

In the Colak case\*,

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\* Note by the Registrar: The case is numbered 15/1987/138/192. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

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The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,  
Mr F. Matscher,  
Mr L.-E. Pettiti,  
Mr R. Macdonald,  
Mr C. Russo,  
Mr R. Bernhardt,  
Mr J.A. Carrillo Salcedo,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 26 October and 24 November 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

#### PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 18 December 1987, within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 9999/82) against the Federal Republic of Germany lodged with the Commission under Article 25 (art. 25) by Mr Serif Colak, a Turkish national, on 7 June 1982.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby the Federal Republic of Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. The Registrar endeavoured to reach Mr Colak - in particular through Mr Rosenberg, the lawyer who had acted for him before the Commission - in order to put to him the enquiry provided for in Rule 33 para. 3 (d) of the Rules of Court, but despite several attempts he was unsuccessful, being unable to discover the applicant's whereabouts.

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 29 January 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr G. Lagergren, Mr F. Matscher, Mr R. Macdonald, Mr J. Gersing and Mr A. Donner (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mr C. Russo,

Mr J.A. Carrillo Salcedo and Mr L.-E. Pettiti, substitute judges, replaced Mr Donner and Mr Lagergren, who had resigned before the hearing, and Mr Gersing, who had died (Rules 2 para. 3, 22 para. 1 and 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Deputy Registrar, consulted the Agent of the German Government ("the Government") and the Delegate of the Commission on the need for a written procedure (Rule 37 para. 1). In accordance with the order made in consequence, the Registrar received the Government's memorial on 30 May 1988. In a letter of 18 July, the Secretary to the Commission informed him that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Deputy Registrar, those who would be appearing before the Court, the President directed on 3 August 1988 that the oral proceedings should open on 25 October (Rule 38). On 26 August he granted the Agent of the Government leave to address the Court in German (Rule 27 para. 2).

6. On 20 September 1988, the Commission produced various documents requested by the registry on the President's instructions. Two further documents were lodged by the Government on 10 October.

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Mr J. Meyer-Ladewig, Ministerialdirigent,  
Federal Ministry of Justice, Agent,

Mr D. Wanner, Staatsanwalt,  
Federal Ministry of Justice, Adviser;

(b) for the Commission

Mr E. Busuttil, Delegate.

The Court heard addresses by Mr Meyer-Ladewig for the Government and Mr Busuttil for the Commission, as well as their replies to its questions.

#### AS TO THE FACTS

8. Serif Colak, a Turkish national born in 1935, lived and worked in the Federal Republic of Germany for a number of years.

9. During the night of 20-21 April 1979, in the course of a fight in a Frankfurt restaurant, he injured another Turk by a knife thrust to the abdomen.

He was arrested on 27 April on grave suspicion of attempted murder (versuchter Totschlag - Articles 212 and 23 of the Criminal Code). The following day, the Frankfurt District Court (Amtsgericht) ordered his detention on remand. The detention order stated that he was suspected of causing grievous bodily harm (gefährliche Körperverletzung - Articles 223 and 223a of the Criminal Code).

10. On an application by the prosecuting authority, the District Court altered the detention order on 29 May 1979, after having heard the accused and in the light of the statements of witnesses and information obtained by the police. Mr Colak was now under suspicion of attempted murder, an offence which carries a very heavy sentence.

This new order remained the legal basis for the applicant's detention until final sentencing.

#### 1. The committal proceedings

11. On 13 October 1979, the prosecuting authority referred Mr Colak's case to the Frankfurt Regional Court (Landgericht). It charged him with attempted murder and requested the opening of trial proceedings (Hauptverfahren) in the Assize Court (Schwurgericht - section 74 para. 2 of the Courts Act - Gerichtsverfassungsgesetz).

On 20 November 1979, the applicant received notification in German and in Turkish of the indictment (Anklageschrift), on which he was able to express his views when he appeared before the President of the Assize Court (Article 201 of the Code of Criminal Procedure). On this occasion the applicant did not raise any objection to his committal for trial on the charge set out in the indictment.

12. On 18 December 1979, the 20th (Criminal) Chamber (Strafkammer) of the Regional Court rejected the public prosecutor's request for the trial to be held before the Assize Court and opened the trial proceedings in the Extended Criminal Chamber (Grosse Strafkammer - section 74 para. 1 of the Courts Act). It considered that the accused was under grave suspicion not of attempted murder but of causing grievous bodily harm.

The prosecuting authority appealed and on 31 January 1980 the Frankfurt Appeal Court (Oberlandesgericht) quashed the lower court's decision on this point. It decided that the proceedings be opened in the Assize Court in accordance with the terms of the indictment. In its view, there was sufficient evidence to support a finding that the applicant had acted with recklessness (bedingter Vorsatz) as to whether death occurred and accordingly had committed the offence of attempted murder.

#### 2. The trial in the Assize Court

13. The hearings in the Assize Court began on 28 April 1980. After Mr Colak had been asked for various personal details, the public prosecutor read out the charges (Anklagesatz; see paragraph 11 above) as they were set out in the indictment (Article 243 of the Code of Criminal Procedure).

14. At the hearing on 5 May, the Assize Court informed the applicant, and his defence counsel (Article 265 of the Code of Criminal Procedure), that there was a possibility of his being convicted of causing grievous bodily harm rather than of attempted murder. According to the record of the hearing, the accused and his defence counsel had the opportunity to prepare their defence in the light of this indication, which did not evoke any response.

Article 265 of the Code of Criminal Procedure provides as follows:

"1. The accused may not be convicted under a provision other than that referred to in the indictment retained by the court, without first having been informed of any alteration in the legal classification of the charges and having had the opportunity to defend himself.

...

3. The hearing must be adjourned at the accused's request if he alleges that he has been unable to prepare his defence sufficiently and contests new facts which have emerged making possible the application of a provision other than that referred to in the indictment retained by the court, allowing for a heavier penalty.

4. The court shall also adjourn the hearing at the request of a party or of its own motion if it considers this step to be appropriate in order to enable the prosecution or the defence to prepare themselves sufficiently in the light of the new state of affairs.

..."

Under German law, an indication given pursuant to the above-mentioned Article makes possible a conviction on the basis either of the original indictment or of the new classification of the facts alleged. Where a court has expressly ruled out charges initially brought, if it intends to revert to them, it must make a further statement to this effect (judgment of the Federal Court of Justice - Bundesgerichtshof - 19 July 1972, *Monatsschrift für Deutsches Recht* 1972, p. 925).

15. The hearing was adjourned on 13 May 1980 because the victim, who was the main witness, had failed to appear. The same day Mr Colak was released on bail of 40,000 DM.

16. A new hearing opened on 15 January 1981. The Assize Court, whose composition had changed in the meantime, asked the accused for various personal details. The prosecution then, again, recited the charges preferred on 13 October 1979 (see paragraphs 11 and 13 above).

17. The following day the Assize Court referred again to the alternative possibility that Mr Colak might be convicted of causing grievous bodily harm and gave him the opportunity to prepare his defence accordingly.

The applicant claims that, shortly afterwards, Mr Rosenberg, his counsel, had a conversation with the President of the Assize Court outside the courtroom. He asserts that the President stated as follows:

"You need not worry. Now the court has indicated that a conviction for grievous bodily harm is possible you can proceed on the assumption that any conviction will indeed only be on that basis. The Chamber will not change its views. If it does however, we will inform you in good time."

("Sie brauchen sich keine Sorgen zu machen. Nach dem Hinweis auf die mögliche Verurteilung wegen gefährlicher Körperverletzung können Sie davon ausgehen, dass auch nur insoweit die Verurteilung in Betracht kommt. Die Kammer dreht sich nicht. Sollte die Kammer sich dennoch drehen, sagen wir Ihnen rechtzeitig Bescheid.")

The Government dispute this allegation.

18. At the end of the hearing on 23 January 1981, the public prosecutor took the view that it was impossible to impute to Mr Colak an intention to kill and that his state of intoxication at the material time justified a finding of diminished responsibility under the criminal law. He called for a sentence of three years' imprisonment for causing grievous bodily harm.

Defence counsel put forward the theory that the victim had been wounded by a third party. If, however, the wound had really been caused by the applicant, his responsibility was, in counsel's submission, diminished and he deserved at most a conviction for drunkenness (Article 330a of the Criminal Code).

19. At the hearing on 10 February 1981 the Assize Court, basing its decision principally on the victim's testimony, found the applicant guilty of attempted murder and sentenced him to five years' imprisonment.

In its view, the applicant had indeed been reckless as to whether death occurred. He must have realised that a knife thrust to the upper part of the abdomen with a blade as long as a hand was capable of killing. The court however recognised that his responsibility under the criminal law was considerably diminished on account, inter alia, of the alcohol which he had consumed.

20. The same day Mr Colak was again remanded in custody under the detention order of 29 May 1979 (see paragraph 10 above). He appealed against the order remanding him in custody, but his appeal was dismissed by the Frankfurt Court of Appeal on 6 March 1981, inter alia, on the following grounds:

"It seems likely that in these proceedings to date the accused has assumed that the probable legal consequences of his trial would be less serious than those which have ensued from ... the judgment of the [Assize Court], in view of the statements made by that court in accordance with Article 265 of the Code of Criminal Procedure at both stages of the trial proceedings to the effect that a conviction under Article 223a of the Criminal Code might also be possible, and, further, in view of the fact that the adjudicating chamber had originally refused the appellant's committal for trial on a charge of attempted murder ... . The applicant was granted bail undoubtedly because the [Assize Court] considered a conviction for causing grievous bodily harm to be a serious possibility. When it had heard the evidence, its assessment of the legal position changed."

3. The appeal to the Federal Court of Justice (Revision)

21. On 19 May 1981, Mr Colak appealed on a point of law to the Federal Court of Justice. He complained inter alia that, despite the assurances (Zusage) of the President of the Assize Court, he had not been informed of the change in the Court's views regarding the legal classification of the facts alleged (see paragraph 17 above). He relied on a breach of Article 265 of the Code of Criminal Procedure (see paragraph 14 above) and of paragraph 1 of Article 6 (art. 6-1) of the Convention.

22. On 19 June 1981 the President of the Assize Court issued a formal statement (dienstliche Erklärung) concerning his alleged conversation with the applicant's counsel (see paragraph 17 above). The statement was worded as follows:

"I no longer recall details of conversations with defence counsel in the corridor."

("Einzelheiten an Flurgespräche mit dem Verteidiger sind mir nicht mehr in Erinnerung.")

On 4 July 1984, after the applicant's application had been lodged with the Commission, the President of the Assize Court repeated this statement in the following terms:

"In connection with the above-mentioned case, I no longer have any recollection of details of conversations with defence counsel held outside the courtroom, as to where or when such conversations took place and what was said."

("In der vorbezeichneten Sache kann ich mich an Einzelheiten über Gespräche mit dem Verteidiger ausserhalb der Hauptverhandlung nach Ort, Zeit und Inhalt nicht mehr erinnern.")

23. On 1 December, the Federal Public Prosecutor (Generalbundesanwalt) of the Federal Court of Justice submitted that the appeal should be dismissed.

He pointed out, inter alia, that the trial had been conducted on the

basis of an indictment for attempted murder. It was no doubt true that the Assize Court had mentioned the possibility of a conviction for grievous bodily harm, but this in no way precluded it from finding the accused guilty of the offence with which he was charged in the indictment. "Assurances" given by the presiding judge could make no difference. It was for the Assize Court as a whole, and it alone, to determine, following its deliberations, whether the first or the second of the two offences was established.

24. On 10 February 1982, the Federal Court of Justice declared the appeal unfounded. It stated merely that, having regard to the grounds relied upon, the contested judgment disclosed no error of law prejudicial to Mr Colak.

4. The complaint to the Federal Constitutional Court  
(Bundesverfassungsgericht)

25. On 25 February 1982, the applicant lodged a complaint with the Federal Constitutional Court. He relied on Article 20 para. 3 (the principle of the rule of law) and Article 103 (the right to be heard by a court - rechtliches Gehör) of the Basic Law.

He argued inter alia that the assurances given by the President of the Assize Court ought to have been regarded as binding on that court. By failing to advise him of its change of position regarding the legal classification of the facts, it had, in his view, infringed the rights of the defence, thus depriving him of a fair trial.

26. On 17 May 1982, the Constitutional Court, sitting as a committee of three judges, found that the appeal did not offer sufficient prospects of success, and, accordingly, that it should not be entertained. It based its decision on the following grounds:

"There is some doubt as to the admissibility of the appeal since the appellant has not stated how he would have conducted his defence differently if he had been expressly informed of the possibility that he might be convicted of attempted murder ..., but it is not necessary to consider this question in greater depth because the appeal does not have sufficient prospects of success on its merits.

The criminal proceedings concerning the appellant are not open to criticism under constitutional law. The appellant could not rely on his not being convicted of attempted murder. It makes no difference in this respect that the Regional Court had at first found that there were insufficient grounds for suspecting him of having had the intention to kill and had, for this reason, refused to refer the case to the Assize Court, or that he had been told that he might be convicted of causing grievous bodily harm rather than of attempted murder, or, further, that in his oral submissions the public prosecutor had sought a conviction for causing grievous bodily harm. On the contrary, in view of the indictment for attempted murder, which was retained by the Court of Appeal, the applicant had to take into account in his defence the possibility of such a conviction.

The position could not be any different even if it were true, as the appellant claims, that the President of the Court assured defence counsel, outside the courtroom, that he could proceed on the assumption that the Assize Court was thinking in terms merely of a conviction for causing grievous bodily harm, and that, if it changed its views, he would be advised thereof in good time. A 'legitimate expectation' (Vertrauenstatbestand) could be created by a court only if a statement were made during the hearing or, otherwise, only on behalf of the whole court and to all the parties. The appellant has not claimed that this was the case. He refers merely to an informal conversation between his lawyer and the President of the Court in the course of which the latter disclosed the Criminal Chamber's provisional assessment of the facts and the law, but without

suggesting that he had been authorised to do so by the chamber. The law of criminal procedure makes no provision for an informal promise of this nature. In the absence of formal confirmation by the court, and this ought to have been requested by a defence lawyer carrying out his brief conscientiously if he wished to alter his pleadings in consequence, such a promise is incapable of generating a 'legitimate expectation' which would be binding on the court by virtue of the applicant's right to a fair criminal trial.

It is therefore unnecessary to take evidence regarding the appellant's allegation, the accuracy of which may perhaps be inferred from the formal statement by the President of the Criminal Chamber in the proceedings before the Federal Court of Justice. The fact that in the circumstances of the case the failure to abide by 'assurances', or indeed such unauthorised assurances themselves, may give rise to concern from the point of view of disciplinary regulations is not sufficient to establish a violation of the Constitution in the criminal proceedings against the applicant."

#### PROCEEDINGS BEFORE THE COMMISSION

27. In his application of 7 June 1982 to the Commission (no. 9999/82), Mr Colak complained of the proceedings leading to his conviction. In his view, they had been conducted in breach of Article 6 para. 1 (art. 6-1) of the Convention.

The Commission declared the application admissible on 9 December 1985. In its report of 6 October 1987 (Article 31) (art. 31), it concluded, by ten votes to two, that there had been no breach of the Article in question. The full text of the Commission's opinion and of the separate opinion accompanying it is reproduced as an annex to this judgment.

#### FINAL SUBMISSIONS TO THE COURT

28. At the hearing on 25 October 1988, the Government requested the Court to "find that there is no breach of Article 6 para. 1 (art. 6-1) of the Convention".

#### AS TO THE LAW

29. The applicant claimed that he had not had a fair trial. According to him, he had been convicted, without notice, of attempted murder, despite the assurances which his lawyer had allegedly received from the President of the Assize Court, on which he had based his defence. In the applicant's view, this constituted a failure to comply with the requirements of Article 6 para. 1 (art. 6-1) which provides as follows:

"In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ... ."

The Government denied that the President of the Assize Court had discussed the case with the accused's lawyer outside the courtroom. Even if such a conversation had taken place, its scope could not have been that alleged by Mr Colak. In any case, there would have been no breach of Article 6 para. 1 (art. 6-1).

The Commission likewise found no breach. Five of its members based their view on the lack of sufficient evidence as to the disputed conversation. Five others considered that in any case the applicant could not have had a legitimate expectation that the Assize Court would try him solely in relation to the charge of causing grievous bodily harm.

30. The Court notes in the first place that it is impossible to establish with certainty whether the conversation alleged by the

applicant took place. Neither the formal statements made by the President of the Assize Court on 19 June 1981 and 4 July 1984 (see paragraph 22 above), nor any other items of evidence adduced, provide sufficient information to enable it to rule on this disputed issue of fact. However, the wording of these statements does not exclude the possibility that the President of the Assize Court did in fact have a conversation with Mr Rosenberg outside the courtroom concerning the legal classification of the acts alleged against Mr Colak. This possibility was moreover mentioned by the Federal Constitutional Court in its judgment of 17 May 1982 (see paragraph 26 above). But even if such a conversation did take place, the Court would have no means of ascertaining exactly what was said.

31. Even if the President of the Assize Court did make the statements alleged by Mr Rosenberg, he could not speak on behalf of his fellow judges.

According to the terms of the written prosecution submissions read out at the opening of the hearings in the Assize Court (see paragraph 16 above), Mr Colak was accused of attempted murder. At the hearing on 16 January 1981, the court did not exclude the possibility of a conviction on this charge. It merely pointed out, as it was obliged to do by law in the circumstances of the case, that a conviction for causing grievous bodily harm was also a possibility (see paragraphs 14 and 17 above). Neither at this point, nor at any other, did the Assize Court suggest that it was no longer intending to deal with the charge of attempted murder.

The applicant's lawyer knew that the Assize Court would make its ruling after its deliberations, solely on the basis of the issues raised during the hearings. Accordingly, he should have satisfied himself that the President's alleged appraisal of the situation did indeed reflect the views of the court itself. It was open to him to seek formal confirmation of those views.

32. The Court therefore finds that there has been no violation of Article 6 para. 1 (art. 6-1).

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 para. 1 (art. 6-1).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 6 December 1988.

Signed: Rolv RYSSDAL  
President

Signed: Marc-André EISSEN  
Registrar