EUROPEAN COURT OF HUMAN RIGHTS

In the matter of Necati ZONTUL (Applicant) -and- GREECE (Respondent State)

Ref.: 12294/07

Annex to the Application, dated April 2008

II. Statement of the Facts

14. Introduction

1. This application is about whether the Applicant's rights under the Convention were infringed when he was allegedly tortured by officials of the Respondent State; and whether the actions taken by the Respondent State in response to the incidents alleged contributed to further violations of the Applicant's rights.

2. It is submitted that the application raises compelling and important issues as to the extent of the procedural rights afforded to victims of gross violations of human rights during a criminal investigation, prosecution and sentencing of those said to be responsible for the abuses; and the nature and extent of the obligations owed by the Respondent State to foreign victims injured within their territory.

3. On 27th May 2001, the Applicant, Necati ZONTUL (a Turkish national) boarded a boat, the *Nuri Reis* from Istanbul to Italy. He was one of 164 migrants on board. On 30th May 2001, the boat was intercepted by the Greek Coastguard, and was towed into Hania Harbour in Crete. The passengers were escorted to a disused military barracks. On arrival at the barracks, the Coastguard took all personal effects, including watches, radios, CD walkmen and personal papers including passports.

4. The Applicant alleges that the conditions in detention were extremely poor, and access to the lavatory, to food and basic amenities was restricted. The Applicant was detained together with approximately 30 males and one minor, in a room of approximately 2 x 2 metres. The room had a concrete floor with no furniture and the only provisions the detainees were provided with was a light blanket.

5. The Applicant alleges that many of the migrant detainees were assaulted at the barracks, by three of the four squads assigned to guard the migrants, as part of a pattern of attacks. Between 1-6 June 2001, various male migrants were taken downstairs to return later with bruises and some were unable to walk. Some told stories of mock executions and Russian roulette.

6. On 5th or 6th June 2001, the Applicant alleges that he was trapped in the toilets and was forced to remove his trousers and undergarments. One of the Coastguard officials, a Mr. Dandoulakis, allegedly asked him "how much, how much" measuring with his finger the amount of the truncheon he intended to insert into his anus. The Applicant pleaded "No, Monsieur", but experienced excruciating pain when the truncheon was inserted in his anus. As a result of the physical pain the Applicant fell onto the floor of the toilet and the

Applicant alleges that Coastguard Dandoulakis kicked him twice with his leather boots. One migrant, [redacted] was hiding in an adjacent cubicle and heard the exchange. When Coastguards Dandoulakis and Vardakis, the latter who was guarding the door, left, [redacted] helped the Applicant to dress and took him back to the room. Another migrant named [redacted] also claimed to have been raped with a truncheon. The Applicant felt so ashamed by his experience of having been raped with a truncheon. He is under the impression that part of the reason for him having been targeted for such treatment resulted from his sexual orientation (he is homosexual), and this exacerbated his shame and embarrassment. The Applicant remembers well Coastguard Dandoulakis because of his distinctive red hair and his large build.

7. After the rape with a truncheon in the toilets referred to in the preceding paragraph, when the Applicant was back in his cell with the other migrants/detainees, a number of coastguards allegedly came into the cell. The migrants/detainees were allegedly forced into the centre of the cell and were kneeling with their hands behind their heads. The coastguards allegedly encircled them and began to beat them with wooden truncheons. Water and what smelled like 'cologne' was sprayed on them. This treatment lasted for what appeared to the Appellant like approximately two hours.[1] The Applicant was in the centre of the encircled detainees and whilst he did not receive directly any of the truncheon blows he was petrified that he would be hit, a fear that was compounded by his prior experience in the toilet. After they finished, the coastguard officers apparently went to the next room, and from the sounds of the men screaming in pain, it appeared to the Applicant that the same treatment was given to the other detainees.

8. The Applicant alleges that at least two or three persons were seriously injured by this incident, someone broke ribs, another broke an arm. Persons waited 2.5 hours before being sent to the hospital.

<u>The Investigation</u>

9. On 6th or 7th June 2001, the commanding officer, who was absent during the incidents referred to in preceding paragraphs, returned to the barracks and heard the complaints of the Applicant and other migrants. The commanding officer announced that an investigation would be opened. The Applicant was forced to publicly identify the man who abused him. He was also later seen on duty despite promises to discipline him. Doctors treated the injured migrants however the Applicant was denied access to the doctors despite his request to be examined.

10. On 8th June 2001, the Ministry of Merchant Marine confirmed in news reports that an official investigation had been ordered to determine whether the coastguard officers were responsible for "omissions or irregular acts" during the detention of the migrants.

11. On 12th June 2001, the Applicant and three other migrants testified to their experiences which were recorded and translated. The translator urged the Applicant "not to make Greece look bad", and as the Applicant later determined when he was given a copy of this initial statement more than one year later and it was explained by another translator, his allegations of rape were downgraded to "a slap" and his detailed account of the events were inaccurately summarized in less than one page, (without the consent of the Applicant). The Statement apparently indicated that the Applicant did not want the

[1] See the Transcript of the Admiralty Court of Chania, Decree No. 24/2002, at p. 153.

officers in question to be punished, though the Applicant denies he ever said this. The Applicant is not in possession of this statement though he refers to it in his subsequent statement dated 5 July 2002 which is appended. In the 5 July 2002 statement, the Applicant notes:

> *"When I was leaving the toilet he touched me in front from my shirt and began pushing me backwards, taking the others out shouting "go away, go away", he hit me with the baton on the back many times, he forced me to bend down and then he started touching me smoothly with the baton from the below my legs going up slowly to the area of the anus. Because however there were people in the toilets who, in going out, noticed me in this phase (one of them was [redacted] who was afraid and stayed inside the toilet also after his physical need), I felt very badly seeing those look at me and he, the HG Officer pushed me in one of the toilets, set me up on my feet with my hands on the wall and was hitting me with the baton high on both my legs, now here and then there. He forced me to take out my trousers and showing the baton to me he was telling me how much do you want "so much, so much", I cannot believe it that he did it with such ease, he seemed to me a person used to it, so much that I believe that he does it also to the following batches of illegal immigrants, he was very comfortable. After he was pushing me using the baton to my neck, indicating to me to bend down and then, he powerfully pushed the baton into my anus, it hurt a lot, I began shouting ([redacted] noticed me, who although he had finished his need was still in the toilet), I felt down because of the pain and then he kicked me again and left.*
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> *And of course I wish that the guilty are exemplarily punished I have asked this also in the previous time but I cannot believe that it was written no. The interpreter then was not so good and a professional like the one today, he was frequently looking at the dictionary. I cannot, however believe how he interpreted yes as no. I would be ashamed to tell all these and I would not have told anything if [redacted] have not noticed it..."* [Statement, Witness' Examination Report Upon Order No. F092.220-1106]

12. In July 2001, the migrants were given "rose" cards (confirming an asylum-seeking position), a ticket to Athens and 5 drachma each. The Applicant was put on a chartered bus in Piraeus and taken directly to the Kurdish camp of Lavrion (though he is not Kurdish). He managed to escape this camp and made his way to Athens.

13. On 3rd October 2001, the Navy Court of Hania ordered the opening of criminal proceedings against five coastguards on charges of offences against human dignity (Section 137A of the Criminal Code). In November 2001, news reports indicated that the authorities had announced that two coastguard officers implicated in the beatings would be punished with 20 days confinement to barracks and that the other four coastguards would serve 30 to 50 days in jail, though the Applicant received no direct information from the officials involved in the investigation.

14. In May 2002, the Applicant was summonsed together with two other men, who had all registered as civil parties in the case, to testify as a witness. On 26th June 2002 they travelled to Hania, together with a lawyer engaged on their behalf. However, on arrival they found that, despite previous assurances, a Turkish-speaking court interpreter was not

available. They consequently did not testify, although the investigating judge argued that the questions would be "simple and they can reply with whatever Greek they know". They subsequently testified to an investigating judge in Piraeus on 5th July 2002.

15. The Applicant, other witnesses and their counsel received threats said to be in connection with their testimony.[2] The trial which was scheduled for 24th October 2003 did not take place. The Applicant met with the Greek Ombudsman on 15th November 2003 to explain his concerns. The trial was postponed several times to 27th February 2004, and was further adjourned on that date without clear explanation as to why the adjournment had taken place.

16. In February 2004, the Applicant and his partner left Greece for Turkey then England. Since mid 2004, the Applicant sought all possible contact with the Greek Embassy in London, United Kingdom, to stay informed about the legal proceedings, though very little information was forthcoming. In particular, the Applicant wished to assert his right to testify at the proceedings and assert his right as civil party registered to the case. Subsequent letters in 2004 and 2005 to the Greek Prime Minister and President did not produce results.

17. On 16th October 2004, in response to a 'Haniotikia' (news) report on the trial with a photo of one of the witnesses, the Applicant sought unsuccessfully to get information on the ruling from the Hania Navy Court. The Applicant subsequently learnt that the Naval Military Court of Hania had imposed suspended sentences to five coast guards convicted under Art 137A.3 of the Criminal Code for the ill-treatment of asylum seekers: 30 months to one for offence to sexual dignity, one year to another for abetting the first one, and eighteen months to three others for abuse. The Applicant was not advised of these proceedings despite his specific and repeated attempts to stay informed, and consequently was not able to provide his evidence on the allegations, nor assert his rights as civil party.

18. An appeal was brought by the coastguards and was scheduled to take place on 13th October 2005. Prior to the date of Appeal, the Appellant sought further to be in contact with all competent authorities in Hania as well as with the Greek Embassy in the United Kingdom to get a copy of the initial judgment and to take part in the proceedings, though despite these efforts the Applicant was not able to obtain a copy of the initial judgment.[3]

19. On 21st September 2006, the Applicant received a letter from the Greek Embassy in London, which enclosed a letter that had apparently been sent on 4th July 2006 but had been returned undelivered. The letter of 4th July 2006 indicated that "the Appellate Martial Court convened on 20 June 2006 and reached the following judgment, which has not been registered yet and is not final and definitive." The letter further disclosed that the Appellate Martial Court sentenced Mr. Dandoulakis and Mr. Vardakis to six months imprisonment, suspended for three years, with the option to convert it to a financial penalty amounting to 4.40 euros per imprisonment day of imprisonment. The Appellate Martial Court unanimously acquitted the three other appellants.

20. The Applicant has received no further communication from the Appellate Martial Court. The Applicant sought advice from the British Foreign and Commonwealth Office to assist in clarifying the state of affairs. On 11th December 2006, the Applicant received a reply from

[2] Correspondence of the Applicant [redacted] to the Supreme Martial Court dated 1st June 2006.
[3] See, Correspondence to the Prosecutor's Office, 4th October and 12th October 2005.

the UK Foreign and Commonwealth Office indicating that it had pursued the matter with the Greek Ministry of Foreign Affairs and, in reference to the June Decision, "This is 'final' (referred to as a 'second degree' decision)". In subsequent correspondence received from the Foreign and Commonwealth Office on 15th December, it was indicated that:

> "You were concerned that some information in our letter to you (reference 200/2006) conflicted with information you had received from the Greek Embassy in London stating that the judgment was not yet final and definitive. The information contained in our letter was based on that which our Embassy in Athens had received from the Greek Ministry of Foreign Affairs (MFA), Our subsequent discussions with the MFA have highlighted that, despite our understanding of their previous assertions, it is not clear-cut; we understand that while the second-degree decision is final in some aspects, other aspects of the decision are open to re-examination in a higher court."

On 5th January 2007 the Applicant received a further communication from the Greek Embassy in London which indicated as follows: "we would like to inform you that the judgement that was reached by the Appellate Martial Court on 20 June 2006 (referred to in the abovementioned letter of 4 July 2006) is now final and definitive."

21. On 20th June 2007, the Applicant received for the first time from the British Foreign and Commonwealth Office (who received them from the Respondent State) the judgments and witness statements relevant to the case, translated to English, which are appended as relevant to this Application. These materials were only received following the representations made by the Embassy of the United Kingdom.[4] The witness statements were provided in the original Greek form as well as translated to English; the Court decisions were only provided in their translated form, in English (no Greek originals were provided).

[4] See Verbal Note of the Hellenic Republic Ministry of Justice to the Embassy of the United Kingdom in Athens, dated 17th May 2007. The documents in question were subsequently given to the Applicant in person by an official of the Foreign and Commonwealth Office in London, on 20th June 2007.

III. *STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS*

15. The Applicant asserts the following violations to the Convention:

I. Commission of Torture (Substantive breach of Art. 3)

1. The forcible and deliberate penetration of the truncheon into the Applicant's anus by the Greek Coastguard, carried out in a context of detention, and in addition to having been repeatedly beaten with a club, caused excruciating pain of such gravity, degradation and humiliation as to constitute torture. This act of sexual humiliation was carried out, at least in part, as a form of discrimination or intimidation as a result of the Coastguard's realization that the Applicant was a homosexual. As is indicated in the transcripts of the Court:

> "... when he realized that Necati Zontul was a homosexual, he isolated Necati Zontul in a toilet, beat him with a club many times on the back, forced him to bend his body forward, placed lightly the club at the lower part of his legs raising it slowly up to the anus. Then, he forced him to stand up and put his hands at the wall, obliged him to take off his trousers and after beating him with the club many times on the upper part of his legs, showing the club asked him: 'how much do you want, so much, so much?' Finally, after placing the tip of the club at his anus, he pushed it into the anus with force causing an intense pain to the immigrant."[5]

The Report of the Examiner of the Admiralty Court of Chania, notes that "on 05-06-01 the Port Guard Dandoulakis in the presence of the Port Guard Vardakis used psychological violence and jeered at the Kurd illegal immigrant Necati Zontul in the baths, because he had realised that Necati Zontul was a homosexual, and he also beat him on the bottom with a club."[6]

2. The Applicant's 5 July 2002 statement confirms that he was beat many times with a club, and that after this, the club had been pushed up his anus and he "collapsed in pain". The Applicant also indicated that the incident caused him shame. He indicated in the 5 July 2002 statement that he was "ashamed to tell all these and I would not have told anything if [illegible] have not noticed it."

Rape as a Particularly Aggravated Form of Torture

3. As this Court has expressed in ***Aydin v. Turkey***, "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence." [23178/94, para. 83].

4. The Inter-American Court of Human Rights, has also noted in the recent ***Case of the Miguel Castro-Castro Prison***, that sexual rape may include forcible anal penetration by a foreign object, and may constitute torture. The Inter-American Court noted:

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[5] Admiralty Court of Chania, Decree no. 24/2002, at p. 176 of English translation.

[6] Report of the Examiner of the Admiralty Court of Chania, Ref. no. 3/2002 dated 3 June 2002 at p 219

"sexual rape does not necessarily imply a non-consensual vaginal relationship, as traditionally considered. Sexual rape must also be understood as act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member. He Court acknowledges that the sexual rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent. Similarly, sexual rape is an extremely traumatic experience that may have serious consequences and it causes great physical and psychological damage that leaves the victim 'physically and emotionally humiliated', situation difficult to overcome with time, contrary to what happens with other traumatic experiences. Based on the aforementioned and taking into consideration that stated in Article 2 of the Inter-American Convention to Prevent and Punish Torture, this Tribunal concludes that the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal 'examination' constituted sexual rape that due to its effects constituted torture."[7]

5. A similar conclusion was reached in the International Criminal Tribunal for the Former Yugoslavia's decision of ***Furundzija***, in which it was held that the objective elements of rape could be defined as follows: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[8]

II. Breach of the Applicant's Procedural Rights (Art. 3 combined with Art. 13)

II.(a) Failure of the Respondent Party to keep the Applicant informed about the Trial and Appellate Proceedings

6. The Applicant asserts that his rights to be kept regularly informed about the proceedings and to participate in same were severely hampered by the failure of the Respondent State to respond to the Applicant's repeated queries about trial dates, and procedures. The Applicant sought to provide investigators with information about the incidents complained of and in this respect, provided 2 witness statements, first on 12 June 2001 then on 5 July 2002. However, his subsequent efforts to remain involved in the trial were unsuccessful, as a result of several initial postponements of trial dates and the failure of the Respondent State to ensure that the Applicant was kept informed about the process, in particular, after he left the country in February 2004.

7. This Court has repeatedly recognised the obligations on States, flowing from the substantive obligations in the Convention, to regularly inform victims and their families about ongoing proceedings. In ***Ilhan***, the Court recognized "the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill-treatment and permitting effective access for the complainant to the investigatory procedure."[9] In ***Ognyanova and Choban v Bulgaria***, the Court stipulated that:

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[7] Inter-American Court of Human Rights, Case of the Miguel Castro-Castro Prison *v.* Peru Judgment of November 25, 2006 *(Merits, Reparations and Costs),* Series C No. 160, paras. 310-312.

[8] *Prosecutor v Furundzija,* Case IT-95-17/1-T, Judgment 10 December 1998 at para 185.

[9] Ilhan v Turkey (Appl. No. 22277/93, 27 June 2000), *para* 92.

"there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in, or tolerance of, unlawful acts. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (*ibid.*, § 115; and ***Anguelova***, cited above, § 140, with further references)."[10]

This point was also underscored by the Inter-American Court of Human Rights, which held in the ***Caracazo case***, that "the next of kin of the victims and the surviving victims must have full access and the capacity to act during all stages and levels of said investigations."[11]

8. The right of victims to be kept informed of procedures which impact upon their interests, including trial and appellate procedures, has also been recognized by numerous declarative instruments. As a member State of the European Union, Greece agreed to bring into force the laws, regulations and administrative provisions necessary to comply with the European Union *Council Framework Decision on the standing of victims in criminal proceedings*. This Framework Decision recognises that "Each Member State shall ensure that victims who have expressed a wish to this effect are kept informed of: (a) the outcome of their complaint; (b)relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected; (c)the court's sentence."[12]

9. The UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, provides that "[t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information."[13] In addition, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* provide that states should: "(*b*) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims; (*c*) Provide proper assistance to victims seeking access to justice; (*d*) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law."[14]

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[10] Ognyanova and Choban v Bulgaria (Appl. No. 46317/99, 23 February 2006), para. 107.
[11] Caracazo Case, Judgment of 29 August 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002), at para 118.
[12] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA), at para. 2.
[13] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.*
[14] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 at para. 12 (b)-(d).*

10. The Applicants' lack of information about the timing and conduct of trials and appellate procedures had a negative impact on his ability to participate in same, and further impacted on his consequential rights. This caused the Applicant continued distress, as he was not afforded the opportunity to explain to the judges in person or by video-conference the exact nature of his experiences and the personal impact on him. Whilst his previous witness statements were taken into account by the Court, the first statement did not specify that the truncheon used by the Coastguard had physically penetrated into his anus, and the Applicant remained concerned that this point would be debated before the Court and that his assertion of penetration would not be believed. He was also concerned that the Coastguard's assertion in his defence that he was merely trying to keep order in the baths would be accepted by the Court, a point which the Applicant strongly believed he would have been able to disprove had he been afforded the possibility to testify at the trial, given his slight physical stature vis-à-vis the accused. Additionally, had the Applicant been present at trial, he would have had the opportunity to explain to the Court why no forensic report was prepared (indeed, he maintains that he was denied opportunity to seek medical attention, a point which has not come out in the trial record).

11. The Applicant's lack of knowledge of the court dates also prevented him from exercising his right as civil party in the proceedings. In the case of ***Hajrizi Dzemajl et al. v. Yugoslavia***, the United Nations' Committee against Torture found that Yugoslavia's failure to inform the complainants of key events which triggered their rights violated Article 13 of the *UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*. It was of the view that "the State party's failure to inform the complainants of the results of the investigation by, inter alia, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention."[15]

12. The Applicant submits that in order to make the rights under the Convention practical and effective, the Respondent Government was under a special obligation to ensure that as someone living outside of the country in which the crime took place, and having expressed a particular interest in participating in the trial and appellate procedures, could have participated in same. The EU *Council Framework Decision on the standing of victims in criminal procedures* has specifically recognised such an obligation. It provides that "Each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred, particularly with regard to the organisation of the proceedings. For this purpose, its authorities should, in particular, be in a position: — to be able to decide whether the victim may make a statement immediately after the commission of an offence, — to have recourse as far as possible to the provisions on video conferencing and telephone conference calls laid down in Articles 10 and 11 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (1)for the purpose of hearing victims resident abroad."[16]

II.(b) Failure of the Respondent Party to Ensure Effective Criminal Proceedings

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[15] Hajrizi Dzemajl et al. v. Yugoslavia, Committee against Torture, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (11 November 1999), at para. 9.5.
[16] Supra., at Para 11 (1).

13. This Court has recalled that Article 3 of the Convention "enshrines one of the fundamental values of democratic society."[17] It has recalled in respect of violations of Article 2 of the Convention, the duty on the State to secure the right to life by, *inter alia*, putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions,[18] measures which are equally applicable in the context of Article 3. In order to satisfy the requirements of Article 3, the State must take appropriate action to sanction those who inflict the prohibited treatment or punishment. This obligation means that the State must provide not only for an accessible procedure for complaints and investigations, but also for an effective criminal justice system.

14. The Applicant submits that the deterrent effect of the judicial system in place, and the significance of the role it is required to play in preventing violations and in ensuring that the prohibition against torture and other cruel, inhuman and degrading treatment and punishment is not undermined, was undermined by the Respondent State by

i) its failure to characterise the treatment of the Applicant as torture; and

ii) its imposition of sentences which do not reflect the gravity of the incidents together with its decision to suspend the sentences imposed on the Coast Guard officers after lengthy criminal proceedings.

i) Failure to characterize the Applicant's treatment as torture

15. The Applicant submits that by failing to recognise the acts perpetrated against him as a particularly aggravated form of torture,[19] the Respondent Government failed to adequately discharge its responsibilities to protect the rights of those under its jurisdiction. By restricting those acts that may constitute torture to a small subset of the actions that are recognised as torture under international law, the criminal law provisions which the Government has put in place to prohibit torture and other cruel, inhuman or degrading treatment and punishment, do not suffice to deter the commission of such offences, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions, and by not allowing such breaches to be punished appropriately.

16. The Greek Criminal Law on the prohibition of torture does not accord with international standards on the prohibition of torture, in particular Article 3 of the European Convention and Article 1 of the UN Convention against Torture. Under the Greek Penal Code, the provisions relating to torture and other forms of ill-treatment are set out in Article 137A of the Penal Code.

Under the provisions of Article 137A.1:

"An official or military officer whose duties include the prosecution, interrogation or investigation of criminal offences or disciplinary offences or the execution of sentences or the guarding or custody of detainees, is punished ... if he subjects to torture, during the performance of these duties, a person who is under his authority with the aim of a) extorting from this person or a third person a confession, testimony, information or

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[17] Aksoy v Turkey (Appl. No. 21987/93, 18 December 1996).
[18] Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115).
[19] Aydin v. Turkey, supra.

statement, or the repudiation or acceptance of a political or other ideology; b) punishing; c) intimidating the person or third persons."

Article 137A.2 defines torture as

"... any systematic infliction of acute physical pain, or physical exhaustion endangering the health of a person, or mental suffering capable of leading to severe psychological damage, as well as any illegal use of chemicals, drugs or other natural or artificial means with the aim of bending the victim's will".

Art 137A.3 lays down less serious offences involving:

"physical injury, injury to the health, the use of illegal physical or psychological force and any other serious offence against human dignity, which is committed by persons under the conditions and for the purposes defined [above]".

17. The Judgment no. 161/2006 found the defendant guilty of having "caused bodily injuries and harm to health, used illegal physical violence and committed a serious insult of sexual dignity (acts not falling within the meaning of paragraph 2, Article 137A [torture]) against a person under his authority with the intention of punishing him..." [p. 53]

18. The Appellate judgment 62/2004 explains what is required for an act to constitute torture within the sense of Art. 137A.2 (this point was not reversed on final appeal). It indicates that:

> "torture presupposes a repetitive and durable physical pain;" [p. 105]

and explains, in reference to the acts of the defendants, that

> "their acts do not of course constitute torture in the sense of paragraphs 1 and 2, Article 137A, Criminal Code, but they fall under paragraph 3 of that article. Torture presupposes a planned causing of intense physical pain, which means that (as pointed out hereinabove) the causing of physical pain must be repeated and durable. In this case, the incident took place once and lasted a few minutes (ten to fifteen minutes according to the witness [redacted]. Therefore, the acts, mainly ecchymoses, excoriations and bruises, which constitute bodily injuries as pointed out hereinabove) by the said persons, fall under paragraph 3, Article 137A, Criminal Code, because they were not frequent enough and did not last as required in order to constitute a 'planned' causing of pain, consequently, this requirement does not appear to be met." [p. 121]

19. Human rights organizations have indicated that the Respondent Government has only sparingly resorted to prosecutions under Art 137(A):

> "The onerous consequences following a conviction for torture and a certain "leniency" towards police officers might explain -but certainly not justify- why prosecutions, let alone convictions, under Article 137A have been very rare. It is also significant that the only two cases known to AI/IHF (in the period 1998 to the end of June 2002) in which police officers have been indicted and tried under Article 137A have conformed to the restrictive interpretation of this article; in both cases the accused police officers were acquitted (cases 1-2 and

56-57 in the table below). There have also been cases where, despite serious allegations of torture (including the use of electro-shock equipment, see the Okeke case infra, section 2.3.d), the prosecutor has only called for a "preliminary inquiry" into the allegations. The documents gathered, should the prosecutor decide to shelve the case, are not accessible to the complainant whose only right is to appeal the decision to shelve the case.[20]

20. The Applicant submits that the characterization of the acts perpetrated by the defendant as falling with acts prohibited by Article 137A.3 of the Criminal Code instead of torture (137A.2) allowed the Courts to set out a penalty for the acts committed against the Applicant which was manifestly disproportionate with the gravity of the acts. The penalty laid down for a violation of Art 137A.1 and 137A.2 is 5 - 25 years imprisonment and 3 - 5 years imprisonment for violations of 137A.3. More serious cases of torture, such as involving the use of electro-shock are prohibited by Art 137B and are punishable by at least ten years imprisonment. In addition to the above, persons convicted of torture are automatically deprived of their political rights and dismissed from their jobs. However, the courts have the possibility to impose a lower sentences when there are mitigating circumstances (Art 83 and 84 CC). This may amount, for Art 137A.3, even to suspended sentences of less than three years if the perpetrator has no prior convictions.[21]

21. In determining the appropriate penalty for the defendant, the Court reasoned as follows:

> "Whereas according to articles 79 and 80, Criminal Code, the Court takes into consideration the seriousness of the crimes and the personality of the defendants who were found guilty. In order to consider the gravity of the crimes, the Court examines the damage or the danger caused by the crimes, the nature, the kind and object of the crimes and all aspects of time, location, means and manner related to the preparation or performance of the crimes and the intensity of the malice aforethought of the culpable persons. When considering the personality of the defendants the Court weighs up in particular the degree of the criminal intention manifested during the acts. In order to determine the degree accurately, it examines the causes that made the perpetrators commit the crimes, the pretext given and the aim sought, their character and degree of their development, the individual and social circumstances and their previous life, their conduct during the acts and after the acts, in particular the repentance shown and their willingness to restore the consequences of their acts and also the financial terms. Taking all those elements into consideration and accepting unanimously that there are in favour of each of the defendants found guilty alleviating circumstances, as described in subparagraph 2 article 84 Criminal Code, since they had until the time of the crime an honest personal, family, professional and in general social life, it deems that the following penalties must be imposed on them: on the defendant, DANDOULAKIS, an imprisonment of six (6) months ...
>
> It sentences the defendant Mr Stylianos DANDOULAKIS who was found guilty, to an imprisonment of six (6) months and orders him to pay the costs of the

[20] OMCT and others. State Violence in Greece: An Alternative Report to the United Nations Committee Against Torture, 33rd Session, Athens and Geneva, 27th OCT. 04, pp. 21-22. Available online at: http://www.omct.org/pdf/procedures/2004/joint/s_violence_greece_10_2004.pdf.
[21] Ibid.

> criminal proceedings amounting to two hundred and twenty euro (220 euro); ... It orders the suspension of execution of the penalties imposed above for a period of three (3) years. It commutes, in case of lifting or revocation of the suspension granted, the penalty depriving freedom as imposed on the convicted persons into a pecuniary penalty of four euro and forty cents (4.40 euro) per day of imprisonment for each of the convicted persons." [pp. 58-61]

22. The Applicant is not aware of any disciplinary proceedings to which the defendant was subjected to, and believes there to be none, following the analysis of the relevant Criminal Code provisions set out above, which only call for a suspension from duty following a conviction under Article 137A.2.

23. This Court has previously held that a State is responsible for any person in detention, who is in a vulnerable situation while in its charge, and that the authorities have a duty to protect such a person. Bearing in mind the State authorities' obligation to account for injuries caused to persons within their control in custody, the Court considers that the acquittal of the police officers suspected of inflicting ill-treatment or the suspension of proceedings and execution of sentences cannot absolve the State of its responsibility under the Convention. (see, *mutatis mutandis*, ***Berktay v. Turkey***, no. 22493/93, § 168, 1 March 2001 and ***Çolak and Filizer v. Turkey***, nos. 32578/96 and 32579/96, § 168, 8 January 2004). In this Court's judgment in the case of ***Abdulsamet Yaman v Turkey***, the Court "also underlines the importance of the suspension from duty of the agent under investigation [para 55]

24. Under Greek law, a particularly aggravated form of torture would command a sentence of up to 25 years' imprisonment. By failing to characterise the acts against the Applicant as torture, the maximum penalty that could be issued for the acts in question, as an offence under 137A.3 is 5 years imprisonment. The Court saw fit to further reduce this penalty to 6 months imprisonment for 'mitigating circumstances' without hearing from the Applicant or taking into account the continuing impact of the acts on him. The Court further suspended this term for three years, and converted the term, if the suspended sentence were to be lifted, to a pecuniary fine.

25. As this Court has noted in the ***Nikolova and Velichkova*** case,

> It is not the Court's task to verify whether the judgments correctly applied domestic criminal law; what is in issue in the present proceedings is not the individual criminal-law liability of the officers, but the international-law responsibility of the State (see ***Tanli v. Turkey***, no 26129/95, £111, ECHR 2001-III (extracts)). However, the Court cannot overlook the fact that, while the Bulgarian Criminal Code of 1968 gave the domestic courts the possibility of meting out up to twelve years' imprisonment for the offence committed by the officers (see paragraph 37 above), they chose to impose the minimum penalty allowed by law - three years' imprisonment-, and further to suspend it. In this context, it should also be noted that no disciplinary measures were taken against the officers (see paragraph 23 above). ... In the Court's view, such a reaction to a serious instance of deliberate police ill-treatment which resulted in death cannot be considered adequate. By punishing the officers with suspended terms of imprisonment, more than seven years after their wrongful act, and never disciplining them, the State in effect fostered the law-enforcement officers' "sense of impunity" and their "hope that all [would] be covered up". [para. 63]

26. In ***Urra Guridi v. Spain***, the UN Committee against Torture underscored that States Parties are obligated to impose appropriate penalties against those held responsible for committing acts of torture, taking into account the grave nature of such acts: "The Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment."[22]

Article 6

27. The Applicant asserts that Article 6 § 1 of the Convention in applicable to his claim in respect of his claim as civil party in the criminal proceedings. As a civil party, the Applicant would under normal circumstances have been both a party to the proceedings for the defence of his civil interests and entitled to claim compensation. As this Court noted in ***Perez v. France*** *((Application no. 47287/99))*, "the fact that they may choose not to claim compensation at a particular stage in the proceedings does not detract from the civil nature of their claim, nor does it take away their right to make such a claim at a later stage, which they cannot in any case be shown not to have exercised until the end of the trial of the merits."

28. The Applicant asserts that he repeatedly enquired to the competent authorities about the assertion of his civil rights within the criminal proceedings with no response. The lack of information about the process as detailed earlier in this submission negatively impacted on his ability to effectively exercise his rights as a civil party in order to claim compensation, as he was not apprised of the date of trial or provided with any information about civil procedures.

Article 13

29. The Applicant complains that he did not have an effective remedy within the meaning of Article 13 of the Convention.

30. The reasons for the lack of an effective remedy are set out in relation to the breach of the Article 3 procedural obligation as well as the breach of Article 6.

[22] (CAT 212/02), para. 6.7.