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Meeting: 1419th meeting (December 2021) (DH)

Communication from the applicant (11/10/2021) in the case of Gurban v. Turkey (Application No. 4947/04).

Information made available under Rule 9.1 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419^e réunion (décembre 2021) (DH)

Communication du requérant (11/10/2021) relative à l'affaire Gurban c. Turquie (requête n° 4947/04)
[anglais uniquement]

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.



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BY E-TRANSMISSION ONLY

11 October 2021

COMMUNICATION

In accordance with Rule 9.1. of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements for *Gurban v. Turkey* (Application No. 4947/04)

I. INTRODUCTION

- 1- The applicant Emin GURBAN was sentenced to aggravated life imprisonment by decision no 2002/192 (file no. 2002/66) of the Istanbul State Security Court No. 6. The decision was upheld and finalized by the Court of Cassation.
- 2- Subsequently, an application was made to the European Court of Human Rights because the regulation stating that the execution of aggravated life imprisonment would “*continue until the convict’s death*” was contrary to the prohibition of torture. In the application, it was further requested that the Court determined that the right to a fair trial, the right to freedom and security, the right to a trial within a reasonable time and the right to an effective remedy had also been violated.
- 3- In accordance with Article 25 of the Execution Law No. 5275, the sentence of aggravated life imprisonment, which will continue until death according to the existing legislation, is arranged and executed in such a way that convicts are held in isolation, granting them only a minimum of rights, thus violating the prohibition of discrimination.
- 4- The articles of law regulating the continuation of aggravated life imprisonment until death without any possibility of conditional release are articles 25, 107, 108 and the provisional article 2 of Law no. 5275 and article 47 of Law no. 5237, and the application of these articles.
- 5- Since 11 October 1996, the Applicant has been held in prison under severe conditions for 25 years.
- 6- The applicant’s application against this decision to the European Court of Human Rights (ECtHR) was examined within the scope of file no **4947/04** and concluded on **15 December 2015**.

- 7- The ECtHR found a violation, ruling that the fact that the execution of the aggravated life imprisonment sentence given to the applicant was to continue until his death, constituted a violation of the prohibition of torture regulated in Article 3 of the European Convention on Human Rights (ECHR).
- 8- In the same decision, the ECtHR stated that a legal mechanism should be established in order to examine the execution of the aggravated life imprisonment sentence given to the applicant within 25 years at the latest, thus clearly indicating the remedies for the violation.

II. THE GOVERNMENT HAS NOT PRESENTED AN ACTION PLAN ADDRESSING THE ROOT OF THE VIOLATION:

- 9- The Government of the Republic of Turkey, which is a party to the Convention, has not taken any steps to fulfill the ECtHR decision regarding the applicant. The violations stated in the decision regarding the applicant continue.
- 10- Similarly, the Government has not presented a realistic action plan that could remedy the violation within the scope of the supervision and examination procedure carried out by the Committee pursuant to Article 46 of the ECHR. While the ECtHR's decisions regarding the violation of the applicant's rights should be implemented, the Government has not put forward any plan to remedy these violations for 6 years.

III. INDIVIDUAL VIOLATIONS AFTER THE ECtHR DECISION:

- 11- Pursuant to the ECtHR's *Gurban v. Turkey* decision (no. 4947/04), a petition was sent to the Istanbul 14th Assize Court, which rendered the sentence of conviction in respect of the applicant, on 6 April 2018, requesting the court to examine the applicant's situation and to release him on probation if his circumstances allow (**Annex-1**).
- 12- In the petition it was expressly stated that on account of Articles 107/16 of Law No. 5275 and Article 17 of Law No. 3713, the Applicant Emin GURBAN and other persons sentenced to aggravated life imprisonment are not entitled to release on probation, that according to the current laws on the execution of sentences, the execution of Emin GURBAN's sentence will continue until his death, that the ECtHR had concluded that a prison sentence with no hope of release constituted a violation of the prohibition of torture and ill-treatment in its decision on the *Vinter v. United Kingdom* case, and that in accordance with the case-law on the subject, the ECtHR had assessed in its decisions in the applications *Öcalan v. Turkey*, *Kaytan v. Turkey* and *Gurban v. Turkey*, that the applicants did not have the right to release on probation under the aggravated life imprisonment sentence, and that this violated the prohibition of torture and ill-treatment.
- 13- The petition also referred to the Court's conclusion in its judgment on the application of *Vinter and others v. The United Kingdom: A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or*

possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration” (Vinter and others v. the UK, para. 122)

14- It was further stated in the petition that as per Article 90/5¹ of the Constitution, the legislation on the execution of the aggravated life sentence given to the applicant Emin GURBAN, that is, the legal regulation in domestic law which specifies that the provisions of conditional release are not to be applied in respect persons sentenced to aggravated life imprisonment, conflicted with the provisions of international agreements.

15- Similarly, reference was made to paragraphs 44 and 45 of the Akat Ekşi decision of the Constitutional Court of 19 December 2013. According to this decision; “(...) *In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter in practice,, the provisions of international agreements must prevail. This rule is an implied annulment rule eliminating the ability to apply the provisions of the law that conflict with the provisions of agreements concerning fundamental rights and freedoms*” (Akat Ekşi decision, 2013/2187, 19.12.2013, para. 44).

“(...) it has been observed that the relevant provision of the law conflicts with the provision of the Convention. It has therefore been concluded that the courts of instance, which decide on this conflict, should not rely on Article 187 of the Law No. 4721, which conflicts with the ECHR and other international human rights treaties, as a basis for their decisions, and that they should take into account the provisions of the international convention that has to be applied in accordance with Article 90 of the Constitution in terms of the conflict that is the subject of the application.” (see para. 45)

16- Briefly, since the European Convention on Human Rights, as one of the fundamental instruments of international human rights law which Turkey has duly ratified, can be directly implemented in domestic law, the Istanbul 14th Assize Court was requested to evaluate the request for conditional release in accordance with the ECtHR’s GURBAN/Turkey decision.

17- However, the Istanbul 14th Assize Court (which was dissolved in the meantime) rejected the petition by its additional decision of 23 May 2018 on the grounds that “*the aggravated life imprisonment continues until the convict’s death*” according to the provisions in Article 1, paragraph B/2 of Law No. 4771 and Article 107/16 of Law No. 5275, noting that the Court of Cassation had upheld and finalized the decision to convict the applicant Emin GURBAN, (Annex-2).

¹ Article 90/5 of the Constitution: *International agreements duly put into effect have the force of law. [...] In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.*”

- 18- Subsequently, an objection was filed with the next higher court, the Istanbul 15th Assize Court (petition dated 18/06/2018, **Annex-3**). The Istanbul 15th Assize Court rejected the objection by its decision no. 2018/790 Misc. Of 12 July 2018 (**Annex-4**).
- 19- After the ordinary legal remedies had thus been exhausted, an individual application was made to the Constitutional Court on behalf of the applicant (application form dated 27/08/2018, **Annex-5**).
- 20- In this application, the Constitutional Court was requested to find that the decision of the ECtHR in the application file numbered 4947/04 had not been implemented by the government so far and that the applications made to the court that had sentenced the applicant to aggravated life imprisonment and to the higher court for the implementation of the decision had not yielded any results, and that Articles 19 and 90 of the Constitution and Articles 3, 5, 13 and 46 of the European Convention on Human Rights had therefore been violated.

IV. THE OBSERVATIONS OF THE MINISTRY OF JUSTICE AGAINST THE ECtHR DECISION:

- 21- The Constitutional Court requested the Ministry of Justice to submit observations regarding the application and on 8 May 2020, the Human Rights Department of the Ministry of Justice submitted its observations to the Constitutional Court (**Annex-6**).
- 22- The observations of the Ministry of Justice are contrary to the ECtHR decisions mentioned in paragraph 12 of this letter. In its observations, the Ministry, despite Article 90/5 of the Constitution and the ECtHR decisions, invokes the existing legal regulations to argue that the legal regulations that apply to aggravated life imprisonment sentences, stipulating that the execution of these sentences will continue until the convicts' death, did not constitute a violation of the principle of equality in the execution regime, and that a different execution regime had to be applied given the nature of the punishment.
- 23- A reply was given to the observations of the Ministry of Justice on 8 June 2020. It was stated that the existing legal regulations regarding the execution of aggravated life imprisonment sentences are not in compliance with the European Convention on Human Rights, that these issues had been determined in ECtHR's decisions on *Gurban v. Turkey*, *Öcalan v. Turkey* and *Kaytan v. Turkey*, and that the observations submitted by the Ministry of Justice were therefore contrary to the ECtHR decisions (**Annex-7**).
- 24- Our application no. 2018/26088 is still pending at the Constitutional Court with no decision made yet.
- 25- The applicant has been in prison for 25 years. During this time, his mental state has deteriorated because there is no prospect of release. The fact that the ECtHR's decision is not being implemented causes him utter sorrow. The ECtHR decision clearly states that a violation arises when the sentence is imposed and executed, not at

the date of the decision. In this sense, the sentence has been executed in violation of the ECHR for 25 years.

V. FINDINGS :

1. The decisions of the ECtHR regarding *Gurban v. Turkey*, *Öcalan v. Turkey*, *Kaytan v. Turkey* and *Boltan v. Turkey* point to a structural problem arising from the existing laws. This structural problem concerns not only individual violations, but also constitutes a systematic violation in the country.
2. Regarding the individual or general implementation of the ECtHR's *Gurban v. Turkey* decision, the Government has not submitted an action plan that could create the possibility of conditional release to the Committee of Ministers
3. Representing the judiciary, the courts of first instance, the appeal authorities and the Constitutional Court continue to take decisions contrary to the decisions of the ECtHR and Article 90/5 of the Constitution.
4. No legal changes are made to stop or remedy the violations or to establish the right to release on probation. The amendments introduced to Article 89 of the Execution Law with the Law No. 7242 do not only fail to remedy the existing causes of violations, but in fact these are provisions that further aggravate the problem and are interpreted adversely them in practice.
5. Due to application of Article 25 of the Execution Law, the conditions under which the applicant's sentence is executed remain severe, contrary to the prohibition of discrimination, as determined in the reports of the European Torture Committee.

VI. RECOMMENDATIONS CONCERNING INDIVIDUAL AND GENERAL MEASURES :

The Committee is recommended

1. To request the Government to submit an Action Plan regarding the applicant that can really remedy the violation found by the ECtHR in its decision,
2. To include the case, which is currently monitored under the supervision procedure, on the agenda of all its weekly, quarterly and/or annual meetings,
3. To bring the topic on the agenda of the member country representatives of the Committee and ensure that the issue is followed up with,
4. To include the issue of the supervision process on the agenda in the bilateral diplomatic relations with Turkey,
5. To request all available statistical information on prisoners without prospect of conditional release from the Government to assess how systematic the violation has become,
6. To take action to ensure that the violation which the applicant Emin Gurban is subjected to is remedied through individual and general measures and to urge the Government to take action in this regard,
7. To ensure that the causes of violations which aggravate the ongoing execution regime are eliminated,

8. To ensure that a mechanism is introduced to abolish the present execution regime which requires the convict to “*remain in prison for life*” and lies at the root of the violation, and to ensure that the execution is reviewed in certain periods, thus paving the way for release or creating hope for release by making it a real possibility.

Submitted for your consideration upon request, 11.10.2021

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