

April 2001

Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan?

Hanz Chiappetta

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Hanz Chiappetta, *Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Workers Party's Leader Abdullah Ocalan?*, 13 Pace Int'l L. Rev. 117 (2001)

DOI: <https://doi.org/10.58948/2331-3536.1206>

Available at: <https://digitalcommons.pace.edu/pilr/vol13/iss1/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

ROME, 11/15/1998: EXTRADITION OR POLITICAL ASYLUM FOR THE KURDISTAN WORKERS PARTY'S LEADER ABDULLAH OCALAN?

Hanz Chiappetta[†]

I.	Introduction	118
A.	The Case of Abdullah Ocalan Related with the Vicissitudes of the Kurds	118
B.	Biographical Notes on Abdullah Ocalan	121
II.	Legal Documents and Provisions Applicable to Turkey's Request from Italy	123
A.	The 1957 European Convention on Extradition and the European Council Convention of 1977 on the Suppression of Terrorism: the Concept of Political Crime and the Political Offence Exception	123
B.	The History of the Political Offense Doctrine in the Italian Jurisprudence	127
1.	The Italian Penal Code and the Italian Constitution: Two Divergent Approaches to the Political Offense Provision	127
2.	The European Convention on the Suppression of Terrorism and the Subsequent Departure by Italian Courts from the Traditional Approach	129
III.	Abdullah Ocalan as the Leader of the Kurdistan Workers Party	130
A.	The Kurdistan Workers Party as a Terrorist Organization and Narcotics Smuggling Organization	130

[†] The author received the equivalent of a J.D. from the University of Milan School of Law; L.L.M. Pace University School of Law. A Valeria, con tutto il mio cuore.

B.	The Granting of Political Asylum under the 1951 Geneva Convention: the War Crimes and the Crimes Against Humanity Exceptions	135
IV.	The Italian Fear and its Subsequent Confirmation: Death Sentence After an Unfair Trial	140
A.	The Sentence of the Italian Court and the Turkish State Security Courts	140
B.	The Death Penalty in Turkey	142
C.	Violations of the Trial Rights and Death Sentence for Abdullah Ocalan	143
V.	Conclusions	146
A.	The Human Rights Watch Proposal	146
B.	The Italian Solution and the Opinion of the International Community	148

I. INTRODUCTION

A. *The Case of Abdullah Ocalan Related with the Vicissitudes of the Kurds*

In 1992, the writer Christopher Hitchens used a very effective expression to describe the Kurdish population:

[They] are homeless even at home, and stateless abroad. Their ancient woes are locked inside an obscure language. They have powerful, impatient enemies and a few rather easily bored friends. Their traditional society is considered a nuisance at worst and a curiosity at best. For them the act of survival, even identity itself, is a kind of victory.¹

Since the medieval period, Kurdistan, the area inhabited by the Kurds, has been ridden by continuous conflicts and destruction. The most significant persecution of the Kurds, however, did not begin until the period before World War I. At that time, Kurdistan was contained within the Ottoman Empire, and the Ottomans feared collaboration between their Russian enemies and the Kurds.²

¹ Christopher Hitchens, *The Struggle of the Kurds*, 182 NAT'L GEOGRAPHIC 32, 60 (AUG. 1992) quoted in Edip Yuksel, *Yes I am a Kurd*, 7 D.C.L. J. INT'L L. & PRAC. 359, 359 (1998).

² See *A Brief History Of The Kurdistan Workers Party (PKK)*, at <http://burn.ucsd.edu/~ats/PKK/pkk-hist.html> [hereinafter *A Brief History*].

When the Ottoman Empire surrendered at the end of the war, the Allies supported the Kurds' nationalist sentiment against the two new countries which took possession of that piece of land: Turkey and Iran. The Allies thought that Kurds should be assured of an absolute unmolested opportunity of autonomous development. Unfortunately for the Kurds, the Treaty Of Sevres,³ which contained the Allies' considerations, was never implemented.

The Lausanne Treaty⁴ of 1923 did provide some protections for "non-Muslim minorities," but the Turkish government denied the applicability of these provisions to the Kurds.⁵ Near the beginning of World War II, the Allies abandoned the Kurdish cause and the United Kingdom and the USSR acquiesced in the suppression of the Kurds by Turkey and Iran.

The first widespread Kurdish revolts against the Turks occurred in the 1920. These revolts were coordinated by a new Kurdish liberation organization. The government's response to these disturbances was characterized by murders, extermination of the revolts in the Kurdish areas, and mass deportation.⁶ Kurdish villages were closely policed, and the use of Kurdish language, dress and names were prohibited.⁷ The purpose of these militarized governmental actions was to suppress growing Kurdish nationalism. In response to this continual repression, in the late 1970's, Abdullah Ocalan formed the radical Kurdistan Workers Party (PKK).⁸ The PKK's goal was the creation of an independent socialist Kurdish state, and it used guerilla tactics to accomplish this aim. From his bases in Syria and

³ See Peace Between the Allied Powers and Turkey (Treaty of Sevres), Aug. 10, 1920 (unratified), art. 62, 64, *reprinted in* 15 AM. J. INT'L L. 179 (Supp. 1921). Art. 62 stated that a commission composed of Allied appointees would prepare for local autonomy in those regions where the Kurdish element is preponderant lying east of Euphrates, to the south of the still-to-be established Armenian frontier and to north of the frontier between Turkey, Syria and Mesopotamia. See *id.*

⁴ See Treaty of Peace, July 24, 1923, 28 L.N.T.S. 11 (1924).

⁵ See *id.*

⁶ See *A Brief History*, *supra* note 2.

⁷ See Yuksel, *supra* note 1, at 371. Kurdish population cannot name their children with Kurdish names and the Turkish government changed the name of most towns, mountains and rivers in Kurdistan. See *id.* at 368-71.

⁸ See Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: a Case Study of the Kurds*, 2 TULSA J. COMP. & INT'L L. 45 (1994).

Lebanon's Bekaa Valley, Ocalan conducted a ruthless campaign, even by terrorist standards.

Since 1980, the war between the Turkish government and the Kurdistan Workers Party has caused the death of 30,000 people.⁹ The PKK is also responsible for a number of murders of Turks in Germany. The German government has issued several arrest warrants for members of the PKK, including Abdullah Ocalan.¹⁰

In October 1997, in response to increasing pressure from Turkey, Syria, which had formerly given Ocalan safe haven, decided to close existing PKK camps within its borders and expelled Ocalan.¹¹ After his expulsion from Syria, Ocalan's first destination was Moscow, where he spent one month benefiting from the close relations that he had with the Russian government.¹² On November 4, the Duma unanimously voted that he be given asylum.¹³ Simultaneously, one third of the Greek Parliament issued Ocalan an invitation to visit Greece as "leader of the world's most oppressed people."¹⁴ Under pressure from the United States, the Russian Cabinet expelled Ocalan.¹⁵ Rather than going to Greece, Ocalan chose to go to Italy where a prominent Democratic Left leader had already expressed support for Ocalan's request for asylum.¹⁶

On November 12, therefore, Ocalan arrived in Italy where he made a formal request for political asylum.¹⁷ Ocalan was arrested the same day, and the Italian Justice Minister, Oliviero Diliberto, was presented with a difficult political dilemma. Justice Diliberto was faced with the question of what to do with the leader of the PKK and the Kurdish resistance, a man deemed alternately a terrorist by the Turkish and German au-

⁹ See Pam O'Toole, *Hate-figure and hero*, BBC NEWS, Nov. 21, 2000, at http://news.bbc.co.uk/hi/english/world/europe/newsid_213000/213964.stm

¹⁰ See Micheal Radu, *Who is Abdullah Ocalan?*, at <http://www.library.cornell.edu/colldev/mideast/ocaln.htm> (visited on Oct. 14, 2000) [hereinafter Radu].

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Radu, *supra* note 10.

¹⁶ See *id.*

¹⁷ See *id.*

thorities and a patriot for many communists scattered around the world.¹⁸

B. *Biographical Notes on Abdullah Ocalan*

Abdullah Ocalan was born to a poor farming family in a village in Eastern Turkey, in 1948.¹⁹ His interest in political affairs led him to study at the School of political science in Ankara, where he became a Maoist.²⁰ He was greatly influenced by the problems and contradictions, both in his country and the world in general; he became a politician in the early 1970s.²¹ He was deeply interested in the study and analysis of scientific socialism; furthermore he investigated the concrete problems of the Kurdish people. In 1973, while still a student, he organized a Maoist group, whose goal was socialist revolution in Turkey. As a result, he was arrested and tortured for seven months before being released.²²

On November 7, 1978, Ocalan formally established the Workers Party of Kurdistan (PKK).²³ At the First Congress (July 15-26, 1981), he was elected General Secretary and "The Manifesto" was adopted as the founding program of the PKK.²⁴ The PKK Program calls for independence, democracy and unification for Kurdistan: "The Revolution is twofold: national and democratic. The National Revolution will establish political, military and cultural power. The second phase will be the democratic revolution. The democratic revolution will strive to eliminate social contradictions stemming from the feudal times," contradictions which are "feudal exploitation, tribalism, religious sectarianism and slave-like dependency of woman."²⁵ PKK wants "to put an end to all forms of domination by Turkish colonialism to set up an independent economy and to strive for the unity of Kurdistan."²⁶

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *A Brief History*, *supra* note 2.

²² See *id.*

²³ See Radu, *supra* note 10.

²⁴ *Abdulla Ocalan Biographical Notes*, at <http://www-personal.usyd.edu.au/~rdemirb1/PUBLIC/serok.html>

²⁵ *Id.*

²⁶ *Id.*

Since its foundation, the PKK has been engaged in an ongoing conflict with the Turkish government.²⁷ The PKK rapidly tried to find a large following among workers, peasants, students, artisans and the different social classes. It organized factory strikes, led student demonstrations and helped to organize the struggles of the peasants against landowners. The Turkish government tried to stop this development by arrests, infiltration and torture.²⁸

In 1979, Abdullah Ocalan traveled to Lebanon, where he established a military and political academy designed to prepare for guerilla war. The ultimate goal of this academy was to create a Maoist state that would encompass areas of Turkey, Iran, and Iraq.²⁹ "Turkey's military coup of 1980 resulted in a drastic increase in the state's campaign of terror" against the Kurds.³⁰ Thousands of people were tortured and killed and the PKK began a period of intensive political and military preparation.³¹ In response to Turkey's actions against the Kurds, during the Second Congress of August 20-25, 1982, the PKK decided to return to Kurdistan and resume the armed struggle.³² On August 15, 1984, the Liberation Units of Kurdistan (HRK), led by the PKK, were established and the war against Turkish government was formally and actively commenced.³³

On March 21, 1985, the National Liberation Front (ERNK) was founded. The ERNK is considered the national organization of the people of Kurdistan, and it is intended to represent the PKK's diplomatic position. The ERNK's aim is to promote the PKK internationally, especially in Europe.³⁴

The ERNK has been created to organize and lead our struggle for a national liberation which embodies the promise of an independent and free future for our people in north-west Kurdistan. The ERNK believes in the need for a wide political unity and the de-

²⁷ See *Role profile: Abdullah Ocalan*, at <http://www.library.cornell.edu/colldev/mideast/ocalan.htm> (visited Oct. 14, 2000) [hereinafter *Role Profile*].

²⁸ See generally Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion* 23 FORDHAM INT'L L. J. 606 (2000).

²⁹ See *A Brief History*, *supra* note 2.

³⁰ See *Role Profile*, *supra* note 27.

³¹ See *A Brief History*, *supra* note 2.

³² See *id.*

³³ See *id.*

³⁴ See *Role Profile* *supra* note 27.

velopment of the people's own political and military force which will be the basis for their liberation . . .³⁵

At the Third Congress of October 25-30, 1986, the PKK founded the Peoples Liberation Army of Kurdistan (ARGK). Since its origination, it has carried out massive military operations against the Turkish Army.³⁶ In response to ARGK's military operations, since 1988 the Turkish government has been destroying Kurdish villages in order to isolate the Kurds from the PKK's influence.³⁷

At the Fifth Congress of the PKK, January 24, 1995, Ocalan clearly defined his ambitions. The Resolution on Internationalism stated that "by effectively arguing in favor of socialism and by spreading socialist ideas to the people of the region, [the PKK] is the vanguard of the global socialist movement"³⁸ In the course of his 20 year struggle against the Turks, Abdullah Ocalan has shown himself to be a national leader who is greatly respected by the Kurdish people in all parts of Kurdistan.

II. LEGAL DOCUMENTS AND PROVISIONS APPLICABLE TO TURKEY'S REQUEST FROM ITALY

A. *The 1957 European Convention on Extradition and the European Council Convention of 1977 on the Suppression of Terrorism: The Concept of Political Crime and the Political Offense Exception*

The bilateral extradition Convention between Italy and Turkey, signed in 1926, became null and void under Article 28,³⁹ paragraph 1 of the 1957 European Convention on Extradition, which entered into force in Turkey and Italy in 1970 and

³⁵ *Statements of ERNK* (visited Oct. 15, 2000), at <http://burn.ucds.edu/ats/PKK/ernk.html>.

³⁶ See *A Brief History*, *supra* note 2.

³⁷ See *Role Profile*, *supra* note 27; see also *Genocide against Kurds and Ocalan Trial*, American Kurdish Information Network (visited Oct. 14, 2000), at <http://www.kurdistan.org/Trial/schulter.html>.

³⁸ *PKK 5th Party Congress Resolution On The Function Of Internationalism*, at <http://burn.ucsd.edu/~ats/PKK/internat.html>

³⁹ See Art. 28: "This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two contracting parties." European Convention on Extradition, opened for signature Dec. 13, 1957, Europ. T.S. No. 24, 359

1963 respectively.⁴⁰ "Extradition is the process by which one jurisdiction secures the return of a suspected or convicted criminal from another jurisdiction."⁴¹ The principle of state sovereignty is the basic premise of international law and encompasses the right of states to control all persons within their territory. International law does not impose on states the duty of extradition and it is established solely by treaty. This is the most typical way states cede some of their sovereignty and states are willing to do that "because they realize that there is more to be gained by giving up some of their power than by allowing criminals to go unpunished."⁴² The most important purpose of this treaty was to put in writing binding principles by which the contracting parties should extradite criminals to the state in which the offense was committed.

The states also hoped that the principle of mutuality would be an effective weapon to the threat of terrorism in that "[w]ith every offender extradited to a requesting state, the requested state's chances grow that when the roles are reversed one hand will wash the other."⁴³ The extradition treaty should reduce the number of safe harbor states to which a terrorist can retreat after an onslaught. Furthermore, terrorists often moved across borders not only to escape prosecution, but also to cultivate connections with terrorists groups in other countries. Although extradition treaties do not attack the problem of terrorism at its roots, they eliminate a number of alternatives for criminals who have completed or are about to complete attacks.

Turkey and Italy are also parties to the European Council Convention of 1977 on the Suppression of Terrorism.⁴⁴ Both the 1957 Convention and the 1977 Convention deal with the concept of political crime. The political protection clause of Article

U.N.T.S. 273, available at <http://conventions.coe.int> [hereinafter Convention on Extradition].

⁴⁰ See *id.*

⁴¹ R. Stuart Phillips, *The Political Offence Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposal for its Future*, 15 DICK. J. INT'L L. 337, 338 (1982) (citing MALCOLM N. SHAW, INTERNATIONAL LAW 422 (1991)).

⁴² *Id.*

⁴³ *Id.*; see also Antje C. Petersen, Note, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L. J. 767, 770 (1992).

⁴⁴ European Council, European Convention on the Suppression of Terrorism, Europ. T.S. No. 90 (Jan. 27, 1977), available at <http://conventions.coe.int> [hereinafter European Convention on the Suppression of Terrorism]

3 of the 1957 Convention stated that "extradition shall not be granted if the offense in respect of which it is requested is regarded by the requested Party as a political offense or as an offense connected with a political offense."⁴⁵ It further states that "the same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person's opinion may be prejudiced for any of these reasons."⁴⁶ The article did not, however, specify exactly what is a political crime, and according to a broad interpretation, terrorist crimes may be deemed to have fallen into the definition. Often, in fact, the largest terrorist organizations have advanced political or religious pretexts for their attacks.

Article 1 of the 1977 Convention defines the characteristics of crimes that shall be regarded neither as a political offense nor as an offence connected with a political offence, nor as an offence inspired by political motives.⁴⁷ It enunciates explicitly that an offense that involves an act of violence against physical integrity, or liberty cannot be considered a political offense.⁴⁸ Moreover, Article 3 states that "[t]he provisions of all extradition treaties and arrangements applicable between Contracting States, including the European Convention on Extradition, are modified as between Contracting States to the extent that they are incompatible with this Convention."⁴⁹ Thus the 1977 Convention not only explicitly states how the 1957 Convention is to be interpreted, but also precisely limits the characteristics applicable to a political offense.⁵⁰ Article 2 of the 1977 Convention extended the applicability of Article 1 stating that,

[f]or the purposes of extradition between Contracting States, a Contracting State may decide not to regard as a political offense or as an offense connected with a political offense or as an offense inspired by political motives a serious offense involving an act of

⁴⁵ Convention on Extradition, *supra* note 39, art.3.

⁴⁶ *See id.*

⁴⁷ *See* European Convention on the Suppression of Terrorism, *supra* note 44, art.1

⁴⁸ *See id.* art. 2.

⁴⁹ *Id.* art. 3.

⁵⁰ *See generally* Convention on Extradition, *supra* note 39.

violence, other than covered by Article 1, against the life, physical integrity or liberty of a person.⁵¹

Despite the explicit instructions given by the Convention, the European states have interpreted and applied its provisions differently. In the struggle to ascertain which offenses merit protection, there is a strict division between "pure" and "relative" political offenses.⁵² The pure political offense is an action directed at the state, it usually does not affect civilians and is not accompanied by common crimes.⁵³ There is unanimity in the international community that pure political crimes such as treason, sedition and espionage clearly qualify for the political offense exception. Since these acts are directed against the state they are typical examples of acts that the political offense exception was designed to protect.⁵⁴ There is an absence of unanimity, however, with regard to the application of the political offense exception to crimes involving either a combination of a common crime with a pure political offense, or a common crime committed for a political reason.

In *In re Castioni*,⁵⁵ for example, the defendant stormed the municipal palace in Switzerland and killed Luigi Rossi, a State Councillor.⁵⁶ He fled to England and when the Swiss government sought his extradition, the English Court stated that "... fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed apart of political disturbances."⁵⁷ This was the first case that represented the Anglo- American "political incidence" approach. Similarly, in cases involving IRA terrorism, American Courts have often refused to extradite the perpetrators. In 1981, for example, the Southern District of New York refused to order extradition because "the realities of the modern world and the circumstances surrounding the IRA's struggle were sufficient to characterize the actions of IRA members as political crimes."⁵⁸

⁵¹ *Id.* art. 2.

⁵² See Phillips, *supra* note 41, at 341-42.

⁵³ See Phillips, *supra* note 41, at 340-42.

⁵⁴ See *id.*

⁵⁵ See *In re Castioni*, 1 Q.B. 149, 166-67 (1891), cited in Phillips, *supra* note 41, at 345.

⁵⁶ See Phillips, *supra* note 41, 343.

⁵⁷ *In re Castioni* 1 Q.B. at 166.

⁵⁸ *Id.*; see also Phillips, *supra* note 41, at 344.

Swiss courts have engaged in a more rigorous examination of the offender's motivation and circumstances. In the *Castioni* case, the Swiss court held that "three criteria must be present to withhold extradition: first the act must have been inexorably linked to a purely political offense, the act must constitute a truly efficient means to reach the purpose and the elements of common criminality must be proportional to the political goal."⁵⁹ The added requirement of proportionality has come to mean that the crime must have been necessary.⁶⁰ Swiss courts have almost universally held that "terrorist acts cannot be proportional to the dissidents' goal because such acts are repugnant to any civilized conscience."⁶¹ In the "mixed" continental approach, of which France is a representative, "the perpetrator's motive is weighed against the seriousness of the crime committed."⁶²

B. *The History of the Political Offense Doctrine in the Italian Jurisprudence*

1. *The Italian Penal Code and the Italian Constitution: Two Different Approaches to the Political Offense Provision.*

Contemporary Italian extradition practice represents the result of a combination of the repressive elements of the fascist era on one side, and the democratic principles contained in the Constitution on the other side. The conflict between the fascist ideas underlying the Italian Penal Code and the democratic principles set forth in the Italian Constitution has materialized in relation to the political offense doctrine.

Under Article 13 of the Italian Penal Code, "extradition is governed by Italian penal law, conventions and international usage and the conduct must be treated as a crime both under the Italian law and the foreign law."⁶³ Article 8 broadly defines a "political offense" by stating that "a political crime is any

⁵⁹ *Id.* at 345.

⁶⁰ *Id.* at 346.

⁶¹ *Id.*

⁶² *Id.* 348.

⁶³ C.P.-I. Dei Reati In Generale, Della Legge Penale, Codice Penale, art. 8. (trans. by author).

crime that either injures a political interest of the state" or "is inspired, in whole or in part, by political motives."⁶⁴

The real intent of the Fascist regime was to eliminate the political offense exception. In this way, the Fascists could punish political offenders more harshly. The Fascist did not have extradition in mind when they wrote the Code; they wanted only to repress individual freedom in order to establish state dominance.⁶⁵ The broad language of the Penal Code granted the Italian state the right to prosecute any individual, Italian citizen or not, who committed an act against the Fascist regime.

The Constitution, on the other hand, in Articles 10 and 26, prohibits the extradition of political offenders, but it does not define a political offense.⁶⁶ Between 1930 and 1948, the majority of bilateral treaties, negotiated by Italy contained provisions for exempting political offenders from extradition.⁶⁷ Nevertheless, because of the conflict between the Penal Code definition and the Constitution provisions, if a state requested extradition of an individual from Italy, the Italian response to the request could come from either source. Because the Italian courts were unable to effectively resolve this conflict, in the 1960's they adopted the traditional view in effect prior to the institution of the Constitution.⁶⁸

In *In re Zind*⁶⁹ and in *In re Kroger*,⁷⁰ Germany requested the extradition of two individuals sentenced in the Federal Republic. In the first case, the Italian Court refused to permit extradition of the defendant, since his act constituted a political offence under Article 8 of the Italian Penal Code.⁷¹ In the sec-

⁶⁴ C.P.-I. Dei Reati In Generale, Della Legge Penale, Codice Penale, art. 8. (trans. by author).

⁶⁵ See Santo Russo, Comment, *In Re Extradition of Khaled Mohammed El Iassem: The Demise of the Political Offense Provision in U.S. -Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1271 (1993).

⁶⁶ See LA COSTITUZIONE ITALIANA, art.10 and 23 (signed Jan.1, 1948). Art. 26 "L'estradizione del cittadino può essere consentita soltanto ove sia espressamente prevista dalle convenzioni internazionali . . . Non può in alcun caso essere ammessa per reati politici." *Id.*

⁶⁷ See VALERIA DEL TUFO, ESTRADIZIONE E REATO POLITICO 68 (1985).

⁶⁸ LA COSTITUZIONE Italiana. art. 10.

⁶⁹ See Judgment of Apr. 5, 1961, Corte di Cassazione, in Foro It. II at 68 [hereinafter *In re Zind*].

⁷⁰ See Judgment of Jan. 11, 1963, Corte d'appello di Bologna, in Foro It. II at 74 [hereinafter *In re Kroger*].

⁷¹ See generally *In re Zind*, *supra* note 69.

ond one, the Court of Appeals denied extradition holding that the act was subjectively politically motivated.⁷²

2. *The European Convention on the Suppression of Terrorism and the Subsequent Departure by Italian Courts from the Traditional Approach.*

The traditional approach was modified in the 1970's when the international community decided to fight the rise of terrorism.⁷³ In an effort to increase international cooperation, many European nations joined to create the European Convention on the Suppression of Terrorism of 1977; a convention that dealt directly with the political offense exception and extradition.⁷⁴ Despite Italy's participation in the 1977 Convention, however, the approach of referring to Article 8 of the Penal Code "was so deeply rooted in Italian jurisprudence that the changes could only occur gradually."⁷⁵

The first real departure the Article 8 approach took place in 1982. In *In re Musbach*,⁷⁶ Germany requested Italy's extradition of a Libyan national accused of murdering a compatriot pursuant to orders received from a revolutionary Libyan movement.⁷⁷ The Court held that:

only those offenders who commit an act outside of Italy in an effort to oppose an illegitimate regime, or seek to assert a fundamental freedom expressly forbidden in their own country, or prove that the request for surrender by the requesting state has been made for political reasons will be exempted from extradition.⁷⁸

Here, because the Italian court reasoned that the defendant's political motives were extraneous to the political system in Germany, it granted Germany's request for extradition.⁷⁹

In the last decade, the international norms have prevailed in the Italian Courts, and the broad application of Article 8 has been restricted. The new interpretation has also recently been

⁷² See generally *In re Kroger*, *supra* note 70.

⁷³ See European Convention on the Suppression of Terrorism, *supra* note 44.

⁷⁴ See *id.*

⁷⁵ See Russo, *supra* note 65, at 1284.

⁷⁶ See Judgment of Jan.14, 1982, Corte di Cassazione, in *Foro It.* II at 125.

⁷⁷ See *id.*

⁷⁸ Russo, *supra* note 65, at 1286.

⁷⁹ See Judgment of Jan.14, 1982, Corte di Cassazione, in *Foro It.* II at 125.

expressed in the Court of Cassation's decision *In re Gomez Ces*.⁸⁰ Mr. Gomez Ces, a member of the Spanish Basque terrorist group ETA, murdered a policeman and injured another.⁸¹ The Court viewed such acts not only in light of Article 8 of the Italian Penal Code, but also in light of international notions expressed in the 1977 Convention.⁸² The Italian Supreme Court concluded that the defendant's act fell within the parameters of Article 13 of the 1977 Convention and granted extradition.⁸³

III. THE ROLE OF ABDULLAH OCALAN IN THE KURDISTAN WORKERS PARTY

A. *The Kurdistan Workers Party as a Terrorist Organization and Narcotics Smuggling Organization*

There is no doubt that Abdullah Ocalan is one of the most important member of the PKK, and there is also no doubt that he participated in the coordination of its actions. In implementing the will of the international community, the 1977 Convention essentially precludes a terrorist from successfully seeking political asylum.⁸⁴ Whether or not the PKK is a terrorist organization is, therefore, the crucial determination. This determination will dictate the decision of whether the organization's leader should or should not have been extradited.

"Terrorism" may be defined as the commission of various violent illegal "acts, which physically or mentally harm the well-being of an individual or group of people with the aims of promoting a political or religious ideology."⁸⁵ "Terrorism" may alternatively be defined as "premeditated and politically motivated violence perpetrated against non-combatant (civilian) targets by sub-national groups or clandestine agents, usually intended to influence an audience."⁸⁶ Terrorism can have an international dimension when the group conducts this kind of action, "on its own or with others closely coordinated, in more

⁸⁰ See Judgment of Mar. 30, 1989, Corte di Cassazione II, Sez. I Penale (c.c. 2/27/89, Sentence No. 499), in Gius. Pen. at 394 (1990).

⁸¹ See *id.*

⁸² See *id.*

⁸³ *Id.* at 400-01.

⁸⁴ See European Convention on the Suppression of Terrorism, *supra* note 44.

⁸⁵ *What is terrorism? Is PKK a terrorist organization?*, at <http://www.turkses.com/problems/pkk/index.htm>

⁸⁶ *Id.*

than one country.”⁸⁷ According to Bruce Hoffman’s recently published *Inside Terrorism*, terrorism is

ineluctably political in aims and motives; violent or, equally important, threatens violence; designed to have far-reaching psychological repercussions beyond the immediate victim of target; conducted by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia); and perpetrated by a sub-national group or non-state entity.⁸⁸

Under these definitions, there is not unanimity that the PKK is a terrorist organization.

Many people inside and outside Turkey believe that PKK is one of the rare Kurdish groups that were not fatally decimated by the Turkish army.⁸⁹ Those holding this opinion argue that its struggle is against Turkey’s rejection of Kurdish identity, which is reflected in Turkey’s harsh disregard for Kurdish human rights.⁹⁰ Turkey has never appreciated the aspirations of its sizeable Kurdish population. Kurdish identity was long dismissed as an illusion, and those who upheld their identity were accused of being “mountain Turks” ignorant of their true Turkish identity and origins.⁹¹ Many of today’s PKK, however, remember a childhood of enforced attendance at government-sponsored boarding schools where Kurdish language and culture were strictly forbidden.⁹² Accordingly, the PKK has repeatedly sought to remind the world that its armed campaign against the Turkish state began only in response to Turkey’s military coup of 1980 that marked a drastic increase in Turkey’s campaign of terror.⁹³ “Since 1988 the Turkish government has been systematically destroying Kurdish villages in the hope that by dispersing inhabitants and barring their return, it will be able to isolate the Kurds from the PKK’s influ-

⁸⁷ *Id.*

⁸⁸ BRUCE HOFFMAN, *INSIDE TERRORISM* (1998), cited in *What is terrorism? Is PKK a terrorist organization?*, *supra* note 85.

⁸⁹ See *Role Profile*, *supra* note 27.

⁹⁰ See Yuksel, *supra* note 7, at 364.

⁹¹ *Id.* at 369.

⁹² See *id.* at 359-60.

⁹³ See *Role Profile*, *supra* note 27.

ence."⁹⁴ By December 1994, more than two thousands villages had been evacuated and destroyed.⁹⁵

Supporters of the Kurdish party have sought to influence international public opinion by noting that in the 1990's, the PKK initiated a number of cease-fires conditioned only on the Turkish government's own cessation of military operations. There was no demand that Turkey grant political concessions in exchange for the cease fire.⁹⁶

While this opportunity to end the violence that has plagued the region was not taken up by the Turkish government, the PKK's own moves towards a more peaceful means of finding a solution to the Kurdish question were intended to demonstrate to the international community that the PKK has distanced itself from aggressive tactics for achieving its political goals.⁹⁷

One of Ocalan's primary goal was to bolster international recognition and support for the PKK's cause. In order to achieve this goal, he sought to increase international awareness of the human rights abuses perpetrated by Turks.⁹⁸ The Turks, on the other hand, have confirmed that PKK attacks have decreased in numbers, but they attribute this decline to the military success of the Turkish security forces.⁹⁹

Among the PKK's principal complains are the under representation of Kurds in Turkish government and various public offices, the lack of adequate education, and the absence of financial freedom for economic development.¹⁰⁰ In response to these complaints, Turkey notes that Hikmet Cetin, the President of the Turkish Parliament in 1994, was Kurdish, and that the former President, Turgut Ozal, was reputed to be half-Kurdish.¹⁰¹ Moreover, more than one hundred deputies in the 550-member

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See, e.g., *Ocalan Declares Cease-Fire*, London MED-TV Television - August 28, 1998, available at <http://burn.ucsd.edu/~ats/PKK/cease98.html>.

⁹⁷ See *Role Profile*, *supra* note 27.

⁹⁸ *Id.*

⁹⁹ See *Commenting on IHF 1994 Annual Report*, New York, Oct. 13, 1994, in *Abdullah Ocalan, Terror & Crime*, at http://www.turkses.com/problems/pkk/pkk_summary.htm.

¹⁰⁰ *Id.*

¹⁰¹ *Abdullah Ocalan, Terror & Crime*, at http://www.turkses.com/problems/pkk/pkk_summary.htm.

parliament are Kurdish.¹⁰² Furthermore, according to the government, the PKK, under the leadership of Abdullah Ocalan, does not wish to see improvement in the education and prosperity level of the Kurdish population because it is much easier to recruit PKK members from uneducated and poor villagers.¹⁰³ This accusation is supported by a Human Rights Watch Annual Report, which noted that PKK murdered fourteen school teachers in one month alone. This accusation is also supported by the IHF Annual Report, which stated that the murder of these teachers continues a long-standing practice of PKK attacks against the educational system in southeastern Turkey, a clear violation of humanitarian law.¹⁰⁴

The PKK asserts that the Kurdistan Workers Party is a liberation movement to free the oppressed Kurdish people of the region.¹⁰⁵ The government replies that PKK has launched terror campaigns on anyone who has not agreed with its point of view and alleges that the PKK makes use of drug trafficking, robbery, extortion, and money laundering.¹⁰⁶ Furthermore, the government points to the fact that PKK members have been arrested for serious crimes in Belgium, Denmark, Germany, Sweden, and Venezuela, among others. In 1993 alone, more than fifty PKK members were arrested by the German police for organizing drug-trafficking in Hamburg and Bremen.¹⁰⁷ In 1995, twenty-five members of the PKK were arrested in Germany and 143 Kilograms of cocaine were seized as well.¹⁰⁸

In 1986, a high Kurdish leader, Semdin Sakik, was held responsible for the slaying of the Swedish Premier Olof Palme.¹⁰⁹ "The Istanbul Daily Sabah reported that Sakik testified during his pre-trial interrogation that Ocalan ordered Palme's assassination because of Sweden's decision to extradite eight PKK

¹⁰² See *The Foreign Service*, S.F. CHRON., Sept. 24, 1995, in *Abdullah Ocalan, Terror & Crime*, at http://www.turkses.com/problems/pkk/pkk_summary.htm.

¹⁰³ See generally Russo, *supra* note 65.

¹⁰⁴ See *id.* at 1286.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ *The Kurdish Connection is Dismissed April 28, 1998*, REUTERS, available at <http://www.sr.se/rs/english/program/palme/pkk.htm>.

members.”¹¹⁰ On July 22, 1998, the Assyrian civilians of Sarsenk became victims of one of the most barbaric attacks of the last two years. Kurdish armed troops entered Sarsenk and attacked the Assyrians in their home, killing many.¹¹¹ The PKK's involvement in these episodes of extreme violence has been proven not only by the Turkish government, but also by humanitarian organizations like Amnesty International and Human Rights Watch.¹¹²

The documentation of these violent events by humanitarian organizations compelled the European Court of Human Rights, in *Zana v. Turkey*¹¹³ to declare the PKK a terrorist organization. The defendant, Zana, was charged, “with supporting the activities of an armed organization, the PKK, whose aim was to break up Turkey national territory.”¹¹⁴ The Court noted that in the interview Mr. Zana gave to journalists, he affirmed that he supported the PKK and, as the commission noted, the applicant's statement coincided with the murders of civilians by PKK militants.¹¹⁵ In fact, he testified: “I support the PKK national liberation movement, but on the other hand I am not on favor of massacres. Anyone can make mistakes, and the PKK killed women and children by mistake.”¹¹⁶

Because of its recognized international status, the decision by the European Court of Human Rights in the *Zana* case is extremely important. Its decisions should be recognized and respected by the states that signed the document chartering the

¹¹⁰ *Kurds owns up Palme's killing Wednesday*, April 29, 1998, INDIA EXPRESS, available at <http://www.expressindia.com/ie/daily/19980429/11950134.html>.

¹¹¹ *PKK Summary; Abdullah Öcalan, terror & crime!*, at http://www.turkses.com/problems/pkk/pkk_summary.html.

¹¹² See Human Rights Watch, *Italy Urged to prosecute PKK leader Öcalan*, Sept. 21, 1998 (visited Sept. 21 2000), at <http://atsadc.org/pkk/pkk/pkkrhw.htm>.

¹¹³ See *Zana v. Turkey*, available at <http://www.dhcour.coe.fr/Hudoc1doc2/HEJUD/199810/zana%20batj.doc>.

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ *Id.* The Court stated that Zana's statement were contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organization which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because while Zana disapproves of the massacres of women and children, he at the same time describes them as mistakes that anybody could make.

Court, the European Convention on Human Rights of 1950. Italy and Turkey are among the signatory nations.¹¹⁷

B. *The Granting of Political Asylum under the 1951 Geneva Convention: The War Crimes and the Crimes Against Humanity Exceptions*

The granting of asylum to Abdullah Ocalan should be evaluated under the provisions of the 1951 United Nations Convention Pertaining to the Status of Refugees (Refugee Convention).¹¹⁸ To make the Refugee Convention more widely applicable, the 1967 Protocol Relating to the Status of Refugees was enacted.¹¹⁹ Under these two documents, a refugee is defined as a person who has a well-founded fear of persecution in his or her country on the basis of race, religion, nationality, political opinion, or membership in a particular social group.¹²⁰ The Convention and the Protocol prohibit signatories from returning a refugee to a country where his life or liberty would be in danger on account of race, religion, nationality, political opinion, or membership in a particular social group.¹²¹ On the other hand, United Nations General Resolution 2312 (XXII) stipulates that political asylum may neither be requested in cases involving non-political crimes nor in cases involving acts against the fundamental principles of the United Nations.¹²² One of the most important principles is the preservation of the independence and territorial integrity of States and any attempt to violate these cannot be regarded as political crimes.¹²³

Article 1 states that the term "refugee" shall apply to any person who "as a result of events occurring before 1 January

¹¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

¹¹⁸ See United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 606 U.N.T.S. 268 [hereinafter 1951 United Nations Convention].

¹¹⁹ See United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267.

¹²⁰ See generally 1951 United Nations Convention, *supra* note 118; United Nations Protocol Relating to the Status of Refugees, *supra* note 119.

¹²¹ See generally *id.*

¹²² The United Nations Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), 22 U.N. GAOR 6th Comm., 23rd Sess., Supp. No. 16, at 81, U.N. Doc. No. A/6716 (1967).

¹²³ See *id.*

1951 and owing to well-founded fear of being prosecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality."¹²⁴ The Refugee Convention contains the war crimes and the crimes against humanity exceptions. It states that the Convention "shall not be applied to a person . . . who has committed a crime against peace, a war crime, or crimes against humanity . . . [and to a person] . . . who has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."¹²⁵

War crimes are violations of the rules of war.¹²⁶

These rules, which limit the type and extent of violence permissible in war, are partly laid down in written treaties and partly consist of unwritten customs. The rules of war fall into several categories. There are the rules concerning the status of combatants that determine whether or not a person has the right to engage in combat or other military activities. For example, professional and conscripted soldiers may kill enemy soldiers in battle, but neither an individual civilian nor a soldier disguised as a civilian may do so. The rules concerning the conduct of hostilities circumscribe the type and extent of damage and suffering that may be inflicted upon the people and territory of the enemy and the treatment of prisoners of war. Finally, there are rules that deal with the behavior of the occupying power in occupied enemy territory."¹²⁷

The treaties, which govern land warfare are the 1907 Convention (No. IV) Respecting the Laws and Customs of War on Land,¹²⁸ the four Geneva Conventions (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Conflict, the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Convention Relative to the Treatment of Prisoners of War, the Convention Relative to the Protection of Civilian Persons in Time of War) and the 1977 Protocols to the

¹²⁴ 1951 United Nations Convention, *supra* note 118, art. 1.

¹²⁵ *Id.* art. 1.F(b).

¹²⁶ John H.E. Fried, *World War II Commemoration*, (visited Oct. 14, 2000), at http://gi.grolier.com/wwii/wwii_warcrimes.html.

¹²⁷ *Id.*

¹²⁸ See Convention (No IV) Respecting the Laws and Customs of War on Land (signed at The Hague, Oct. 18, 1907).

Geneva Conventions of 1949.¹²⁹ Article 3 established the provisions that each party of an armed conflict, not of international character, shall be bound to apply to its own conduct.¹³⁰ The criteria to establish the difference between a genuine armed conflict and a mere act of banditry, on the one hand, or an unorganized and short-lived insurrection, on the other, are essentially the presence of an authority responsible for the acts of the party in revolt, the recognition of the insurgents as belligerents by the government and the presence of an organization in the movement.¹³¹

In *The Prosecutor v. Dusko Tadic*,¹³² the International Criminal Tribunal stated, "an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."¹³³ In this decision, the International Tribunal for the Former Yugoslavia recognized that the content of customary law applicable to internal armed conflict is debatable.¹³⁴ Some national courts are taking the view that the "grave breaches" system contained in each of the four Conventions may operate regardless of whether the armed conflict is international or internal.¹³⁵

In *Prosecutor v. Dusko Tadic*, however, the International Tribunal stated that the Geneva Conventions apply only to international conflicts¹³⁶ and "unless the parties to an internal

¹²⁹ See Respectively: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Conflict (signed at Geneva, Oct. 21, 1950); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed at Geneva, Aug. 12, 1949); Convention Relative to the Treatment of Prisoners of War (signed at Geneva, Aug. 12, 1949); Convention Relative to the Protection of Civilian Persons in Time of War (signed at Geneva, Aug. 12, 1949).

¹³⁰ *Id.* art. 3.

¹³¹ See J. Pictet, ed., *IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1958*, in JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 810-12 (Carolina Academic Press 2000).

¹³² See *The Prosecutor v. Dusko Tadic*, I.C.T. for the Former Yugoslavia (1995), reprinted in PAUST ET AL., *supra* note 131, at 561.

¹³³ See *id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Theodore Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 80 (1994), quoted in PAUST ET AL., *supra* note 131, at 827.

armed conflict agrees otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are crimes against humanity and genocide, which apply irrespective of the conflicts' classification."¹³⁷ Moreover, some of the acts prohibited by Article 3 could be considered crimes against humanity and so excluded by the "grave breaches" provisions.¹³⁸

Crimes against humanity do not require a connection to international or internal armed conflicts.¹³⁹ The Trial Chamber in *Prosecutor v. Nikolic*,¹⁴⁰ for example, defined these crimes as directed against civilian population.¹⁴¹ Such crimes are organized, systematic, not committed by isolated individuals and of a certain scale and gravity.¹⁴² Additionally, in the Charter of the Nuremberg Tribunal,¹⁴³ murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war are considered crimes against humanity.¹⁴⁴ Also, the Genocide Convention of 1948 covers a substantial portion of the conduct that is deemed within the meaning of crimes against humanity.¹⁴⁵ The Nuremberg Tribunal, however, ultimately defined the concept of crimes against humanity very narrowly. First, the Nuremberg Tribunal applied the concept only to acts committed during the war and, second, application of the concept was limited to acts committed in connection with crimes against peace or war crimes.¹⁴⁶ Thus, because crimes were limited temporally to the

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ For a detailed explanation see the United Nations Definitions web-site, available at <http://dcc2.bumc.bu.edu/refugees/definitions.htm>.

¹⁴⁰ See *The Prosecutor v. Nikolic*, IT-94-2-R61 (20 Oct. 1995), reprinted in PAUST ET AL., *supra* note 131, at 908.

¹⁴¹ Joseph L. Falvey, Jr., *Criminal Sexual Conduct as a Violation of International Humanitarian Law*, 12 ST. JOHN'S J. LEGAL COMMENT 385, 410 (1997).

¹⁴² *Id.*

¹⁴³ See the Charter of the International Military Tribunal, Nuremberg (Aug. 8, 1945), reprinted in PAUST ET AL., *supra* note 131, at 858-61.

¹⁴⁴ *Id.*

¹⁴⁵ See the Convention on the Prevention and Punishment of the Crime of Genocide (signed New York, Dec. 9, 1948).

¹⁴⁶ See John H.E. Fried, *World War II Commemoration*, at http://gi.grolier.com/wwii/wwii_warcrimes.html.

war years, the Tribunal foreclosed any liability for acts before September 1939.¹⁴⁷

The concept has not developed since Nuremberg, nor has it been embodied in a special convention. Also the Genocide Convention, however, fails to include within its meaning social and political groups and also fails to include mass killings and violations of human rights when they are not accompanied with the intent to destroy a specific group in whole or in part.¹⁴⁸

A more complete and modern analysis and definition of the concept of crimes against humanity is provided by the Statute of the International Criminal Court (I.C.C.).¹⁴⁹ Article 7 of the Statute of the I.C.C. delineates the acts that can be considered crimes against humanity, such as extermination, torture, rape, sexual slavery, and it also specifies that these acts must be part of a widespread or systematic attack directed against any civilian population.¹⁵⁰ The same Article defines an attack directed against any civilian population as a "course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."¹⁵¹ The attack must also be "widespread and systematic."¹⁵²

In *Prosecutor v. Akajesu*,¹⁵³ the Chamber defined "widespread attack" as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims;" while "systematic" was defined as "thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial

¹⁴⁷ See Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law N.10, *reprinted in* PAUST ET AL., *supra* note 131, at 861-863.

¹⁴⁸ Taylor & M. Cherif Bassiouni, *Extract from 80 Proceedings*, AMERICAN SOCIETY OF INTERNATIONAL LAW, at 56, 59, 63, 70-72 (1986), *reprinted in* PAUST ET AL., *supra* note 131, at 874-875.

¹⁴⁹ See Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, U.N. Doc. A/CONF. 183/9 (1998), at art. 7.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *Prosecutor v. Akayesu*, ICTR-96-4-T (2 Sept. 1998), *reprinted in* PAUST ET AL., *supra* note 131, at 911-12.

public or private resources.”¹⁵⁴ The I.C.C. Statute’s definition of crimes against humanity seems to go further than the definition contained in the American case, *United States v. Altstoetter*.¹⁵⁵ In *Altstoetter*, the Court affirmed that “the governmental participation is a material element of crimes against humanity” and they constitute an abuse of sovereignty because, by definition, they are carried out by or with the toleration of authorities of a State.¹⁵⁶ According to the I.C.C., widespread attacks committed during a civil war may also be considered crimes against humanity.¹⁵⁷ In fact, such acts may be so deemed crimes against humanity even if they are not carried out with the toleration of a State, but against the same State, by a political, racial, ethnic, or cultural group.¹⁵⁸

IV. THE ITALIAN FEAR AND THE FOLLOWING CONFIRMATION: DEATH SENTENCE AFTER AN UNFAIR TRIAL

A. *The Sentence of the Italian Court and the Turkish State Security Courts*

By the sentence passed on October 11, 1999, the Italian Court recognized political asylum for Abdullah Ocalan.¹⁵⁹ According to the Amnesty International Reports and to the European Court of Human Rights Reports, the Italian Court believed more than likely that in Turkey, Ocalan’s rights would have been violated and that he would have been subjected to torture.¹⁶⁰ Those reports focused on obstacles within the Turkish legal system to the improvement of Turkey’s human rights, such as the existence of specialized political Courts (State Security Court or SSC) and police impunity for human rights violations.¹⁶¹ Considering that the jurisdiction of these specialized

¹⁵⁴ *Id.*

¹⁵⁵ See *United States v. Altstoetter*, reprinted in PAUST ET AL., *supra* note 131, at 863-64.

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ Kurdish rebel leader freed from jail in Italy Decision worsens Turkish-Western relations November 20, 1998, available at <http://europe.cnn.com/WORLD/europe/9811/20/italy.kurds.01/>.

¹⁶⁰ See The Death penalty in Turkey, Amnesty International Report, EUR 44/40/99.

¹⁶¹ See *id.*

courts encompass political offenses and serious criminal offences deemed threatening to the State, it was more than likely that, if Ocalan had been extradited, he would have been subjected to the authority of Turkey's SSC.¹⁶²

Accused of being an instrument of repression as they have lost the necessary balance between security and liberty,¹⁶³ Turkey's State Security Courts are distinguished from civilian courts by the participation of a military judge, a fact that undermines the independence of the court.¹⁶⁴ The Secretary of Defense and the Prime Minister appoint the military judge, and a special committee of military members effectively controls the process in such courts.¹⁶⁵ The European Court has expressed concerns that this procedure violates a defendant's right to an independent and impartial tribunal.¹⁶⁶ The judges' military superiors can assess and discipline them and, the judges, therefore, "can be unduly influenced by these considerations which had nothing to do with the nature of the case."¹⁶⁷

In addition, the SSCs are governed by special procedures that afford fewer protections for defendants. In particular, suspects accused of political crimes, like Ocalan, are subject to extended periods of incommunicado detention during which they may be tortured.¹⁶⁸ Though the systematic use of torture is well documented, the individuals responsible for such acts are rarely held accountable. Finally, lawyers representing defend-

¹⁶² The current Turkish Constitution specifically provides for SSCs, describing them as special Courts "established to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against the Republic whose characteristics are defined in the Constitution, and offences directly involving the internal and external security of the States." TURKISH CONSTITUTION, art. 143.

¹⁶³ See Joseph R. Crowley, *Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Reporters in Turkey*, 22 FORDHAM INT'L. L. J. 2129-30 (1999).

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 2142.

¹⁶⁶ The art. 6(1) of the European Convention states the "right to a fair and public hearing within a reasonable time by an independent and impartial tribunal." European Convention, *supra* note 117, at 6(1).

¹⁶⁷ *Incal v. Turkey*, Eur. Ct. H.R. judgment of June 9, 1998, 78 Reports of Judgments and Decisions 1547 (1998-IV).

¹⁶⁸ Crowley, *supra*, note 163, at 2129-30.

ants in the SSCs are often subject to intimidation and harassment.¹⁶⁹

B. *The Death Penalty in Turkey*

The death penalty existed in Turkey before the foundation of the Republic of Turkey in 1923.¹⁷⁰ Since then, 588 people have been executed in Turkey for various crimes, such as murder, drug-trafficking, and violent attempts to overthrow the constitutional order.¹⁷¹ Between October 1980 and October 1984 alone, 50 people were executed; half of whom had been convicted of politically related offences by the SSCs after trials that did not meet internationally recognized standards for fairness.¹⁷² Although the first steps to fully abolish the death sentence were taken in Turkey about five years ago, the bill for a new penal code has not yet been approved by the Parliament.¹⁷³ In 1999, the Turkish government informed the Council of Europe that "this bill is one of the priority items on the Parliament's order of business."¹⁷⁴

The fact that the death penalty continues to exist in Turkey is significant because Italy ratified the 1957 Convention on Extradition with the following reservation: that the Italian government would not have to extradite persons if they risked the death penalty in the demanding country.¹⁷⁵ Moreover, Italy should also take into consideration Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷⁶ as interpreted by the European Court of Human Rights in the *Soering* case.¹⁷⁷ The

¹⁶⁹ See *id.*

¹⁷⁰ See *The Death penalty in Turkey*, Amnesty International Report, EUR 44/40/99.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ The death penalty is also present in the law on the Prohibition and Prosecution of Smuggling, the Law on Forestry, and the Military Criminal Code. See *Charter of the International*

¹⁷⁴ See Crowley, *supra* note 163, at 2142.

¹⁷⁵ See Convention on Extradition, *supra* note 39.

¹⁷⁶ See U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 46, U.N. GAOR, 39th Sess., 93d plen. mtg., U.N. Doc. A/RES/39/46 (1995) [hereinafter *Convention Against Torture*].

¹⁷⁷ See *Soering Case*, 161 Eur. Ct. H. R. (Ser.A) (1989), available at <http://www.unhcr.ch/refworld/legal/refcas/hcr0123.htm>

Court held that “the risk of exposure to the death row phenomenon would make extradition a breach of the Article 3 of the United Nations Convention.”¹⁷⁸ Article 3 provides that “no State Party shall . . . extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁷⁹ The Court held that “the death row phenomenon could involve suffering of such exceptional intensity or duration that could be included in the meaning of Article 3.”¹⁸⁰ Obviously, the Turkish government’s promise was not enough for the Italian Court to eliminate its concern about the possibility that Ocalan would be put to death or would be exposed to the “death row phenomenon.”

C. *Violations of the Trial Rights and Death Sentence for Abdullah Ocalan*

For “reasons of political opportunity,” on January 16, 1999, the Italian government requested Ocalan to leave the country to a secret destination.¹⁸¹ On February 15, he was located and taken into custody in Kenya by the Turkish Security Forces.¹⁸² He was subsequently brought to prison on the Turkish island of Imral, where a special security measures were introduced by a National Defense Ministry.¹⁸³

In a letter to the Turkish State President,¹⁸⁴ Suleyman Demirel, Ocalan’s lawyers stated that, in violation of national and international law, the prison was not under control of the Ministry of Justice, as it should have been according to Turkish law, but was, instead, a “place of interrogation” under the control of the Military Authority.¹⁸⁵ Moreover, all those wishing to go to the island, including Ocalan’s lawyers, were forced to apply for a permit.¹⁸⁶

¹⁷⁸ *Id.*

¹⁷⁹ Convention Against Torture, *supra* note 176, at art.3.

¹⁸⁰ *Id.*

¹⁸¹ See first paragraph of Conclusion, *infra*.

¹⁸² Turkey: Death Sentence After Unfair Trial - the Case of Abdullah Ocalan Amnesty International - Summary of Report - EUR 44/40/99. (Aug. 1999)

¹⁸³ See Press Statement of Ocalan Lawyers, 5 May 1999 (visited 21 Sept. 2000), at <http://www.freedom-for-ocalan.com/eng/trial/anwalte290599.htm>.

¹⁸⁴ The letter dated March 2, 1999 was sent also to the Justice Minister 7 days later. See *id.*

¹⁸⁵ *Id.*

¹⁸⁶ See Radu, *supra* note 10.

Ocalan's lawyers also complained about the violations of the pre-trial investigation process. These violations included abrogation of the rule of confidentiality and right to present a defense. These complaints stemmed not only from the fact that Ocalan's initial interrogation, which took place on the plane that brought him from Kenya to Turkey, was broadcasted the next day on Turkish television, but also because at every meeting with his lawyers there were one or two government officials present.¹⁸⁷ Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law."¹⁸⁸ This means that any public officials should refrain from making statements about the guilt or innocence of an accused before the outcome of a trial has been reached.

Ocalan's lawyers have also declared that the gravest violation of the right of defense has been the lack of security for them.¹⁸⁹ Since Ocalan's initial imprisonment on Imral, demonstrations against the lawyers as they travel to and from the island prison have been continuous. Even worse, in a recorded attack in Ankara, the police beat them up in the street. Nevertheless, the Turkish government did not help them to carry out their defense duties.¹⁹⁰

Additionally, Ocalan's right of access to the outside world has been violated. In fact, he has been deprived of access to his family, and he was only granted access to lawyers ten days after his arrest.¹⁹¹ Turkey's own law pertaining to the State Security Courts permits four days of detention incommunicado. The right to be brought promptly before a judge is established in Article 5(3) of the European Convention.¹⁹² The European

¹⁸⁷ See Asip Kaplan, *Press Conference of Ocalan's Lawyer*, (May 29, 1999), at <http://www.freedom-for-ocalan.com/eng/trial/anwalte050599.htm>; see also *Amberin Zaman*, *Turkey Celebrates Capture of Ocalan: Handcuffed Guerrilla Chief Declares: 'Let There Be No Torture or Anything'* THE WASHINGTON POST, Feb. 18, 1999, at A17.

¹⁸⁸ European Convention, *supra* note 117, art. 6(2).

¹⁸⁹ *World: Europe Ocalan lawyers seek adjournment, May 30, 1999*, at http://news.bbc.co.uk/hi/english/world/europe/newsid_356000/356371.stm

¹⁹⁰ See *id.*

¹⁹¹ See *Turkey: Death Sentence After Unfair Trial - the Case of Abdullah Ocalan* Amnesty International Report, EUR 44/40/99.

¹⁹² See European Convention, *supra* note 117, at art. 5 (3).

Court of Human Rights has ruled that detaining a person for four days constitutes a failure to allow prompt presentation to a judge.¹⁹³ Ocalan first saw a judge eight days after his arrest.¹⁹⁴ Furthermore, in violation of the right to be informed promptly of any charges against him, as guaranteed in the European Convention,¹⁹⁵ neither Ocalan nor his lawyers received a copy of the indictments filed against him. The lawyers received a copy of the charges only a short time before they were read at the trial session.¹⁹⁶

Violations of Ocalan's human rights continued during the trial. For example, during the trial, Ocalan's opportunities to receive legal advice from counsel were severely restricted.¹⁹⁷ Ocalan attended the trial enclosed in a glass box and was unable to speak with his lawyers during the hearing. He was even denied permission to pass notes to them.¹⁹⁸

The Italian fear that a State Security Court would try Abdullah Ocalan was confirmed. Because the SSCs are of military character, it is not surprising that one of the three judges was a serving soldier.¹⁹⁹ It is nevertheless unacceptable for a civilian on trial for his life, and who has been in a bloody conflict with the Turkish Armed Forces for at least fifteen years, to be tried by a military tribunal.

On June 18, 1999, the Turkish parliament amended Article 143 of the Constitution and excluded military judges in order to comply with the European Court of Human Rights.²⁰⁰ As a consequence of the amendment, a civilian judge has replaced the military judge.²⁰¹ Ocalan's lawyers argued that all proceeding conducted prior to the date of the amendment contravened the law and, therefore, demanded that all hearings and determina-

¹⁹³ See *Brogan and Others v. United Kingdom*, 145 Eur. Ct. H.R. (ser. B) (1989) cited in *The Death penalty in Turkey*, Amnesty International Report, EUR 44/40/99.

¹⁹⁴ See *id.*

¹⁹⁵ See European Convention, *supra* note 117, at art.6 (3)(a).

¹⁹⁶ *Turkey: Death Sentence After Unfair Trial - the Case of Abdullah Ocalan* Amnesty International Report, EUR 44/40/99.

¹⁹⁷ See *id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Turkey Removes Military Judges*, at http://www.metimes.com/issue99-25/reg/turkey_removes_military.htm

²⁰¹ See *id.*

tions made before June 23, 1999 should be reheard by the new civilian judge.²⁰² The Court rejected this demand.²⁰³

On June 29, on the island of Imral, under Article 125 of the Turkish Penal Code (TCP), Ankara State Security Court No. 2 unanimously sentenced Abdullah Ocalan to death.²⁰⁴ The Court had determined that "[Ocalan] carried out acts aiming at the separation of parts of territory which are under the sovereignty of the State by inciting and leading the armed terrorist organization which he founded."²⁰⁵ The Court also decided that in view of the severity and continuity of his actions and the grave, imminent, and great danger to the country, there was no occasion for the application of Article 59 (TCP) that allows for commutation of a death sentence.²⁰⁶

V. CONCLUSIONS

A. *The Human Rights Watch Proposal*

Human Rights Watch is an organization, which monitors human rights development around the world and conducts investigations on suspected human rights violations.²⁰⁷ On November 21, 1998, while Ocalan was in Italian custody, Holly Cartner, the Executive Director of the Europe & Central Asia Division of Human Rights Watch, wrote a letter to the Italian Prime Minister Massimo D'Alema and asked that Ocalan be tried in Italy.²⁰⁸ The Human Rights Watch believed that Ocalan should not receive asylum under the 1951 Convention relating to the Status of Refugees. They strongly urged that, in light of the widespread and systematic atrocities committed by the PKK against the civilian population under Ocalan's leadership, his asylum claim be denied under the 1951 Convention.²⁰⁹

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Text of Ocalan verdict, 9 June, 1999*, BBC NEWS (visited 21 Sept. 2000), available at http://news.bbc.co.uk/hi/english/world/monitoring/newsid_380000/380845.stm.

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ Human Rights Watch, at <http://www.hrw.org>

²⁰⁸ *See* Letter from Holly Cartner, Executive Director Europe & Central Asia Division, to Massimo D'Alema, Italian Prime Minister (Nov. 21, 1998), available at <http://www.hrw.org/hrw/press98/nov/italy-ltr.htm>.

²⁰⁹ *Id.*

The PKK is believed to have committed at least 768 extra judicial executions. Targets included teachers, civilians, police officers, and those deemed by the PKK "State Supporters."²¹⁰ These crimes were documented by Human Rights Watch.

Human Rights Watch has also conducted extensive research in Turkey documenting the widespread use of torture in pre-trial detention, as well as gross violations of international humanitarian law committed by both sides to the conflict in the southeast of Turkey, the PKK and the security forces.²¹¹ Human Rights Watch has specifically condemned the Turkish government for the commission of serious violations of international human rights law, including torture, extra judicial killings and indiscriminate shootings during its conflict with the PKK.²¹²

Human Rights Watch approved of Italy's refusal to extradite Ocalan to Turkey on the basis of the continued existence of the death penalty therein.²¹³ Moreover, given the widespread use of torture in Turkey, extradition of Ocalan to Turkey would conflict with Italy's commitments under the European Convention of Human Rights²¹⁴ and the U.N. Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment,²¹⁵ both of which prohibit the extradition of an individual to a country where there are substantial grounds for believing that he would be subject to torture.²¹⁶

While Human Rights Watch supported Italy's initial decision to refuse extradition, the organization also maintained that government abuses cannot, under any circumstances, be used to justify or excuse those abuses committed by Ocalan's PKK. Human Rights Watch believed that Italy must either take steps to investigate and prosecute Ocalan or extradite him to another country that would both respect the prohibitions against his re-

²¹⁰ *See id.*

²¹¹ *Id.*

²¹² Human Rights Watch, World Report 1999, Turkey, Human Rights Developments, at <http://www.hrw.org/hrw/worldreport99/europe/turkey.html>.

²¹³ *Id.*

²¹⁴ *See generally* European Convention, *supra* note 117.

²¹⁵ *See generally* U.N. Convention Against Torture, *supra* note 176.

²¹⁶ *See* Letter from Holly Cartner, Executive Director Europe & Central Asia Division, to Massimo D'Alema, Italian Prime Minister (Nov. 21, 1998), available at <http://www.hrw.org/hrw/press98/nov/italy-ltr.htm>.

turn to Turkey and hold him accountable in a free and fair trial conducted according to international standards.²¹⁷

B. *The Italian Solution and the Opinion of the International Community*

Ocalan left Italy on January 16, 1999, not because he has been extradited but only for purely political and economic considerations. There is no doubt that Italy had the legal authority to refuse extradition. First, because the Italian Constitution prohibits extradition to countries which retain the death penalty and, second, the Italian government could apply its reservation to the 1957 European Convention on Extradition.²¹⁸ Ocalan's presence in Italy, however, began to strain diplomatic relations between Turkey and Italy. The Turkish protests against Ocalan's presence in Italy frightened the Italian government when they evolved into a Turkish boycott of Italian products.²¹⁹ Ankara angrily accused Rome of sheltering terrorists and murderers, and it ordered trade links with Italy to be cut. Because Turkey is one of Italy's major trading partners, Italy's desire to avoid a rift in commercial relations with Turkey became the principal consideration in its treatment of the Ocalan issue.²²⁰

Moreover, Rome was afraid of the PKK and its acts of terrorism. Ocalan's arrest brought thousands of Kurds to Rome to demonstrate against his possible extradition.²²¹ Kurdish popular support for Ocalan was revealed throughout Europe as Kurds took to the streets of other European nations. These nations wished to avoid embroiling themselves in the Ocalan issue, and, as the British Prime Minister did, other European leaders defined the treatment of Ocalan as an Italian "domestic issue."

Taking Ocalan to the airport and telling him to catch a plane out of Italy was the "perfect" political solution. Extradition

²¹⁷ Lotte Leicht, *Human Rights Watch: Italy Urged to Prosecute PKK Leader Ocalan*, (New York, Nov. 21, 1998), at <http://atsadc.org/pkk/pkchrw.htm>.

²¹⁸ See Convention on Extradition, *supra* note 39.

²¹⁹ See M A Shaikh, Ocalan more lethal as asylum seeker in Italy than a free Kurdish rebel (visited Sept. 21, 2000), available at <http://muslimedia.com/archives/world98/ocalan.htm>.

²²⁰ See generally Radu, *supra* note 10.

²²¹ See generally *id.*

tion would have given the appearance that Italy did not recognize the Kurds' right to self-determination while granting political asylum would have suggested that Italy did not recognize the PKK as a terrorist organization. Either of those choices, difficult as they may have been, had a sound legal basis under international law, but Italy instead took the shameful route of avoiding the decision and chose to offload their legal responsibilities.