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Promotion and protection of all human rights, civil,
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Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns

Addendum

Mission to Turkey: comments by the State on the report of the Special
Rapporteur on extrajudicial, summary or arbitrary executions*

* Reproduced in the annex as received.

Annex

Mission to Turkey: comments of the Government of Turkey on the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

The following document represents the views and comments of the Government of Turkey in respect of the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, drafted following a country visit to Turkey from 26 to 30 November 2012.

1. The Turkish Government welcomes the visit of Mr. Christof Heyns, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions between 26-30 November 2012 to Turkey. As a part of its policy to maintain a close and constructive cooperation with the international human rights mechanisms, Turkey is pleased to have hosted the Special Rapporteur.
2. The Turkish Government would like to make the following remarks on the report of the Special Rapporteur concerning his visit:
3. Regarding the comments in **paragraphs 13 and 14**, it should be noted that Article 13 of the Constitution sets the limits of the grounds for restrictions of fundamental rights and freedoms. Accordingly, restrictions may only be imposed by law and it shall not be in conflict with the requirements of the democratic order of the society and the principle of proportionality. In practice, the courts are strictly bound by the said article of the Constitution in applying the proportionality test to decide whether there is a violation of such rights.
4. **Regarding paragraphs 17 and 96**, by an amendment made in 2007, the law enforcement officials' powers to use force and firearms are redefined in Article 16 of the Law on the Duties and Powers of the Police in a manner to protect fundamental rights and freedoms taking into consideration EU standards, international human rights law criteria, modern approaches and the new security concept. Thus, the police are authorized legitimate powers to use force for the prevention of crime. Regarding the power to use firearms granted to law enforcement officers under Article 16 of the said law, the principle of proportionality and balance are clearly emphasized by the phrases: "... in order to break resistance and to such extent as necessary", "... in order to quell resistance", "... in order to effect an arrest and to such extent as necessary", and "... to such extent as necessary to eliminate risk of assault".
5. In terms of protecting the right to life, there is no contradiction between Article 6 of the International Covenant on Civil and Political Rights (the "ICCPR"), Article 2 of the European Convention on Human Rights (the "ECHR"), to both which Turkey is a party on one hand and Article 17 of the Constitution and Article 16 of the said law on the other hand. Indeed, the exceptional circumstances set out in Article 17 of the Constitution in which deprivation of life may be considered lawful are compatible with the exceptional circumstances specified in Article 2 of the ECHR. There are well-established court practices reflecting the above-mentioned provisions of the ECHR. (*see the Court of Cassation judgment E:2011/3144, K:2011/8592, dated 28 December 2011*). The national laws are also in line with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (see Articles 9 and 10 of the Principles).
6. In **paragraph 18**, the statement that "the Special Rapporteur received reports that more than 50 individuals were killed in 2011 by excessive use of firearms by law enforcement officers..." cannot be documented.

7. The right to life is an absolute right enshrined in the domestic laws and the international conventions, to which Turkey is a party. However, occurrences of death as a result of the use of force that is permitted by domestic laws and such international conventions, as a necessary measure under the circumstances, are not considered as a violation of the right to life.

8. Concerning the use of pepper spray and teargas **as mentioned in paragraph 19** of the report, teargas sprays have been used legally by the police in order to suppress riots and other turbulent incidents in line with the provisions of the Chemical Weapons Convention, to which Turkey became a party in 1997. Use of teargas in such events is regulated by the Law on the Development, Production, Storage and Prohibition on the Use of Chemical Weapons which was enacted on 21 December 2006. Accordingly, using such devices for the purposes specified in Article 2 (e) and (f), including controlling public disturbances and quelling riots are not prohibited by the said law.

9. In 2012, in cases where the security forces have, as a last resort, intervened in civil disturbances, the interventions were gradual and proportionate.

10. The police's use of force and weapons is not limited to self-defense; use of force is permitted also in some certain cases (*see, ECHR, Article 2, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Article 9, 12, 13, 14*). Each case of use of force is considered under its specific circumstances and in accordance with the conditions specified by law.

11. Concerning **paragraph 29**, all procedures regarding temporary village guards are conducted in line with the Law on the Villages No 442 and the by-law dated 2008 where an efficient oversight mechanism for their lawful functioning is provided.

12. In **paragraph 43**, concerning occurrences of death resulting from domestic violence against women, law enforcement officers do pay serious attention to such cases. Law enforcement officers are entitled to, *ex officio*, give provisional protection order for the victims who are at high risk according to the risk analysis form under the Law no 6284 on the Protection of the Family and Prevention of Violence against Women.

13. Furthermore, according to the Implementation Regulation of the Law no. 6284 which came into force on 18.01.2013, it is clearly stated that "Reconciliation or intermediacy shall not be proposed neither to the victim of violence nor to the perpetrator at the execution stage of the protective or preventive interlocutory injunctions".

14. Concerning **paragraph 50**, according to the relevant legislation, the members of judiciary are under an obligation to investigate and adjudicate the killings irrespective of the motive of the incident. Any omission or negligence in investigation and adjudication bear criminal and administrative liability. In practice, cases concerning crimes against LGBT individuals are investigated and prosecuted diligently by the judges and prosecutors. For instance, H.A., who was accused of killing 3 women, one of whom was homosexual, was given by Izmir 7th Heavy Criminal Court aggravated life sentence. On another case, Istanbul 5th Heavy Criminal Court sentenced Ö.B.Ç to 19 years imprisonment for the killing of homosexual M.T.

15. Regarding **paragraph 56**, *the Government would like to emphasize that the Turkish Forensic Medicine Institution is well qualified and equipped to carry out its duties. If the remnants are scientifically fresh enough for identification, the Forensic Medicine Institution prepares its reports accordingly. However, in some instances, the remnants are too old and date back to 1990s making it scientifically impossible to establish the identification of the persons and mortis causa.*

16. In addition, in all cases, the families are given access to the relevant domestic procedures and their outcomes.

17. The use of term “mass graves” in the report is misleading given the fact that no “mass remains” of human beings have been found in the places of recent excavations. The excavations in question were carried out in the presence of the Public Prosecutor and under the control of forensic experts. All the non-contaminated evidences gathered from crime scene were taken to the laboratory by the expert team. DNA examinations were carried out diligently and identified bodies were delivered to their families. The suggestion that the evidence was contaminated, lost or destroyed is not accurate.

18. Concerning **paragraph 59**, the prosecutors assign gendarmerie to conduct preliminary investigation in the event that the crime is alleged to be perpetrated by the police. If the gendarmerie is alleged to have committed an offence, then it is vice versa. In an extraordinary situation where it is alleged that a criminal act was committed jointly by gendarmerie and police, the prosecutor himself carries out the investigation and collects the evidence without involvement of the accused law enforcement officers. This practice ensures proper and sound operation of the investigation stage.

19. Concerning **paragraph 60**, the Forensic Medicine Institute is subordinate to the Ministry of Justice which carries out its work impartially. In this respect, forensic medicine institutions of many EU countries are also government-affiliated in organizational terms. The Turkish Forensic Medicine Institution bears a significant importance given its membership to the ENFSI and its well-equipped laboratories. Moreover, the participation of impartial experts assigned by the parties in the autopsies is permitted.

20. With regard to **paragraph 62**, Article 77 of the Turkish Penal Code (TPC), which came into force in 2005, regulates the crimes against humanity. The questions can come up as to whether a provision introduced in 2005 can be applicable to the acts performed in 1990s. In this respect, the principle of non-retroactivity of criminal codes is recognized (*ex post facto* laws). However, the said principle does not “*prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*”. (Article 15-2 of the ICCPR, see also Article 7-2 of the ECHR). A prosecution which is prima facie retroactive can therefore be fully lawful under both international and national law, if it is established that already at the time of its commission, the relevant act qualified as a crime against humanity or another crime under international law. Moreover, the legal system of a state needs to contain rules making it possible for individuals to be held accountable on the basis of international law either by rendering international law directly applicable in the territory (the principle of monism) or by endowing its rules with the domestic legal force by means of transformation (the principle of dualism)¹. This fact is endorsed by the ECtHR in its judgments such as *Kononov v. Latvia* and *Kolk and Kislyiy*.

21. Given the fact that Turkey is a party to the ECHR and accepts the ECtHR’s jurisdiction, the prosecutors and judges should interpret the procedural rules on the statute of limitations for the offences committed in 1990s in line with the principles set forth in ECtHR judgments. For instance, in the case of *Eşref Bitlis*, the commander of the Turkish Gendarmerie Forces in 1993 who died in a questionable plane crash in the same year, a verdict of non-prosecution has not been issued although the statutory limitation of 20 years has expired. This constitutes a precedent for similar pending cases.

22. Therefore, Article 77 of the Turkish Penal Code is interpreted in a broad manner by judges and prosecutors so that it precludes the application of the provisions on statutory limitations in all kind of acts which are considered as crimes against humanity.

¹ See the Opinion of Venice Commission p. 13 (Opinion No. 634 / 2011)

23. Concerning **paragraph 76**, a separate investigation on ill-treatment, killings and missing persons in different provinces of Turkey are under progress with regard to the accused persons namely Kenan Evren and Tahsin Şahinkaya.

24. As to the reference made in **paragraphs 83 and 84** to the independence of the Human Rights Institution, while drafting the law establishing the said institution, models of the organizational structures of Human Rights Institutions in some EU countries were taken into consideration, members of which are appointed by the Prime Minister, or the relevant Ministers or the Government. In all these cases, the Human Rights Institutions were granted “A” status by the UN. The Human Rights Institution Law no. 6332, which was adopted on 30.6.2012 explicitly stipulates that the Institution is independent in terms of its duties and powers.

25. Concerning **paragraphs 95-99**, the Government would like to stress that each right safeguarded under the ECHR except the prohibition of torture under Article 3, has a set of restrictions.

26. The grounds for restrictions to the right to life under the ECHR are as follows:

- *in defense of any person from unlawful violence;*
- *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
- *in action lawfully taken for the purpose of quelling a riot or insurrection.*

27. The grounds for restrictions to the right to life pursuant to Article 17 of the Turkish Constitution are as follows;

“the act of killing in self - defense, the occurrences of death as a result of the use of a weapon permitted by law as a necessary measure in cases of: apprehension, or execution of warrants of arrest, prevention of escape of lawfully arrested or convicted persons, quelling of a riot or insurrection, execution of the orders of authorized bodies during martial law or state of emergency are outside of the provision of Paragraph 1.”

28. The above mentioned provision of the Constitution is identical to that of the ECHR. The requirements of necessity and proportionality are the general criteria which are invoked to set limitations to the fundamental rights under Article 13 of the Constitution. Accordingly, fundamental rights may only be restricted by law and this restriction cannot be contrary to the principle of democratic society and of proportionality.

29. In this respect, the Turkish Court of Cassation applies proportionality and necessity test in the light of the case-law of the ECtHR. Besides that, the report seems to have solely focused on Article 17 of the Constitution and failed to read the Constitution as a whole given that Articles 13 and 90/5 of the Constitution, which refers to the supremacy of the international conventions over domestic laws, are not included in the relevant part of the report. Furthermore, it seems that the case-law of the Court of Cassation is not examined.

30. Concerning paragraphs 109-110, Article 216 of the TPC criminalizes the hate crimes. The article states that:

(a) A person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates a clear and imminent danger to public security, shall be sentenced to a penalty of imprisonment for a term of one to three years;

(b) A person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year;

(c) A person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace.

31. Therefore, although there is not any specific legislation on hate crimes, criminalization of such offences is provided by this article. In this sense, Istanbul 41th First Instance Court has recently handed down a judgment in which 6 suspects were sentenced to 5 months imprisonment for waving a banner reading a racist expression against Armenians during the protest for the 20th anniversary of Hocali Massacre held in Istanbul.

32. As for the situation of LGBT individuals, 2nd paragraph of the above-referred Article criminalizes the gender-related hate offenses.

33. Concerning **paragraph 111**, Article 158 and the following articles of the Turkish Criminal Procedure Code no.5271 (the “CPC”) sets the conditions of examination of the complaints by the law enforcement officers and prosecutors. Law enforcement officers carry out their duties under the command of the prosecutors and they are therefore required to inform the prosecutors about the complaints received. In examining the complaint, the prosecutors give either non-prosecution decision if no evidence is obtained or submit an indictment to initiate a criminal case before courts. This is the ordinary course of the affairs which a complaint can undergo.

34. However, offences related to violence and death threats are accepted among the offences, prosecution of which does not necessitate any complaint to be lodged. In other words, prosecutors are obliged, *ex officio*, to initiate a criminal investigation in case of such indictable offences.

35. Moreover, there is a particular circular issued by the High Council of Judges and Prosecutors (Circular Number: 10) according to which the victims of violence and death threats are directed by the prosecutors to the relevant administrative authorities to be granted protection. Disciplinary investigation shall be brought against the administrative bodies in the event that they fail to provide protection to such victims.

36. Therefore, the CPC and its secondary legislation already foresee a system proposed by the report.

37. Concerning **paragraph 115**, there exist special prosecution offices in 11 different regions in Turkey that are assigned by the Anti-Terror Law no 3713. They are exclusively empowered to investigate political and mass killings committed as a part of a systematic plan. In this context, Cemal Temizöz, ex-colonel of Kayseri Gendarmerie Forces, is standing trial before Diyarbakir 6th Heavy Criminal Court for 20 unresolved murders committed in 1990s. He was arrested in 2009. Nine times aggravated life sentences are demanded for him by the prosecutor.

38. **Lastly**, the PKK, which is prescribed as a terrorist organization by the EU, NATO and various countries, including the United States, Australia, New Zealand and Canada, should have been referred to as such in the report. Similarly relevant references should have been made as “terrorists”, instead of “alleged terrorists”.

39. Turkey reiterates its determination for the continued cooperation with the Special Procedures of the UN.