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人权委员会
第五十七届会议
议程项目 11(a)

公民权利和政治权利，包括酷刑和拘留问题

2001 年 2 月 9 日土耳其常驻联合国日内瓦办事处代表团致人权事务高级专员的信

请参阅任意拘留问题工作组于 1999 年 12 月 2 日发表的关于 Abdullah Ocalan 先生的第 35/1999 号意见，谨此递交我国政府对这项意见的反应。

已于 2000 年 9 月 13 日将附件转发给任意拘留问题工作组主席 Kapil Sibal 先生。

请将此附件*作为人权委员会第五十七届会议临时议程项目 11 (a) 之下的正式文件散发。

大　使
常任代表
Murat Sungar（签名）

* 附件不译，原文照发。

Annex

Responses of the Turkish Government to the Opinion No. 35/1999 adopted by the Working Group on Arbitrary Detention of the United Nations Commission for Human Rights

The Working Group on Arbitrary Detention of the United Nations Commission on Human Rights specifies the three categories of arbitrary detention in its report and after assessing the information available to them, concludes that the third category of arbitrary deprivation of liberty is present in Mr. Ocalan's case.

The Turkish Government does not deem it necessary to respond to all of the allegations submitted by the applicant, as the major part of these allegations were regarded by the Working Group as "not meeting the measure of gravity" to breach the right to a fair trial.

The Government will only be submitting its views concerning the conclusion of the Working Group regarding a breach of the right to a fair trial.

The Government would like to remind the fact that the Working Group based its unacceptable opinion concerning Turkey partly on the fact that they regarded the responses submitted by the Government as being unsatisfactory.

1. The Working Group believes that the Government's explanation for the lack of access of lawyers during the first ten days of Mr. Ocalan's incarceration with the poor weather conditions was unsatisfactory due to the fact that during the same period the judges were able to have access to the island by helicopter. In response to this allegation, the Government would like to mention the view of the Government that the meteorology reports which are far from demagogical discussions should be taken as evidence. The Government would like to underline its view once more and reiterate that the lawyers of the applicant and public prosecutors had equal opportunities to reach the island.

Since the beginning of the proceedings, the Government has been repeating that its main concern is the safety of the accused. To provide his safety, the Government had to take all the necessary precautions without any exceptions. The measures taken had the nature of effecting everybody who is supposed to deal with Mr. Ocalan. This included the lawyers who had the obligation to provide genuine power of attorneys in order to verify that they were authorised to represent the applicant.

It should be mentioned again that the unfortunate poor weather conditions had a negative effect on the case. It is true that judges and officials had the opportunity to use the helicopter to reach

the island. However it is not logical to expect the Government to provide the lawyers with helicopters to reach the island. Instead they have been transferred to the island with usual means of transportation. Due to the poor weather conditions, the officials deemed it unnecessary to risk the lives of lawyers by transporting them to the island by sea.

During the preliminary investigation and trial the lawyers of the defendant had every kind of means to contact Mr. Ocalan and to examine the files of the case thoroughly.

The Government believes that the statement of the Working Group concerning the fact that they found the Government's explanation of poor weather conditions unsatisfactory, is not an expression suitable to appear in a report of an international authority.

In addition to the explanations given above, the contact between the suspect of terrorist activities and his lawyer is subject to special provisions and the same procedures are present both in German and English legal systems. Article 16 of the Turkish Code No. 4229 deals with the term of detention.

Upon the application of the lawyers of the accused which took place on 22 February 1999, the necessary permission was granted and the meeting was scheduled to take place on 25 February 1999, despite the fact that at that date the lawyers still did not have the power of attorney to represent the applicant. Mr. Ocalan had the chance to be represented by eleven lawyers during the trial until the end of proceedings.

2. In the report the second reason for accusing the Turkish Government was given to be the presence of the guards during the meeting which took place between Ocalan and his lawyers. Even if they were not able to hear the conversations between them, their presence was found to be in any event contrary to Article 22 of the "United Nation's Basic Principles on the Role of Lawyers".

The Government has constantly been repeating that the Government's basic consideration has been the safety of Mr. Ocalan. The presence of the official in the meeting of Ocalan and his lawyers relates to this main consideration. However as mentioned above those who were present during the meeting were unable to hear the conversation and did not intervene in any manner.

If the files are examined it will be seen that there is nothing indicating that the presence of the guards had any kind of influence on the trial, intermediary decisions of the court and on the final judgement.

Whether the UN principles on the Role of Lawyers prohibits similar practices or not, one has to accept that the state of necessity is also a basic universal principle of law of civilised communities. Everybody has to appreciate that in such extremely exceptional cases this principle of law is of great importance.

3. The report also gives importance to the threats, insults and attacks alleged to have been suffered by the lawyers and states that no inquiry has been initiated and that the police forces were often in delay to intervene.

There are several statements of the Working Group. Fist of all, lawyers of Mr. Ocalan have not faced any kind of particularly serious threats, insults or attacks. It has been mentioned on several occasions that they had every opportunity and freedom of movement to make public statements and criticise the authorities. Their claims appeared in Turkish newspapers and televisions with detail and some of them may be considered in contradiction to the ontology of professional lawyers that aims to prevent them from acting as militants when they represent a terrorist suspect within the sphere of a trial. Identifying themselves with their client is against the ethics of profession. When one gets involved in a terrorist approach and act accordingly, it should be accepted that they will face reactions from the public and the relatives of those who where murdered.

At the same time one has to take into consideration that the offender Mr. Ocalan has been the brain and main initiator of the killings of babies, children and of 30.000 more people. How can it be expected that people taking Mr. Ocalan's side, will be approved by those who were fathers and mothers of murdered victims. When the situation is assessed according to principles of basic logic, one will be able to consider the very serious concern of the Turkish authorities and officials in dealing with the protection of lawyers.

Secondly, the affirmation that no inquiry has ever been initiated by the Government does not reflect the truth and is against the reality of the work carried out by the legal authorities in this respect. As a matter of fact, the office of the chief public prosecutor has started an investigation concerning the allegations relating the attacks. Official investigations are still in pending and the Working Group should not be making such judgements prior to the decisions of the juridical endeavours. This attitude is really not understandable.

Thirdly, the allegation that the police forces often arrived late is not supported by facts and evidence. The fact is that, police forces have always been present in this vicinity of the court and spent every effort to prevent the lawyers from being harassed. They behaved in a very dignified and calm manner while separating the lawyers from the public.

The other fact is that lawyers have not suffered any harassment when they were making public proclamations criticising the authorities and officials in a harsh manner.

4. The Working Group states in its report that Mr. Ocalan's allegation that he was held *in communicado* detention for ten days was not contested by the Government and reaches the conclusion that as he was medically examined during his trip to Turkey, the time spent on the plane should be regarded as being spent in a place of detention.

It is not possible for the Government to understand the logic of regarding the plane as a place of detention. The transfer of Mr. Ocalan from Kenya to Turkey by plane takes time during which

some conversation took place between officials and the suspect. These conversations can not be regarded as questioning. There is no record of this conversation which supposedly took place.

During this transfer to Turkey how can one expect that the representatives of the suspect to be present? As we explained in the responses to the applications made on behalf of Mr. Ocalan, any statement taken from him at that stage, was not used against him and did not take place in the trial.

The case of Mr. Ocalan consists of files and processes initiated by the courts of different parts of Turkey, but the case was not supported by the statements taken from the accused during the pre-trial phase.

5. As a last point in the report, the constitution, independence and impartiality of Turkish State Security Courts were discussed. In that respect, the report contains a big error concerning the nature of these courts.

First of all, the report identifies these juridical authorities as "military courts". These courts were of non-military character even before the 1999 modification of the Turkish Constitution. Before the modifications and afterwards, these courts were and now constituted according to the principle of collegiality, which means that there were three judges sitting. One of these three members was a military judge, nominated by the Superior Council of Prosecutors and Judges. In August 1999, after the modification of the Constitution and the Law, all members are civilian professionals, appointed by the aforementioned council. So, the fact of modification should not be called as the "demilitarisation" of so called "military" courts.

Unfortunately, the report reiterates this expression several times. There is no transformation of military courts to civil courts. First of all this mistake has to be corrected.

Another serious erroneous conclusion is as follows:

The report states that:

a) Amended law did not prescribed any procedure to be followed in respect of cases that had been tried under the repealed law.
b) Mr. Ocalan's trial did not begin *de novo* after the amendment of the law.
c) Mr. Ocalan used to be tried by a military court and after the modification by a civil court. So, civil court could not continue to try a case which has been tried before in a military court.
d) The judge trying the case happened to be witnessing the proceedings before the military court. The reason for the continuation of the proceedings by the civil court appear to be based on ground of expediency.
e) The judge was appointed to deal with the case before the civil court, but he was witnessing the proceedings before the military court. It means that this judge who was witnessing Ocalan's trial before the military court either at his own initiative or nominated to do so by the Government has to disqualify himself.

f) If the judge witnessed the proceedings in his personal capacity he should be disqualified for being appointed as a judge to judge Mr. Ocalan. If he was nominated by the Government to witness the proceedings he should be also disqualified. For that reason alone the trial of Mr. Ocalan can be considered to be arbitrary and all proceedings rendered pursuant to such an appointment must be declared to be void".

The above mentioned summary of the report contains serious errors in the conclusion of the points from para. a-f. The conclusions on the prescriptions of the law on State Security Courts are thoroughly and even contrary to the general principles of the Code on Criminal Procedures. Some points depicting the errors of this evaluation are expounded below with respect to the correspondent paragraph:

a) According to the general principles of the Code on Criminal Procedures, there is no need and necessity to prescribe a procedure to be followed in respect of cases that had been within the process of a judgement and which is not concluded yet with a final sentence of the court. In such cases, the new code of procedure is applied immediately after it takes effect. The mistake of the report is to differentiate the tribunal which tried Mr. Ocalan from the one after the modification of the law. To sustain its wrong conclusion, the report states that the tribunal was military before the modification and after the modification has been a different kind of civil court. This evaluation, as we explained above, is entirely wrong. Since there are no different two tribunals but only one civil tribunal which continued to deal with Mr. Ocalan's case after the modification of the law. As we tried to explain before, in a court of three judges, if one of the judges is ordered to be a military judge, this alone is not sufficient to qualify this court as being a military one. There are several prescriptions in the Law No. 2845 which puts in evidence that these were civil courts. One of them is the fact that their decisions are controlled by the Supreme Court (*Yargitay).* When an evaluation is based upon a wrong qualification, it is evident that the results reached upon these assumptions will be also wrong.

b) When after the modification of the Code on Procedures, the qualification of judges changed and there is no need to restart the trial *de novo.* As we explained above, the new Law of Procedure takes effect immediately after the modification for cases which are under the process of being tried unless the new prescriptions does violate the prerogatives and rights of defence. As it will be explained below, civil judge is not a new appointed judge by the Government. The authors of the report should know beforehand that judges are not nominated by the Government but by an entirely independent body whose constitution is based on the prescription of Turkish Constitutional Law. The point that we are trying to put on evidence is that there was no need to have a special prescription concerning the cases on the process of judgement.

c) As we explained before that the tribunal which begun to deal with Mr. Ocalan's case, is a civil court and the one which completed the phase of trial is the same civil tribunal. The explanations are submitted above.

d) The civilian judge who replaced the military judge is not a judge witnessing the process either by his private wish or appointed by the Government for this purpose. He is a complementary part of the tribunal according to the law. He is called a "reserve judge" who is appointed to the court before the beginning of the trial of Mr. Ocalan's case. This is based on the Article 3 of the Code No. 2845. This reserve judge is not appointed separately. This means that he is not a person who is only witnessing audiences. He is a complementary element of the court appointed by the High Council of Prosecutors and Judges, maybe years ago, before the beginning of Mr. Ocalan's case. The evaluation of the report is entirely wrong about the stand and functions of this reserve judge.

On the other hand it is customary and general legislative practice to have reserve judges in European Courts. In this respect we are referring to the results of Seminars organised by the UN Superior Institute of Criminal Sciences of Syracuse. In the report of syntheses written by Prof. Jean Pradel it is said that:

"*Enfin, un peu partout, le legislateur prevoit souvent qu'à côté du tribunal, collégial par hypothèse, peuvent siéger en seconde ligne quelques juges supplémentaires qui assistant passivement aux débats et qui interviendront en cas d'impossibilité pour les juges de première ligne de continuer à siéger. C'est là une mesure de précaution qui permet de continuer l'affaire sans devoir la reprendre à zéro en cas d'empêchement d'un juge puisqu'il est partout de principe que les mêmes juges doivent être présents de l'ouverture de l'audience au jugement. Cette présence de juges supplémentaires est assez générale. Elle a été adoptée, par example, en France (art. 296 C.P.P. pour la cour d'assises, art. 398 C.P.P. pour le tribunal correctionnel "lorsque le process paraît de nature à entraîner de longs debâts." (Jean Pradel, Procédure pénale comparée dans les systèmes modernes: Nouvelles études pénales, Association Internationale de Droit Pénale, No:15, Toulouse 1998, p.46)*".

It is all evident that the role of the reserve judge who is a complementary element of the tribunal has been wrongly evaluated in the report. It can also be seen on the records of the trial that the reserve judge was present during the process. So, it is not a thought or provocation of expediency but a legal procedure which is not absolutely contrary to the principles and requirements of fair trial.

e) Let us summarise this part of the report once again:

"The judge was appointed to try the case before the civil court, but he was witnessing the proceedings before the military court. It means that this judge who was witnessing Mr. Ocalan's trial before the military court either at his own initiative or appointed by the Government for this purpose:"

This summarised assertion of the report contains so many errors that its seems rather painful to touch upon all of them. First of all as we explained before, the civil judge is not appointed by the Government and also not for this purpose. Secondly as we emphasised several times he is not appointed after the termination of the job of military judge. On the contrary he has been a complementary element of the court who will be in charge, in case one of the members of the

court will not be able to be present due to indeterminate several reasons. His presence is necessary during the phase of trial for this kind of incidence, which might be occurred. So, there is no problem of appointing a new judge who does not know anything about the case. If it was so, it is evident that the trial should begin *de novo*, but this is not the case.

Thirdly, the reserve judge is not a person following the proceedings by his own will or appointed by the Government for this purpose. He is charged by law to be present during the proceedings in case one of the members of the court will be missing. According to the law in such a case he will be able to associate to the work of the tribunal with sufficient knowledge derived from the different phases of the trial. And this entirely in conformity with the practice of European Courts as we referred to Prof. Pradel's report.

f) Let us again summarise a part of the report:

"*If the judge witnessed the proceedings in his personal capacity he should be disqualified for being appointed as a judge to try Mr. Ocalan. If he was nominated by the Government to witness the proceedings he should also be disqualified. For that reason alone, the trial of Mr. Ocalan could be considered arbitrary and all proceedings rendered pursuant to such an appointment could be declared void*".

As we explained above in several occasions, neither the civil judge was appointed after the termination of the job of military judge nor he was appointed by the Government to witness the proceedings. He has been always a necessary element of the court whose job is determined by law. Several explanations given above does not need to be reiterated here.

Before we finish these connotations concerning the Working Group's report, we feel the need to put this assertion about the well being of this report.

As a matter of fact, the report does mention in several occasions the qualification of a trial to be in conformity with the principles of fair trial. The principle of fair trial has to be considered as bounding everybody and especially official universal institutions like the Working Group. The case of Mr. Ocalan is now in the process of examination by the European Court of Human Rights. The judges of this court should not influenced or interfered.

Any kind of intervention which has the probability to interfere with the organ of judgement might be evaluated as contrary to the third criterion established by the Working Group in his own report against Turkey. Even tough it is rather painful to make such an observation, it has not been possible for us to assert our concerns on that issue.

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