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

Communication from NGOs (Association of Lawyers for Freedom (Özgürlük için Hukukçular Derneği) Human Rights Association (İnsan Hakları Derneği), and Human Rights Foundation of Turkey (Türkiye İnsan Hakları Vakfı)) (12/10/2021) in the Gurban group v. Turkey (Application No. 4947/04).

Information made available under Rule 9.2 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 d'ONG (Association of Lawyers for Freedom (Özgürlük için Hukukçular Derneği) Human Rights Association (İnsan Hakları Derneği), and Human Rights Foundation of Turkey (Türkiye İnsan Hakları Vakfı)) (12/10/2021) relative au groupe d'affaires GURBAN c. Turquie (requête n° 4947/04) **[anglais uniquement]**.

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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11.10. 2021

COMMUNICATION

Joint submission by Association of Lawyers for Freedom (Özgürlük için Hukukçular Derneği), Human Rights Association (İnsan Hakları Derneği), Human Rights of Turkey (Türkiye İnsan Hakları Vakfı), and the Foundation for Society and Legal Studies (Toplum ve Hukuk Araştırmaları Vakfı) under Rule 9.2 of the Rules of the Committee of Ministers regarding the supervision of the execution of judgments and of terms of friendly settlements regarding the cases of *ÖCALAN (2) v. Turkey*, *KAYTAN v. Turkey*, *GURBAN v. Turkey*, and *BOLTAN v. Turkey* (Application Nos 24069/03, 27422/05 ,4947/04, 33056/16)

Introduction

- 1) On 7 September 2021, the Government of Turkey replied to the joint submission Association of Lawyers for Freedom (Özgürlük için Hukukçular Derneği), Human Rights Association (İnsan Hakları Derneği), Human Rights Foundation of Turkey (Türkiye İnsan Hakları Vakfı), and the Foundation for Society and Legal Studies (Toplum ve Hukuk Araştırmaları Vakfı) (the NGOs) made to the Committee of Ministers (the Committee) on 26 July 2021 regarding the supervision of the execution of the European Court of Human Rights (the ECtHR) judgments in the cases of *Öcalan v. Turkey (2)*, *Kaytan v. Turkey*, *Gurban v. Turkey* and *Boltan v. Turkey* (application nos 24069/03, 27422/05, 4947/04, 33056/ 16). In its response, the Government did not provide any concrete answer regarding the issues raised in the submission made by the NGOs. The Government has, misleadingly, stated that Turkey's legal system provides for the possibility of conditional release in respect of life imprisonment and aggravated life imprisonment and claimed that the conditions in İmralı Prison did not violate Article 3 of the European Convention on Human Rights (the ECHR). Reflecting on the Government's responses, we would like to bring the following issues to the attention of the Committee:

The Applicants Öcalan, Kaytan, Gurban and Boltan and Hundreds of Others in Similar Situations are Subject to an Execution Regime in Which They Remain in Prison Until Their Death, Without the Possibility of De Jure or De Facto Conditional Release.

- 2) As the ECtHR has unequivocally determined in the judgments in which it found that the ECHR had been violated, the aggravated life sentences given to the applicants Öcalan, Kaytan, Gurban and Boltan are subject to an execution regime requiring that the convicts, due to the type of crime they were convicted of, are held in prison until their death. In terms of these types of crimes, the Turkish legal system does not grant the right to conditional release, neither to the applicants nor to the people who have been sentenced to similar penalties under similar charges whose number, though not known exactly, is estimated to be in the hundreds.
- 3) In its responses to our joint submission, the Government of Turkey refrains from addressing this issue, and essentially states that the execution of life imprisonment and aggravated life imprisonment in the Turkish legal system would not continue throughout the life of the convict. This is factually and legally incorrect. As we explained in detail in our submission to the Committee on 26 July 2021, Turkish law contains important exceptions to this, which also apply in the cases of the applicants.
- 4) For example, Art. 1/B-2 of Law No. 4771 (Article 1 of this Law was abolished by Law No. 5218), the Provisional Art. 11 added to Law No. 647 by Art. 1/E-5 of Law No. 5218, Art. 17/4 of the Anti-Terror Law (TMK), Art. 107/16 of the Execution Law and the Provisional Art. 2 of the Execution Law regulate the situations in which the execution of aggravated life imprisonment has to continue until the convict's death. Likewise, the provisions contained in Art. 17/2 and 17/3 of the TMK and Art. 106/9, 107/13, 108/3 and 110/4 of the Execution Law include other circumstances where conditional release is prohibited.
- 5) Pursuant to these provisions, Turkish law undisputedly stipulates that the execution of aggravated life imprisonment sentences in some cases have to continue until the convict's death. It is the NGOs submission, in line with the ECtHR's findings, that due to these categorical prohibitions of and exceptions to conditional release, Turkish law is not compatible with the right to hope requiring that "**a sentence must be legally reducible**". The ECtHR found a violation of the ECHR in its *Öcalan v. Turkey (2)* and other judgments, which are the subject matters of our submission, precisely because the life sentence was not legally reducible in a large group of cases in Turkish law.
- 6) Additionally, although the Government has stated in its reply submissions that the President has the authority to abolish – mitigate sentences, the ECtHR, in its *Öcalan v. Turkey (2)* judgment, concluded that this authority of the President and the practice of granting amnesties did not meet the requirement that the sentence be legally reducible. Following this decision, in its *Kaytan v. Turkey*, *Gurban v. Turkey* and *Boltan v. Turkey* judgments, the ECtHR reiterated its findings in the Öcalan decision. In this respect, the aggravated life imprisonment sentences imposed on the applicants Abdullah Öcalan, Hayati Kaytan, Emin Gurban and Civan Boltan fall within the scope of circumstances where conditional release is categorically prohibited due to the above-mentioned laws. Hence, the applicants' sentences, just like those imposed on hundreds of convicts in a similar situation, will continue until they die. In order to remedy this situation, which the ECtHR found to be in violation of the Convention, that is to execute the ECtHR judgments, it is imperative that the Government of Turkey immediately introduces the necessary legislative amendments and the policy changes.

Conditional Release Periods and Suitability of the Execution of the Penalty Regarding the Convict's Resocialization

- 7) Another problematic aspect of Turkish law in terms of the right to hope that must be observed during the supervision of the execution of the ECtHR decision is the conditional release periods applied for convicts sentenced to life imprisonment or aggravated life imprisonment, **who are not subject to** the prohibitions and exceptions outlined in paragraphs 2-5 above. Comparative law considers the period for a first review of a sentence regarding conditional release to not to go beyond twenty-five years. Many countries facilitate this after a shorter period. In Turkish law, however, those who have been sentenced to aggravated life imprisonment – again, this concerns only the convicts who are not subject to the prohibitions and exceptions outlined in paragraphs 2-5 – can benefit from conditional release under certain circumstances if they have served thirty years of their sentence in a penitentiary institution (Article 107/2 of the Execution Law). However, in cases where convicts have been sentenced to multiple aggravated life imprisonment or to aggravated life imprisonment and life imprisonment, it is required for them to spend thirty-six years in a penitentiary institution, and in some cases this period can even be up to forty years.
- 8) In this way, the Turkish legislator has essentially increased the periods for conditional release in cases of multiple conviction, crimes committed within an organized structure, and repeated offences. These periods lie well above the twenty-five years which comparative law takes to be an acceptable period for initial review. Likewise, it is not realistic to expect that the resocialization of a convict will be achieved when s/he has to spend thirty-six or forty years in prison. This aspect of Turkish law presents us with another major problem regarding the extent to which the execution of sentences is suitable for the resocialization of the convict and ensures s/he no longer poses a danger to society. At this point, it should be stated that the ECtHR, discussing the periods required for the review of sentences in its judgments on *Bodein v. France*¹ and *T.P and A.T v. Hungary*², found a regulation specifying this period as twenty-six years after the conviction to be compatible with Article 3 of the ECHR, while it considered it a violation for the first review to be carried out forty years after the conviction.
- 9) According to Article 48 of the Turkish Penal Code, aggravated life imprisonment shall be served throughout the life of the convict and in accordance with the strict security regime specified in the legislation. Therefore, aggravated life imprisonment is a sentence that limits the convict's enjoyment of rights and freedoms and intensifies his/her isolation. The principles of the strict security regime are arranged by the provisions in Art. 25 of the Execution Law. In accordance with the relevant legislation (e.g., Regulation on Visits of Convicts and Detainees, Articles 5/1-f, 9/4, 11, 12, 15/2), especially Art. 25 of the Execution Law, a strict regime is applied in matters such as employment, communication, and physical activities. Security and isolation are the main pillars in the execution of aggravated life imprisonment sentences in Turkey, while the notion of resocialization is

¹ <http://hudoc.echr.coe.int/eng?i=001-148264>

² <http://hudoc.echr.coe.int/eng?i=001-166491>

brushed aside. This strict execution regime can hardly give convicts any opportunity for their resocialization. The purpose of the execution regime for life sentence convicts should be to ensure harmonization, as far as possible, with the execution regime of other convicts. It must not aim at subjecting those convicts to an execution regime where they are given a harsher and aggravated prisoner status and held in higher security institutions or in sections of penitentiary institutions that are designated for them.

Assessment of the Amendments Introduced by Law no. 7242 in the Context of the Right to Hope

- 10) The above-mentioned provisions in Turkish law, which are in conflict with the right to hope, were not amended by the Law No. 7242, which entered into force on 15 April 2020, and consists of 69 articles containing many amendments in substantive criminal law, criminal procedure law and execution law. Law No. 7242 does not introduce any changes in terms of execution of life imprisonment sentences which are subject to the prohibitions of conditional release in Turkish law. Likewise, the extremely long minimum prison periods required for conditional release were maintained (see paras 7-8 above). Nor have any legislative amendments been introduced to bring the harsh conditions of execution of aggravated life imprisonment sentences in line with the ECHR standards.

Legal Reducibility of a Sentence, Conditions of Amendment in the Execution Law and Discrimination Due to the Anti-Terror Law

- 11) Some of the regulations contained in Law no. 7242, which are relevant to the subject matter of this submission, should be examined in the context of the right to hope. In the Turkish legal system, the main mechanism existed with respect to reducing a sentence is conditional release. For this reason, the amendments concerning conditional release indirectly affects the narrative around the right to hope. The NGOs submit that the conditional release as prescribed and applied in Turkish law is far from fulfilling the requirements of the right to hope. This is not only in terms of the periods need to be spent to become eligible for conditional release, but also in terms of the way the law is interpreted and applied in practice. An analysis of the amendments introduced by the Law No. 7242 from this perspective leads the following conclusions: The current common approach of the Turkish authorities to the notion of conditional release is based on the crime rather than the convict and this is detrimental to the right to hope. The only aim of the law and authorities applying the law in Turkey appears to be for convicts, who had been imprisoned for crimes within the scope of the Anti-Terror Law (TMK), to remain in prison at the duration of their full prison sentence. Their situation in prison is ignored, and it is considered natural that those who had been sentenced to life time imprisonment will not be allowed to return to the society for the remaining of their lives.
- 12) This did not change even under the extraordinary conditions the prisoners faced under the Covid-19 pandemic. After the World Health Organization officially declared that the world was going through a pandemic, new policies for prisons began to be discussed worldwide. On 20 March 2020, the European Committee for the Prevention of Torture (CPT) published

a set of principles³ regarding prisoners. On 25 March 2020, the UN High Commissioner for Human Rights⁴ and on 6 April 2020, the Council of Europe Commissioner for Human Rights called on Turkey to take urgent action.⁵ What was common to these principles and calls was the appeal to reduce the number of prisoners in prisons and to ensure that the measures to be taken within the scope of the pandemic would not restrict existing freedoms. Also, the UN Human Rights Commissioner and the Council of Europe Commissioner for Human Rights demanded the release of political prisoners who were detained without any legal basis. Subsequently, the Turkish Government introduced a so-called “partial amnesty” with the Law No. 7242, changing the Execution Law to reduce the period required for conditional release from 2/3 to 1/2 of the sentence in respect of certain crimes. This, however, excluded political prisoners convicted under the TMK. No change was made in terms of political crimes within the scope of the TMK, which according to Turkish laws require that 3/4 of the sentence is executed for conditional release to be granted. Human Rights Watch criticized this aspect of the amendment and stated that Turkey “puts sick prisoners at grave risk.”⁶

- 13) On 22 April 2020, a total of 135 deputies, including the Republican People's Party's parliamentary group deputy speakers Engin Altay, Özgür Özel, Engin Özkoç and 132 deputies, applied to the Constitutional Court on the grounds that the procedure followed for adopting Law No. 7242 was unconstitutional. On 11 June 2020, the same deputies applied to the Constitutional Court this time for the annulment of Law No. 7242 on substantial grounds. In the application, they claimed that the articles of Law No. 7242 as well as 15 specific articles in different laws amended by the law were unconstitutional because they constituted a special amnesty.⁷ The Constitutional Court rejected the cases respectively on 17.07.2020 and 14.07.2021.⁸

Administrative and Observation Boards Established Based on the April 2020 Amendment to the Execution Law

- 14) The changes introduced in Turkish law by the Law No. 7242 and the Administration and Observation Boards established within the scope of the *Regulation on Observation and Classification Centers and the Assessment of Convicts* of 29 December 2020 do not deal with the institution of conditional release in terms of crimes within the scope of the TMK.⁹ The fact that the administration and observation boards are made up of prison staff constitutes a tantamount limitation of the involvement of the convicts in the assessment process and insufficient procedural safeguards. In general, as well as in the cases specified in article 89/3 of the Execution Law, the structure of the administrative and observation boards poses a problem especially in ensuring objectivity in the assessment of good conduct of the prisoners. At the same time, Article 109 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security

³ <https://rm.coe.int/16809cfa4b>

⁴ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>

⁵ <https://www.coe.int/en/web/commissioner/-/covid-19-pandemic-urgent-steps-are-needed-to-protect-the-rights-of-prisoners-in-europe>

⁶ <https://www.hrw.org/news/2020/04/03/turkey-covid-19-puts-sick-prisoners-grave-risk>

⁷ <https://ihd.org.tr/en/ihds-amicus-curiae-submission-on-law-no-7242/>

⁸ <https://www.anayasa.gov.tr/media/6998/2020-41.pdf>

⁹ <https://www.bbc.com/turkce/haberler-turkiye-56292598>

<https://gazetekarınca.com/2021/04/30-yillik-tutuklunun-tahliyesi-iyi-halli-degil-denilerek-engellendi/>

Measures is related to the determination of good conduct in respect of conditional release. The provision emphasizes compliance with the rules of the penal institution as an important element in the determination of good conduct. This means that the defect of the Law is also contained in the provision of the Regulation. The lawsuit filed by the Association of Lawyers for Freedom at the Council of State for the annulment of the *Regulation on Observation and Classification Centers and the Assessment of Convicts* was rejected.

The Convicts' Procedural Guarantees During Sentence Review

- 15) Pursuant to Article 107/11 of the Execution Law, amended by Article 48 of the Law No. 7242, the convict can object against the decision rejecting his/her conditional release. Likewise, according to Article 110/3 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security Measures, a complaint can be made in accordance with Law No 4675. Although these regulations regarding legal remedy seem positive, the Execution Judgeships' examining the file as the decision maker is not sufficient in terms of the convicts' active participation in the assessment process.

Our Assessments Concerning the Conditions in İmralı Prison

- 16) As is known to the Committee, the applicant Abdullah Öcalan has been subjected to a special and discriminatory form of isolation in İmralı Prison since 15 February 1999. The ban on lawyer visits lasted without any interruption for 8 years, from 27 July 2011 to 2 May 2019. In 2019, lawyer-client consultations took place on five occasions, but after the last lawyer visit on 7 August 2019, the complete ban on the lawyer visits to the applicant started again. This state of severe isolation in İmralı Prison is also confirmed in the CPT's report¹⁰ on its Turkey visit on 6-7 May 2019, published on 5 August 2020, which has also been cited by the Turkish Government in its replies. The report states various violations of the ECHR and contains the following call to the Turkish authorities regarding the ban on the visits by lawyers and family members: "*The CPT urges the Turkish authorities to take the necessary steps to ensure that all prisoners at Imralı Prison are effectively able, if they so wish, to receive visits from their relatives and lawyers. To this end, an end should be put to the practice of imposing a ban on family visits for 'disciplinary' reasons. Further, the Committee requests the Turkish authorities to provide – on a monthly basis – an account of the visits which all prisoners held at Imralı Prison have received from their family members and lawyers.*" In the same report¹¹, the CPT also made the following request: "*The CPT once again calls upon the Turkish authorities to carry out a complete overhaul of the detention regime applied to prisoners sentenced to aggravated life imprisonment in Turkish prisons, in the light of the precepts set out in paragraphs 82 to 84 of the report on the 2013 visit. To this end, the relevant legislation should be amended accordingly.*"
- 17) In its judgment of 18 March 2014, the ECtHR found that the strict sensory and social isolation imposed on the applicant Abdullah Öcalan was in violation of Article 3 of the

¹⁰ <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-two-reports-on-turkey> (para. 51)

¹¹ <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-two-reports-on-turkey> (para. 47)

Convention (see paragraphs 110-147 of the judgment). In the light of this finding, as part of the individual measures Turkey has to take to implement the Court's *Öcalan v. Turkey* judgment, the conditions of sensory and social isolation found as problematic by the Court must be brought in line with the Convention standards.

FINDINGS

- 18) The NGOs submit that the Turkish Government's responses to lawyers and NGOs' submission are far from offering a solution to the problem at hand. The government does not indicate any plans to lift the prohibitions of conditional release placed for certain groups of aggravated life time imprisonment convicts, including the applicants, or any legislative changes or meaningful measures to end to the violations the ECtHR found, stop the ongoing violations and prevent future similar violations.
- 19) The amendment made in Article 89 of the Execution Law with the Law No. 7242 does not include a possibility of conditional release in terms of aggravated life sentence. Contrary to the decisions of the ECtHR, the inadequacy of procedural guarantees in the amendment made regarding term-limited prison sentences is another major problem.
- 20) The Constitutional Court has not made a decision regarding the right to hope that deals with the issue in its merits.
- 21) In order to gain an insight into the situation, it is imperative for the Committee to request statistic information and relevant data on aggravated life sentences from Turkey. This is because the Turkish authorities have direct access to data and statistical information regarding the issue under the supervision of the Committee, but the public and relevant NGOs are denied access to such figures.
- 22) As the sensory and social isolation imposed on one of the applicants, Abdullah Öcalan, in İmralı Prison, which was found to have violated the Convention by the ECtHR, continues in an aggravated manner, the Committee should take steps to address this matter with the Turkish authorities to ensure the execution of the judgment in its entirety.

RECOMMENDATIONS

As the NGOs, we request the Committee

- i. To continue its supervision of the execution of the judgments in the Öcalan (2), Gurban, Kaytan, and Boltan group in an effective and transparent manner and to keep this issue on its agenda.
- ii. To review the Action Plan submitted by the Government of Turkey in 2015 regarding the judgment on *Öcalan v. Turkey* (2) and the Action Plan submitted on 7 October 2021 for the Öcalan, Kaytan, Gurban and Boltan group and to take action to ensure that legislative and policy changes that are compatible with the ECtHR's judgment are made in terms of aggravated life imprisonment which are subject to the regime of life-long execution without the possibility of conditional release.

- iii. To request statistical information from the Government of Turkey for the entire case group, asking for information including data showing “how many persons have been sentenced to aggravated life sentence in Turkey, how many persons have received this sentence by years, in which years the relevant judgments were finalized, and how many years persons sentenced to aggravated life imprisonment have been held in prison.”
- iv. To request that, in accordance with the principles set forth in the ECtHR judgments, those provisions in Turkish law concerning categorical prohibitions of conditional release for certain crimes are repealed without any discrimination and to call for general measures to change the laws which have caused the violation of the ECHR.
- v. And to take steps to ensure that the sensory and social isolation imposed on the applicant Abdullah Öcalan in İmralı Prison, which the ECtHR found to have violated the ECHR, is changed and brought in line with the Court’s findings.