 September 1980 to 1 July 1982), is not disputed by the respondent Government and in respect of which the respondent Government invoke a right of derogation under Art.15 of the Convention; and that, secondly, the applicant Governments complain of certain alleged practices in respect of which they have adduced detailed evidence.

13. The Commission concludes that the applications cannot be declared inadmissible on the ground that there is no *prima facie* evidence or on any other ground involving an examination of their merits at this stage.

III. As to the objection that domestic remedies have not been exhausted

14. The respondent Government submit that the applications are in part inadmissible for failure to exhaust domestic remedies, as required by Art.26 of the Convention. The applicant Governments argue that this requirement does not apply where the violations complained of consist, as in the present case, of legislation or practices.

15. The Commission observes that the applicant Governments complain, firstly, of specific legislation as violating certain Articles of the Convention.

According to the Commission's case-law the provisions of Arts. 26 and 27 (3) as to the exhaustion of domestic remedies do not apply to applications under Art.24 the object of which is to determine the compatibility with the Convention of legislative measures *(First Greek* Case, 1st decision on admissibility, Collection of Decisions 25, 92, at pp.114–115 = Yearbook 11, 690, at p.726, with further reference). This rule must be seen as a consequence of the absence, in many countries, of legal remedies against legislation. The Commission here notes the applicant Government's submission, not contested by the respondent Government, that, by Act N° 2324 of 27 October 1980 (Law on the Constitutional Order), any appeal seeking the annulment of enactments passed by the National Security Council was prohibited.

The Commission concludes that the applications, in so far as they relate to specific legislation, cannot be declared inadmissible for failure to exhaust domestic remedies.

16. The Commission further observes that the applicant Governments complain, secondly, of alleged judicial and administrative practices. It notes that these practices, in so far as they are described as affecting rights under Arts.5, 6, 9, 10 and 11 of the Convention, are cited as evidence of the implementation of, and the situation under, the emergency legislation complained of. It therefore finds that, to this extent, the complaints concerning alleged judicial and administrative practices cannot be considered separately, but must be regarded as ancillary to the complaints concerning emergency legislation.

17. The Commission further notes that the applicant Governments, invoking Art.3 of the Convention, complain of an alleged practice of ill-treatment in violation of the relevant Turkish legislation, as described by the respondent Government. They submit that detainees have been tortured or subjected to inhuman or degrading treatment. They also adduce evidence to show that, during the period covered by the applications, torture or ill-treatment were not merely isolated incidents or exceptions, but so widespread and applied in such a systematic manner as to constitute an administrative practice in the sense of the case-law of the Commission and the Court.

18. The respondent Government, while admitting that isolated acts of torture or ill-treatment of prisoners have been committed during the relevant period, deny

any administrative practice that might imply a system or pattern of such treatment with the tolerance of the Turkish authorities. They refer in particular to judgments imposing punishments for ill-treatment of prisoners.

19. The Commission recalls that an administrative practice comprises two elements: repetition of acts and official tolerance (Report in the *First Greek* Case, Yearbook 12/1, 195). As to repetition of acts, the European Court of Human Rights in its judgment in the *Northern Ireland* Case (at para.159) describes such acts as "an accumulation of identical or analagous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system". By official tolerance is meant that, though acts of torture or ill-treatment are plainly illegal, they are tolerated in the sense that the superiors of those immediately responsible, though cognisant of such acts, take no action to punish them or to prevent their repetition; or that higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings a fair hearing of such complaints is denied (Commission's Report in the *First Greek* Case, *loc.cit.*, p.196). To this latter element the Commission would add that any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system. In this regard the Court *(loc.cit.)* has observed the following:

> "It is inconceivable that the higher authorities of a State, should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected".

20. In the present case the Commission has as a preliminary point examined the question whether an administrative practice can be found where individual acts forming part of such practice have been criminally prosecuted. It here recalls that an administrative practice may exist in the absence of, or even contrary to, specific legislation *(First Greek* Case, 2nd decision on admissibility, Collection 26, 80, at p.106 = Yearbook 11, 690, at p.770). It further notes that official tolerance may be found to exist on two alternative levels: that of the direct superiors of those immediately responsible for the acts involved or that of a higher authority (Report of the Commission in the *Northern Ireland* Case, Eur.Court HR, Series B N° 23–1, 393). Thus an administrative practice may be found to exist by virtue of repeated acts tolerated at a lower level even though no such toleration is established at a higher level and, moreover, some of the acts concerned have been criminally prosecuted.

The Commission therefore finds that the existence of an administrative practice of torture or ill-treatment of prisoners in Turkey, during the relevant period, cannot from the outset be excluded on the sole ground that persons guilty of such treatment have in a number of cases been punished. The question to be decided is

whether or not the higher authorities have been effective in bringing to an end the repetition of acts.

21. However, in accordance with the Commission's case-law on admissibility, it is not sufficient that the existence of an administrative practice is merely alleged. It is also necessary, in order to exclude the application of the rule requiring the exhaustion of domestic remedies, that the existence of the alleged practice is shown by means of substantial evidence (*First Greek* Case, 2nd decision on admissibility, *loc.cit.; Northern Ireland* Case, decision on admissibility, Collection 41, 3, at p.85 = Yearbook 15, 80, at p.242).

22. The Commission finds that this condition is satisfied in the present case. It observes that the term "substantial evidence", used in the *First Greek* Case, cannot be understood as meaning full proof. The question whether the existence of an administrative practice is established or not can only be determined after an examination of the merits. At the stage of admissibility *prima facie* evidence, while required, must also be considered as sufficient. The Commission here recalls that it has considered in the *Donelly* Case (Collection 43, 123, at p.148 = Yearbook 16, 212, at p. 262) that the domestic remedies' rule in Art.26 does not apply where an applicant under Art.25 submits "evidence, *prima facie* substantiating" both the existence of an administrative practice and his claim to be a victim of acts part of that practice. There is *prima facie* evidence of an alleged administrative practice where the allegations concerning individual cases are sufficiently substantiated considered as a whole and in the light of the submissions of both the applicant and the respondent Party. It is in this sense that the term "substantial evidence" is to be understood.

23. The Commission recalls that, at the admissibility stage in the *First Greek* Case, it did not consider as "substantial" evidence of an administrative practice the detailed material then submitted by the Governments of Denmark, Norway and Sweden and consisting of statements by former prisoners, press reports and other publications, the authenticity and veracity of which it had not yet had occasion to examine (2nd decision on admissibility, Collection 26, 91, 106 = Yearbook 11, 748, 770).

24. In the *Northern Ireland* Case the Commission was faced with a different situation. The Irish Government relied in support of their complaint of an administrative practice in violation of Art.3 of the Convention on the report of a committee of inquiry appointed by the United Kingdom Government (Compton Report), on affidavits and statements of former detainees and on medical evidence (decision on admissibility, Collection 41, 14 = Yearbook 15, 98). The Commission found an administrative practice of five interrogation techniques referred to in the Compton Report and observed when admitting the remainder of the complaint under Art.3 (Collection 41, 86–87 = Yearbook 15, 246):

> "Without in any way pronouncing at this stage on the question whether or not the allegations under Art.3 are well-founded, the Commission has carried

out a preliminary examination of the evidence and other material submitted by the applicant Government in support of their allegations of forms of ill-treatment other than the five techniques. The Commission observes first that, while generally stating that the facts alleged are not admitted, the respondent Government have not offered any counter-evidence or made detailed comments on the material presented by the applicant Government.

Secondly, the Commission finds that the allegations of ill-treatment contrary to Art.3 must be examined as a whole and the other forms of ill-treatment alleged cannot be considered in isolation from, or without having regard to, the five previously authorised techniques. The Commission has already held that the five techniques constituted an administrative practice to which the domestic remedies' rule in Art.26 does not apply. On the evidence now before it, the Commission finds that other forms of ill-treatment are alleged as forming part of the admitted administrative practice of interrogation in depth and that, therefore, the domestic remedies' rule cannot be properly applied to these allegations. The further examination of all other questions regarding the exent of such an administrative practice and its consistency with the provisions of the Convention relates to the merits and cannot be considered by the Commission at the stage of admissibility".

In the same case the Commission, when determining whether there was substantial evidence of an administrative practice in breach of Art.2 of the Convention, also took into account the submissions of both Parties (Collection 41, 85 = Yearbook 15, 242).

25. In its examination of the question whether there is *prima facie* evidence of an administrative practice of torture or ill-treatment in the present case, the Commission has again had regard not only to the applicant Government's submissions, including statements and reports by individuals and organisations, but also to the submissions of the respondent Government.

26. The Commission recalls that the applications do not relate to the present situation in Turkey but concern alleged breaches of the Convention between 12 September 1980 and 1 July 1982. The information contained in the respondent Government's submissions covers this period and the time thereafter.

The respondent Government state in particular (at paras.165 and 278 of their observations on the admissibility of the applications) that, between 12 September and 6 December 1982, 582 complaints of torture or ill-treatment were made to the competent Turkish authorities; that, as of December 1982, 319 investigations were still pending while 263 had been completed; that in 205 cases the complaints were found to be groundless, while 58 cases were brought before the courts; and that the court proceedings in 16 of the 58 cases were then completed resulting in the conviction of 16 officials in 7 cases. The respondent Government further refer to more recent information (letter of 18 October 1983 from their Permanent Representative to the Secretary-General of the Council of Europe) stating that, as of 22

August 1983, 669 complaints of torture or ill-treatment were filed; that investigations were then pending in 312 cases; that in 256 cases the complaints were found to be groundless, while 63 cases were brought before the courts; and that the court proceedings in 38 cases were completed resulting in the conviction of 63 and the acquittal of 50 officials. The respondent Government also quote an instruction issued by the Head of State on 12 June 1981 and referring to legal proceedings "against 65 security officers in connection with persons who have died or been injured as a result of torture".

27. The Commission finds that the material submitted by the applicant Governments, consisting as in the *First Greek* Case of statements by former prisoners, press reports and other publications, the authenticity and veracity of all which the Commission has not had a full occasion to verify must be seen in the light of the above information provided by the respondent Government, which in part confirms the applicant Governments' allegations. This information shows that, during a period of emergency legislation involving derogations from Convention rights, a great number of complaints of torture or ill-treatment of prisoners were brought before the competent Turkish authorities and that, in a number of these cases, torture was found to have caused serious injuries, or even the death, of prisoners.

28. The Commission finds, on the basis of a preliminary examination, that there is *prima facie* evidence of a "repetition of acts" (cf.para.19 above) contrary to Art.3 of the Convention during the relevant period.

29. The Commission has next examined whether there is also *prima facie* evidence of "official tolerance" of such acts.

30. The Commission notes that, in the present case, detailed instructions to prevent torture or ill-treatment of prisoners (reproduced at para.282 of the respondent Government's observations on the admissibility) were issued by the Head of State on 12 June 1981 and that, following complaints by individuals, criminal proceedings concerning alleged torture or ill-treatment of prisoners were brought in a substantial number of cases.

However, as stated above (para.19), any action taken by the higher authority must be on a scale which is sufficient to put an end to the repetition of acts or to interrupt the pattern or system; an administrative practice may be found to exist by virtue of repeated acts tolerated at a lower level even though no such toleration is established at a higher level and, moreover, some of the acts concerned have been criminally prosecuted (para.20).

The Commission notes that a great number of complaints alleging torture or ill-treatment of prisoners were apparently addressed to the competent Turkish authorities between 12 June 1981, when the above instructions were issued, and 1 July 1982 and that criminal proceedings were apparently opened in a substantial number of these cases. This seems to indicate that the efforts of the Government authorities to prevent violations of Art.3 of the Convention on a considerable scale were not sufficient and, at least during the relevant period, did not achieve their

aim. It also seems to indicate that there was tolerance, at the level of direct superiors of those immediately responsible for the acts involved, of such violations. The Commission here refers to its findings (at the stage of the merits, not of the admissibility) in the *Northern Ireland* Case (Report *loc.cit.*, p.474).

31. As regards its above findings in the present case, the Commission observes that it has taken into account the information provided by the respondent Government, as to proceedings concerning complaints of torture or ill-treatment; also in so far as it relates to court decisions taken after 1 July 1982. However the present applications relate to a defined period in the past. It is consequently not the Commission's task, at this stage of the proceedings, to examine whether the measures taken by the respondent Government, since 12 September 1980, have after 1 July 1982 succeeded in preventing such violations.

32. In conclusion the Commission, on the basis of a preliminary examination, also finds *prima facie* evidence of "tolerance" of acts contrary to Art.3 of the Convention during the relevant period.

33. The Commission notes the respondent Government's submission, that requests for extraditions to Turkey were during this period granted by France, the Netherlands and Sweden, and the submissions of the French, Netherlands and Swedish Governments concerning the restricted number and the character of these cases. It does not find, on the basis of the material before it, that this information leads to a different result as regards the alleged practice in Turkey during this period.

34. It follows that the rule as to the exhaustion of domestic remedies does not apply and that the applicant Government's complaint under Art.3 cannot, as requested by the respondent Government, be declared inadmissible under Arts.26 and 27 (3) of the Convention.

IV. As to the objection concerning the French reservation under Art.15 of the Convention

35. In their submissions under Art.15 the respondent Government, in reply to the application introduced by France (N° 9940/82), refer to the French reservation concerning this Article, the validity of which they do not discuss. They argue that France is estopped from bringing a case against Turkey, which gives rise to a consideration of issues that would be covered by this reservation and thus could not be examined in the context of an application brought against France. In their view the present reservation has to be distinguished from the problem raised in the *Austria* v. *Italy* Case in so much as it affects on a permanent basis the scope of review by the Convention organs.

36. The applicant Governments, relying on the Commission's decision in the *Austria* v. *Italy* Case, consider that the French reservation under Art.15 is irrelevant to the determination of the application by France.

37. The Commission notes that France, when ratifying the Convention, made a reservation concerning Art. 15 (1)

"to the effect, firstly, that the circumstances specified in Art. 16 of the Constitution regarding the implementation of that Article, in Sect. 1 of the Act of 3 April 1878 and the Act of 9 August 1849 regarding proclamation of a state of siege, and in Sect. 1 of Act N° 55–385 of 3 April 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Art. 15 of the Convention and that, secondly, for the interpretation and application of Art. 16 of the Constitution of the Republic, the terms 'to the extent strictly required by the exigencies of the situation' shall not restrict the power of the President of the Republic to take 'the measures required by the cirumstances'".

The Commission, like the Parties, does not consider that it is in the present case faced with the question of the validity of this reservation under Art. 64 of the Convention.

38. The Commission observes that the objection raised by the respondent Government does not concern a question of estoppel or opposibility, but an issue of reciprocity.

39. The Commission finds that the general principle of reciprocity in international law and the rule, stated in Art. 21 (1) of the Vienna Convention on the Law of Treaties, concerning bilateral relations under a multilateral treaty do not apply to the obligations under the European Convention on Human Rights which are "essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" *(Austria* v. *Italy*, Yearbook 4, 116, at p. 140). The European Court of Human Rights (at para. 239 of its judgment in the *Northern Ireland* Case) has similarly referred to the "objective obligations" created by the Convention over a network of mutual, bilateral undertakings.

40. The Commission further recalls that the enforcement machinery provided for in the Convention is founded upon the system of "a collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention" and that a High Contracting Party, when referring an alleged breach of the Convention to the Commission under Art. 24, "is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe" *(Austria* v. *Italy, loc.cit.)*.

41. The Commission has stated earlier that an application brought under Art. 24 "does not of itself envisage any direct rights or obligations between the High Contracting Parties concerned", the special objective obligations, accepted by the High Contracting Parties under the Convention, being obligations towards persons within their jurisdiction, not to other High Contracting Parties (Application

N° 8007/77, *Cyprus* v. *Turkey*, Decisions and Reports 13, 147 = Yearbook 21, 226, 228). It further observes in this respect that the Convention clearly indicates where, as regards a right of action under it, a question of reciprocity may exceptionally arise. This is the case in Art.46 (2), concerning recognition of the Court's jurisdiction, but not in Art.24, which contains no such indication.

42. It follows from the foregoing that the objective character of the Convention must also be respected in the case of a reservation, such as the present one, concerning the enforcement machinery of the Convention.

43. The Commission concludes that France is not barred from bringing a case against Turkey under Art.24, which gives rise to a consideration of issues that would be covered by the French reservation under Art.15 of the Convention.

V. As to the objection that the acts complained of are justified under Art.15 of the Convention

44. The respondent Government submit that many of the matters complained of are derogating measures which Turkey was entitled to take under Art.15 of the Convention.

45. The applicant Governments consider that the determination of issues arising under this Article must in inter-State cases be reserved for the examination of the merits.

46. The Commission recalls that, in cases brought under Art.24 of the Convention, it cannot be its task to carry out a preliminary examination of the merits at the admissibility stage, in the same way as in proceedings relating to individual applications under Art.25 of the Convention (cf.paras.11 to 13 above), and that consequently, in accordance with its case-law, the effects of derogations unter Art.15 of the Convention must in inter-State cases be reserved for the examination of the merits (*First Cyprus* Case, Yearbook 2, 182, 184; *First Greek* Case, 1st decision on admissibility, Collection 25, 115 = Yearbook 11, 728; *Northern Ireland* Case, Collection 41, 88 = Yearbook 15, 248, 250).

47. The Commission consequently reserves for an examination of the merits the question whether, and to what extent, matters complained of in the present application are justified as derogating measures under Art.15 of the Convention, and the related question whether Turkey has complied with her obligations under para.(3) of this Article.

For these reasons, the Commission,

Without in any way prejudging the merits of the case,

Declares the applications admissible.

Secretary to the Commission
(H. C. Kruger)

Acting President of the Commission
(G. Sperduti)