

CONCLUDING OPINION OF THE TURKEY TRIBUNAL SEPTEMBER 24, 2021

1. As an Opinion Tribunal, the Turkey Tribunal was mandated to assess and report independently on allegations of human rights violations taking place under the jurisdiction of Turkey. This Opinion is not legally binding but may serve as a source, with moral authority, for raising awareness. Indeed, silence is the greatest enemy of fundamental human rights.
2. The Tribunal is independent. All its judges have experience in the field of human rights. Three were judges in the European Court of Human Rights. One of the judges of the Tribunal was a justice of the Constitutional Court of South Africa, the apex court in that country. One judge held senior positions in the United Nations. Another judge holds a senior position in a reputable international civil society organisation. All the judges are or were professors at well-known universities. None of the judges of the Tribunal has any links with Turkey or any other party that could result in either the improper favoring of, or bias against Turkey. They performed their task pro bono. This unanimous Opinion is the result of serious consideration and intense debate.
3. The Tribunal's hearing was an enlightening and profound experience. It will hopefully contribute to enhance vigilance about the human rights situation not only in Turkey, but also in the region and indeed worldwide.
4. The Opinion of the Tribunal is based on international and European human rights law and on the information made available to the Tribunal by Expert Rapporteurs and the testimony of witnesses.
5. To the extent that the government of Turkey might have been in a position to place before the Tribunal information or submissions relevant to the Tribunal's mandate, it is unfortunate that it chose not to do so.
6. The Expert Reports presented to the Tribunal were thorough, detailed and comprehensive. They contained highly valuable information. The Opinion of the Tribunal is based the totality of information that emerged from the reports and the oral testimony.
7. As a result of the varied nature of the topics addressed, the presentation nature and contents of oral testimony by witnesses necessarily differed. The witnesses told the stories of their

respective experiences. Human frailties, understandably sometimes, came to the fore. Some witnesses were nervous; and some emotional. A few showed symptoms of trauma and will hopefully receive medical or psychological attention. The Tribunal acknowledges the courage shown by the witnesses during their testimony and their contribution to breaking the silence.

8. Aspects of the testimony presented were touching; and others somewhat chilling. One witness, for example, said that when he asked his abductors where he was, he was told that he was “in a place that neither exists, nor does not exist”. Others told the Tribunal not only how they had been physically tortured, but also of threats that their wives and daughters would be raped. The Tribunal realizes the long-term and perhaps everlasting consequences for future generations of gross human rights violations. The Tribunal hopes that its Opinion will inspire and encourage the improvement of respect for and the protection of the human dignity and rights of all.
9. Witnesses did not testify under oath. Because of the absence of the Turkish government or its representatives, the testimony was not tested, for example by way of cross-examination. But none of the witnesses contradicted other witnesses, or the contents of the reports. Several in fact corroborated the information in the reports.
10. The Tribunal was mandated to address questions on six topics: torture; abduction; press freedom; impunity; judicial independence; and whether the acts of the Turkish government amount to a crime against humanity. These topics of course overlap. For example, someone who is abducted and disappears, is often tortured. Without a free press to report on events, complaints and allegations, the public and international community would not know about the abduction and torture. This silence and ignorance result in the failure to investigate the matter and bring it to a court. If the legal profession is furthermore intimidated and the judiciary not independent, impunity will necessarily follow.
11. Now let me express the Tribunal’s opinion concerning the six topics:

TORTURE

12. The Tribunal is of the view that there is a systematic and organised use of torture in Turkey, particularly against people perceived to be linked with or supportive of the Kurdish people and the Gülen movement, as well as people suspected of ordinary crimes.

13. The Tribunal recalls that Turkey is bound by the international prohibition of torture. While it acknowledges that Turkey declared the state of emergency following the attempted coup d'État and notified the Council of Ministers of its derogation from the ECHR on 20 July 2016, it reiterates that the prohibition of torture enshrined in the applicable international legal documents is absolute and that no derogation is possible.
14. The witness statements are consistent with the other information that was presented to the Tribunal in relation to the systematic and organised use of torture and confirms the prevailing pattern in the acts of torture. In this regard, the Tribunal reiterates that it is not called upon to pronounce itself on individual cases of torture but to formulate an opinion on the global human rights situation in Turkey.
15. The Tribunal particularly notes that the threats of torture to relatives, especially the rape of one's wife and daughter, affected some of the victims more than physical acts of torture to themselves. In this regard the Tribunal joins the recognition by some international instances that mental suffering of persons that are forced to watch severe mistreatment being inflicted on others, can rise to the level of gravity required under the international crime of torture.
16. Furthermore, the Tribunal acknowledges that the arbitrary arrest, detention and torture have a serious and long-lasting impact on victims, not only on a physical and a mental level, but also on a social level. In this regard, the Tribunal observes that some people, after their release from prison, were rejected by their family and communities. This social rejection can become unbearable for them, influencing their decision to flee the country.
17. Finally, The Tribunal reiterates the obligation of the Turkish state to take measures to prevent and to investigate allegations of ill-treatment.
18. In the light of the foregoing, the Tribunal deems that the conduct of Turkey is not in conformity with its obligations under international law.

ABDUCTIONS

19. Regarding abductions, the Tribunal is of the opinion that abductions are a part of state action towards perceived political opponents and that complaints and allegations of abductions are not properly investigated. While Turkey is not a party to the International Convention for Protection of All Persons from Enforced Disappearances, it nevertheless has obligations under *ius cogens*.

20. There are reasonable grounds to accept the following: the alleged victims are arbitrarily deprived of their liberty and outside a formal legal procedure; Turkish governmental officials are at least indirectly by acquiescence, involved in their deprivation of liberty; and the Turkish authorities refuse to disclose the fate and whereabouts of the persons concerned. Therefore, as understood under international law, the abductions amount to enforced disappearances.
21. The Tribunal furthermore observes a recurring pattern used to execute the enforced disappearances. Regarding domestic enforced disappearances, firstly, the perpetrators do not seem to be worried about an intervention by the law enforcement authorities since the forcible deprivations of liberty are carried out in broad daylight, in the presence of eye witnesses or security cameras; secondly, the abductions are carried out in a similar manner, namely using the same type of vehicles, often by provoking a car accident and by a bag being put over the heads of the alleged victims after which they are pushed into a black transporter van.
22. As to extra-territorial enforced disappearances, the Tribunal observes the following recurring situations: the extra-territorial abduction is either incited by Turkey through the cancellation of the passport of the abductee which results in his arrest when travelling, or is executed by the Turkish National Intelligence Organization without the formal consent of the host state or is conducted with the formal consent of the host state, outside a formal legal procedure.
23. The Tribunal is of the opinion that the subsequent disappearance for a prolonged period of time and arbitrary detention is not in conformity with international law.
24. Based upon the information presented to the Tribunal, there are reasonable grounds to come to the conclusion that domestic enforced disappearances are conducted by MIT officials or other individuals working with or for the Turkish State. The Tribunal notes that Turkey publicly recognizes its involvement and thus its responsibility in regard to enforced disappearances in countries other than Turkey itself.
25. Furthermore, the Tribunal is of the opinion that the complaints and allegations of these enforced disappearances are not effectively investigated.
26. The Tribunal concludes that Turkey does not act in conformity with its positive obligation to investigate under international law and that there exists no effective protection of the rights to liberty, personal integrity and life of perceived opponents of the government.

PRESS FREEDOM

27. The Tribunal is of the opinion that the repression against the press and freedom of expression points to a larger policy of the State to silence critical voices and limit people's access to information.
28. The Tribunal reiterates the indispensable role of freedom of expression in promoting democratic principles, including transparency and accountability. A free press can only perform its role in democratic society if access to information and the freedom to disseminate it are guaranteed. Therefore, press freedom functions as a necessary "watchdog" for government accountability and respect for human rights.
29. This Tribunal acknowledges with concern the following: the plight of journalists kept in pretrial or long-term detention; the prosecutions and severe convictions for insult or defamation of the president or state; the criminalisation of journalists covering Kurdish and Armenian issues; the recurring physical and mental violence inflicted upon members of the press and media; the application of ambiguous defamation, insult and terrorism law provisions against them; the abuse of emergency powers, as well as the direct and ongoing interference by State authorities in the internal affairs of the journalistic profession.
30. The primary area of tension between the government and its media is situated within the public and political sphere. Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech. This is not to say this freedom cannot be subjected to exceptions, but as the ECtHR has established, such exceptions "must, however, be construed strictly, and the need for any restrictions must be established convincingly.
31. Turkish media have a duty towards the public to report on matters of public interest, including terrorism, even in a context of political violence. In combatting terrorism, the State may impose certain restrictions on the press, but these must strictly follow a balancing test to ensure they are in accordance with international law.
32. The Tribunal recognises the difficult and troubling political situation in which many of the reported cases of media interference take place, in particular in the aftermath of the attempted coup of 2016. There is no denying that terrorism poses a significant threat to democracy and stability in Turkey, as elsewhere. However, it is a principal characteristic of democracy that it offers the possibility to resolve problems through public debate, as it has often done before. Criminal prosecution and detention of journalists for the mere reporting

on sensitive yet important political topics in itself a form of direct interference with freedom of the press and have a chilling effect that may result in self-censorship.

33. The restriction of freedom of expression, in particular press freedom, through the extensive use of criminalisation, prosecution, and pre-trial detention of journalists, has been exacerbated by the events of 15-16 July 2016. These restrictions inhibit both the media and the public from actively exercising these freedoms, essential in a democratic society. In addition, they deeply impact the families and communities of their direct targets.
34. In light of the above, the Tribunal is of the opinion that the conduct of Turkey, as far as press freedom is concerned, does not meet its obligations under international law.

IMPUNITY

35. The Tribunal is of the opinion that there has been a persistent and prevailing culture of impunity in Turkey since 1980, which has reached unprecedented levels in recent years, particularly since the attempted *coup d'état* of 15 July 2016.
36. The Tribunal acknowledges the Report's identification of five interconnected causes which contribute to impunity and show the organised and institutionalised nature of the problem: (i) the deficient legal structure, (ii) the political rhetoric reinforcing the patterns of impunity, (iii) the lack of political will to hold state agents accountable, (iv) the ineffective and delayed investigations by prosecutors, and (v) the lack of an independent judiciary.
37. The Tribunal notes that the lack of effective investigations into allegations of serious human rights violations such as torture and enforced disappearances is the result of the unwillingness of prosecutors to initiate investigations into crimes committed by state officials. Furthermore, the Tribunal observes that the impunity clauses under Turkish law make the prosecution of civil servants, public officials, security forces and personnel of the intelligence services – at least in practice – subject to an authorisation of the relevant administrative authority that is controlled by the government.
38. The Tribunal notes that the culture of impunity is entrenched in the judicial and more specifically the criminal justice system. As a result of the lack of effective investigations into serious human rights violations, the real and perceived lack of independence of the judiciary and the lack of accountability of perpetrators, citizens have lost their confidence in the judicial system. Moreover, victims of serious human rights violations are further traumatized by the lack of effective access to justice.

39. The Tribunal is of the view that the persistent and prevailing impunity for serious human rights violations is not in conformity with Turkey's obligations under international law. Further, this impunity sustains and even fosters the systematic and organised use of torture and enforced disappearances in Turkey.

INDEPENDENCE OF THE JUDICIARY AND ACCESS TO JUSTICE

40. The Tribunal observes that Turkey made important reforms to its legal and judicial system in the period between 2010 and 2013. The Tribunal refers in particular to the constitutional reform adopted in 2010 which extended the powers of the Constitutional Court in order to receive individual applications for the protection of human rights and changed the composition and the appointment procedure for the members of the High Judicial Council. This reform was a step in the right direction towards ensuring judicial independence and guaranteeing access to justice of individuals in case of human rights violations.
41. However, the Tribunal notes with concern that, even though the applicable legal framework provided effective safeguards, the rule of law was destabilized very swiftly by the government's reaction to the Gezi park protest in June 2013 and furthermore to the concrete threat of prosecution of high-ranking state officials for corruption in December 2013.
42. First, the Tribunal notes the adoption of multiple (amendments to) laws that disrupted the independence of the judiciary. In particular, the Tribunal refers to the law of February 2014 that curtailed the independence of the High Judicial Council. Moreover, the political control over the High Judicial Council and the Constitutional Court was reinforced through several amendments to the Constitution passed on 20 January 2017 that changed the selection and appointment procedures of their members.
43. Second, in addition to the forcible relocations, the Tribunal notes with concern the mass dismissals of approximately 4.560 judges and prosecutors in the aftermath of the attempted coup d'état, based on a list drawn up by the High Judicial Council.
44. Third, the Tribunal notes that multiple judges and prosecutors who had adopted decisions or performed investigations disapproved by the government, were summarily arrested and placed in pre-trial detention on suspicion of membership of a terrorist organization after the attempted coup d'État. This constitutes, in the view of the Tribunal, a severe intimidation of the judiciary.

45. The Tribunal refers in this regard to the national anti-terror criminal provisions, which are too vague and overly broadly interpreted, as observed by the ECtHR in its judgment dated 22 December 2020 in *Selahattin Demirtas v. Turkey*. In addition, the Tribunal notes the extensive limitations of the right of defence, especially in anti-terror cases, introduced by emergency decrees, which in its opinion are not in conformity with the international human rights obligations of Turkey. The Tribunal is further concerned by the prosecution of lawyers and human rights defenders. Furthermore, the Tribunal observes that Law of June 2014 established ‘criminal judges of peace’ and granted them extensive powers such as the issuance of search warrants, detention of individuals, blocking of websites or seizure property, without an effective review by a higher judicial authority.
46. Lastly, the Tribunal expresses particular concern over the lack of enforcement of two judgements of the ECtHR ordering the immediate release of detainees.
47. In the view of the Tribunal and referring to the lack of independence of the judiciary as well as the prevailing culture of impunity, effective access to justice and thus the protection of fundamental human rights in the current state of the judicial system in Turkey is illusory.

CRIMES AGAINST HUMANITY

48. The Tribunal firmly reiterates that it does not have a mandate to assess the potential individual criminal responsibility in specific cases. However, the Tribunal is called upon to formulate an opinion on whether the acts of torture and abductions that in its view have taken place and continue to take place in Turkey are part of a specific, global context that would allow to qualify them as crimes against humanity under customary international law.
49. The Tribunal is of the view that, at least since the attempted coup d’État in July 2016, the acts of torture and enforced disappearances have occurred in a systematic and organised manner. In this regard, the Tribunal particularly notes the following: the high numbers of reported cases; the existence of specialized teams for torture; the lack of effective investigations and the prevailing impunity of state officials; the deficient legal framework; the lack of enforcement of ECtHR decisions; and the serious, long-lasting impact of these gross human rights violations on the victims and their families. In addition, the Tribunal observes that the acts of torture and enforced disappearances specifically target civilians perceived to be opponents of the government.

50. As a result, the Tribunal is of the view that these acts of torture and enforced disappearances cannot be viewed as mere isolated occurrences. Rather, in the opinion of the Tribunal, they are to be considered as part of a widespread and systematic attack against any civilian population that has taken place in Turkey at least since July 2016.
51. Thus, the Tribunal is of the view that the acts of torture and enforced disappearances committed in Turkey, in applications brought before an appropriate body and subject to the proof of the specific knowledge and intent of the accused, could amount to crimes against humanity.

- Ends -

Turkey Tribunal Panel of Judges:

Prof. Em. Dr. Françoise Barones Tulkens, the president

Justice Dr. Johann van der Westhuizen

Adj. Prof. Angelita Baeyens

Prof. Em. Dr. Giorgio Malinverni

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