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Date: 08/01/2019

**DH-DD(2019)14**

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Meeting: 1340<sup>th</sup> meeting (March 2019) (DH)

Communication from the authorities (04/01/2019) in the Oya Ataman group of cases v. Turkey (Application No. 74552/01).

Information made available under Rule 8.2a 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 : 1340<sup>e</sup> réunion (mars 2019) (DH)

Communication des autorités (04/01/2019) relative au groupe d'affaires Oya Ataman c. Turquie (requête n° 74552/01) (**Anglais uniquement**).

Informations mises à disposition en vertu de la Règle 8.2a des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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**Ankara, December 2018**

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**UPDATED INFORMATION**

**On**

**Oya Ataman Group of Cases**

Application no. 74552/01

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**I. INTRODUCTION**

In addition to information submitted in the latest action plan dated 11 January 2018, the Turkish authorities would like to provide further information as regards the decisions taken by the Committee in the 1310<sup>th</sup> DH meeting on 15 March 2018.

In total 67 cases are examined by the Committee under Ataman group of cases.

**II. INDIVIDUAL MEASURES**

**A) INFORMATION ON PENDING INVESTIGATIONS**

The Turkish authorities would like to recall that, in its 1310<sup>th</sup> meeting, the Committee of Ministers invited the authorities to provide an updated list of the pending investigations and information on their current state. In this respect, the following information on the five cases out of 49 cases, where the investigations into the incidents that resulted in the violation of Article 3 are currently pending, is provided.

*1 - Işeri and Others (29283/07)*

As indicated in the last action plan submitted on 11 January 2018, the criminal investigation in respect of the police officers who allegedly inflicted on the applicants ill-treatment was reopened. The authorities would like to note that the investigation authorities detected the suspects. Lastly, on 17 December 2018, the applicants' medical reports were issued by the institution of forensic

medicine. After receiving these reports, the prosecution office will decide whether to issue an indictment and lodge a criminal case *proprio motu* or not.

## *2 - Kemal Baş (38291/07)*

The judgment rendered by the İzmir 34<sup>th</sup> First Instance Criminal Court was appealed by the applicant to the Court of Cassation on 7 May 2015. This case is still pending before the Court of Cassation.

## *3 - Hasan Yaşar and others case (50059/11)*

The investigation concerning the death of İkbâl Yaşar is still pending before the Yüksekova Chief Public Prosecutor's Office. The investigation authorities continue their efforts to find out the perpetrator. The authorities would like to note that the deadline concerning the limitation period is 23 March 2033.

## *4- Ataykaya Case (no. 50275/08)*

The authorities would like to note that the criminal investigation is underway. The eye witnesses were heard by the prosecution office. All of them stated that they could not see who had shot the applicant's son as the security forces interfering with the incidents had put on gas masks. The traces and remnants of cartridge killing the applicant's son were retrieved during the post-mortem forensic autopsy. These evidences were examined in the criminal laboratory; however, the rifle used to fire that cartridge could not be detected as the gas cartridge in question had not kept characteristic features of the arms used since it was made up of plastic pieces. Nonetheless, the prosecution office continues the investigation. In order to accelerate this investigation, a deputy chief public prosecutor was specially assigned. Further information regarding the outcome of this investigation will be provided.

## *5 - Mızrak and Atay Case (65146/12)*

As detailed in the judgment, on 3 November 2009, the Diyarbakır Public Prosecutor's Office initiated a criminal case for the offence of intentional homicide in respect of police officers interfering the incidents where the applicants' relatives were shot and dead. The criminal proceedings with respect to suspects have come to an end 26 April 2018. The Diyarbakır Assize Court decided the

suspects' acquittal on the grounds that it could not be ascertained that they were the perpetrators committing the offence charged. The applicants appealed this case to the Court of Appeal. It is still pending.

Moreover, as a result of the administrative proceedings pending before the 1<sup>st</sup> Chamber of the Diyarbakır Administrative Court, the applicants were awarded compensation for their pecuniary and non-pecuniary damages resulting from the death of their relatives. In this case the administrative court confirmed the negligence of the Administration with respect to the incidents in question. Following the judgment; on 15 September 2014, the 10<sup>th</sup> Chamber of the Council of State (the Supreme Administrative Court) upheld the negligence of the administration but also found that the compensation awarded was insufficient. For this reason, the Council of State partly quashed the judgment and remitted the case file. In response, the Diyarbakır First Instance Administrative Court rendered a decision of persistence in its previous judgment. Therefore, the case file is currently pending before the Council of State to be examined by the Grand Chamber.

## **B) INFORMATION ON THE TIME – BARRED INVESTIGATIONS**

In 44 cases, where the violation of Article 3 was founded, the investigations on account of the acts of the police forces are time – barred. In these cases, none of the applicants requested reopening of the investigations. The Turkish authorities inquired about the possibility of *ex officio* reopening of investigations. The Public Prosecution offices which are responsible for these cases evaluated the possibility of *ex officio* reopening of the investigations concerned. In response, they indicated that the reopening was not possible in time – barred cases. To illustrate, as it is seen in the attached document, the Istanbul Public Prosecution Office *ex officio* inquired about the possibility of reopening of investigation with respect to the case of *Vatandaş* (37869/08) and, as a result, it was indicated that the reopening of investigation or criminal proceedings was not possible due to the expiration of limitation periods (see annex I). The authorities would like to point out that this conduct is compatible with the Committee's practice in the *Barbu Anghelescu* group of cases v. Romania (see CM/ResDH(2016)150 and DH-DD(2016)554).

In this respect, the authorities would like to emphasize that statute of limitations are provided in the Turkish Criminal Code, not in the Code of Criminal Procedures. As such, these rules have substantive effects rather than procedural. It means that the expiration of prescription periods eliminates the unlawfulness of the criminal act. Accordingly, in cases where the perpetrators were already acquitted on account of statute of limitations, reopening of the investigations, as a result which the perpetrator could be sentenced if the investigation reopened results in a criminal

proceeding, would lead to the violation of the principle of non-retroactivity of the criminal provisions. Therefore, it appears that there is no a general measure, including legislative amendments, which would ensure the reopening of investigations. This consequence is related to both the principle of legality or *nullum crimen sine lege*, as well as a more general fundamental principle of legal certainty or the rule of law. In view of these points, the Turkish authorities would like to indicate that if the persons acquitted due to statute of limitations are retried and sentenced, new violations are likely to be occurred on account of Article 7 of the Convention as well as it would be detrimental for the principle of legal certainty.

In addition, the Turkish authorities would like to note that the cases at hand are predominantly old cases. In most of the cases the limitation periods pertaining to criminal proceedings expired as the prescription periods in the previous penal code, which was applicable to the cases, were too short. The authorities would like to note that in the current Criminal Code (Law No. 5237, introduced in 2005), the prescription periods are significantly lengthy in comparison with the previous legislation. Today the minimum prescription period is eight years whereas it was five years in the previous Code. This period might be extended to 12 years if an event, for example taking a statement or issuance of an indictment, requires severance of the limitation period.

On the other hand, the authorities draw the Committee's attention to the fact that the issue of excessive length in criminal proceedings were examined under *Ormancı group of cases* (24240/07). The Committee finding that the general measures were effective and capable of preventing similar violations decided the closure of Ormancı (CM/ResDH(2014)298).

Accordingly, the authorities would like to note that effective general measures have been taken to prevent similar violations of Article 3 on account of expiration of limitation periods. Furthermore, the issues of lack of effective investigation into the security forces' acts and their impunity are examined under *Batı* group of cases (33097/96).

## **C – INFORMATION ON REOPENING OF CASES**

1. In 30 cases, criminal investigations were instituted against the applicants on account of their act of violation of Law on Meetings and Demonstrations. In only four cases the applicants were convicted and sentenced to imprisonment. In two cases, notably *Lütfiye Zengin and others* (36443/06) and *Gün and others* (8029/07), the applications lodged for reopening of the proceedings were admitted by the domestic courts, and as a result, the applicants were acquitted of the alleged charges. In *Gülcü* (17526/10), where the applicant was a minor, the Diyarbakır Juvenile Assize Court reopened the criminal proceedings in response to the European Court's judgment. As a result, in view of the Court's findings, this court acquitted the applicant of

all charges. In one case, *Uzunget and Others* (21831/03), the applicants were entitled to request the reopening of the impugned criminal proceedings. However, they did not avail themselves of this opportunity.

In seven cases, fines were imposed on the applicants on account of their participation in unlawful meetings and demonstrations within the scope of Misdemeanour Act. The only consequence of a misdemeanour is payment of fine. Except for the *Akarsubaşı* (70396/11), in six cases, the European Court awarded the applicants just satisfaction in respect of their pecuniary damages resulting from the payment of the fine. In *Akarsubaşı* (70396/11), the Court did not award just satisfaction as the applicant did not request. However, the applicant was entitled to request reopening of the proceedings before the domestic courts. He did not avail himself of this opportunity.

## **D - JUST SATISFACTION**

The just satisfaction amounts awarded by the Court in the Ataman group of cases have been paid within the deadlines, and relevant payment documents have been submitted to the Committee of Ministers.

## **III - GENERAL MEASURES**

The Turkish authorities would like to submit specific information on the points raised by the Committee in its 1310<sup>th</sup> DH meeting. In response to the decisions taken in this meeting, the following general measures have been taken or envisaged to be taken.

### *A – INFORMATION ON THE DIRECTIVE ON TEAR GAS AND DEFENCE RIFLES, THE USE AND STORAGE OF EQUIPMENT AND AMMUNITIONS AND TRAINING OF USER PERSONNEL*

As noted by the Committee, in its 1310<sup>th</sup> DH meeting, a new directive governing the security forces' conduct during a violent gathering was adopted in 2016. This directive, notably "*the Directive on Tear Gas, and Defence Rifles, the Use and Storage of Equipment and Ammunitions relating to them and Training of User Personnel*", involves detailed rules with respect to use of weapons and equipments to disperse a violent public meeting or demonstration. Detailed information on this directive has already been provided in the last action plan dated 11/01/2018. In addition to this, the Turkish authorities would like to submit specific information as regards the

Committee's decisions taken in the 1310<sup>th</sup> DH meeting. This directive is attached to this submission (See annex II).

In this respect, the authorities would like to note that the current directive differs from the previous one in that this directive, along with the manual disclosing the features and proper use of arms and equipments, involves specific rules as regards use of gas, tear gas, and defence rifles, the use and storage of equipment and ammunitions, the procedure to be followed before, during and after an intervention.

Furthermore, in Article 9, it is provided that an intervention assessment meeting shall be held under the chairmanship of the head of department of the rapid intervention force, with the participation of senior police officers who are responsible for the units that took place in the intervention concerned. In this meeting the type, amount, duration of the ammunition used during the interference is assessed within the framework of the principle of use of proportionate force. Furthermore, the information obtained is added to the relevant interference form to provide the basis for subsequent interferences. Moreover, if need be, further trainings shall be provided to those personnel who are entitled to use equipment in question. The Turkish authorities would like to note that these arrangements brought about its positive consequences since the Directive was put in force. Accordingly, the "interference assessment meetings" provided under the directive are capable of reviewing the necessity and reasonableness of any use of force.

Furthermore, the Turkish authorities would like to highlight that this Directive is the sole secondary legislative instrument on the use of tear gas and related equipment and ammunition by police officers. Therefore, it is noteworthy that diverse legislation on this issue has been harmonised under this new Directive.

#### *B – INFORMATION ON STATISTICAL DATA*

The Turkish authorities would like to note that the "*Directive on Tear Gas, and Defence Rifles, the Use and Storage of Equipment and Ammunitions relating to them and Training of User Personnel*" has significantly improved the practice since its introduction in 2016. In 2015, before the current directive, the rate of intervention in the meetings was 3,2 %. This rate sharply dropped to 0,8 % in years 2017 and 2018.

STATISTICS ON POLICE INTERVENTION IN MEETINGS AND DEMONSTRATIONS
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YEARS	TOTAL NUMBER OF MEETINGS/ DEMONSTRATIONS	TOTAL NUMBER OF INTERVENTIONS	INTERVENTION RATE (%)
2015	48909	1560	3,2 %
2016	40016	813	2 %
2017	38976	318	0,8 %
2018	45553	356	0,8 %

#### *B – INFORMATION ON RECENT CASE - LAW OF THE CONSTITUTIONAL COURT*

As noted by the Committee, the Constitutional Court's approach concerning the right to assembly and association is in line with the European Court's findings in the cases at hand. In 2018, the Constitutional Court (the CC), affirming the European Court's understanding and interpretation, rendered several judgments with respect to this issue.

In the case of *Umut Şimşek ve Diğerleri* (app. no: 2015/1431, date of judgment: 12/6/2018), the CC found violation of right to assembly on account of the fact that the domestic criminal court suspended the pronouncement of the applicants' conviction for their violation of the Law on the Meetings and Demonstrations. The CC held that the mere lack of notification of a meeting does not justify an intervention. The authorities should tolerate peaceful gatherings and demonstrations to a certain degree. The CC maintained that some participants' violent acts are not sufficient to qualify the whole meeting as violent<sup>1</sup>.

In another judgment, *Ali Orak ve İrfan Gül* (App No: 2014/10626 ; Date of judgment: 18/4/2018), the CC found that the applicants' conviction for violation of the Law on Meetings and Demonstrations on account of the fact that they held a public meeting in an disallowed place and

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<sup>1</sup> <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/14310>



marched through a route that has not been permitted and that they did not notify the gathering beforehand is in violation with the right to assembly. Particularly, the CC held that the first instance criminal court had failed to assess whether the meeting concerned was peaceful or not. In spite of the suspension of pronouncement of the conviction, this intervention violated the applicants' right to association as they had to sustain the threat of punishment for three years<sup>2</sup>.

In *Özge Özgürengin* (App. No: 2014/5218, date of judgment: 19/4/2018) the CC found a violation of right to assembly and prohibition of ill-treatment in its substantive and procedural aspects. Concerning the violation of prohibition of ill – treatment in its substantive aspect, the CC held that the applicant's injury during the demonstrations resulted from the police intervention which was qualified by the CC as disproportionate. Furthermore, the CC found that the procedural aspect of the right was also violated on account of the fact that the public prosecution office had discontinued the investigation commenced against the police officers on the ground that the suspect officers' intervention was within the legitimate limits. The CC noted that prosecution office had not conducted an effective investigation. With respect to violation of right to association, the CC held that the police intervention was necessary though, the excessive use of force, as established under the violation of prohibition of ill-treatment, resulted in the violation of right to assembly as well<sup>3</sup>.

The Turkish authorities would like to note that as a consequence of the judgment, the CC may award just satisfaction in respect of pecuniary and non-pecuniary damages. Furthermore, the CC may also communicate the judgment so that the concerned authority can repair negative consequences of the violation. For example, in the last judgment, the CC decided to transmit the judgment to the İzmir Public Prosecution office for reopening of the investigation. In this respect, the Turkish authorities would like to note that individual application before the Constitutional Court proved to be an effective remedy to prevent impunity of security forces and similar Article 3 violations.

#### *C – INFORMATION ON INTER-MINISTERIAL WORKING GROUP ACTIVITIES AND COOPERATION WITH THE INFORMAL WORKING GROUP OF THE COUNCIL OF EUROPE*

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<sup>2</sup> <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/10626>, see also <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/9247>

<sup>3</sup> <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/5218>.

At the outset, the Turkish authorities would like to indicate that the inter-ministerial working group continues its activities after a suspension due to coup attempt of 15 July 2016.

Within the context of the cooperation with the informal working group of the Council of Europe a meeting was held on 4 – 5 October 2018. Issues related to freedom of expression and freedom of assembly were discussed in light of the European Convention on Human Rights and the case-law of the European Court of Human Rights<sup>4</sup>.

The Turkish authorities would also like to provide brief information on other mechanisms aiming to enhance human rights standards, other than inter-ministerial working group and cooperation with the informal working group of the Council of Europe. In this respect, the authorities would like to draw the Committee's attention to the activities of the Reform Action Group (RAG) which was established in order to determine strategies with respect to the EU accession process. The RAG, following a three – year interval, held its fourth meeting on 29 August 2018, in Ankara with the participation of Minister of Justice, Minister of Foreign Affairs, Minister of Treasury and Finance and Minister of Interior.

In this meeting, it was noted that Turkey went through a significant process of change since the last meeting of the Reform Action Group held on 11 December 2015. The vital threat posed to the country by the treacherous 15 July coup attempt has been eliminated with the measures taken during the state of emergency period and a significant progress in the fight against terrorism was recorded.

Following the termination of the state of emergency, Turkey withdrew its derogations from Article 4 of the UN Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights (ECHR). The RAG underlined the Turkey's determination to continue with reforms in the areas of the judiciary and fundamental rights.

In that regard, the RAG has confirmed that the steps to be taken in judiciary in the forthcoming period would continue on the basis of the Judicial Reform Strategy (2015-2018) which is currently being implemented. Therefore, the Judicial Reform Strategy would be updated with the participation of all stakeholders, the Turkish legal community and civil society. As a result of this process, the updated Judicial Reform Strategy will be announced soon and will particularly aim to ensure effective investigation, bolster trust in the judiciary, enhance the effectiveness of justice system and strengthen the right to trial within a reasonable time.

Furthermore, regarding fundamental rights and freedoms, the importance of the implementation

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<sup>4</sup>[https://www.coe.int/en/web/secretary-general/news-2018/-/asset\\_publisher/RBiBpv6mdmFG/content/informal-working-group-of-the-council-of-europe-and-the-turkish-ministry-of-justice](https://www.coe.int/en/web/secretary-general/news-2018/-/asset_publisher/RBiBpv6mdmFG/content/informal-working-group-of-the-council-of-europe-and-the-turkish-ministry-of-justice)

of the Action Plan on the Prevention of the ECHR Violations was underlined in the fourth meeting of the RAG. Following a thorough analysis of the Action Plan (2014-2019), all options including updating the Action Plan were addressed at the meeting.

In the fifth meeting of the RAG, which was held 11 December 2018, it was emphasized that Turkey remained committed to its EU membership process and would continue its efforts with determination. The RAG has affirmed that, in order to strengthen the protection of fundamental rights, by the first quarter of 2019, the authorities will prepare the new Action Plan on Human Rights, implementation period of which will end in March 2019. Within this context, the opinions and proposals of all stakeholders, including those of the Council of Europe and the European Commission, will be received during the updating process, which is currently underway.

The Turkish authorities would like to point out that the willingness and determination to update both the Judicial Reform Strategy and the Action Plan on Human Rights has been confirmed by the highest State authority. In the second 100 – day action plan, which was released on 13 December 2018, the Presidency of Republic of Turkey declared that the update of both arrangements within 100 days is planned.

In this scope, the Ministry of Justice has started to prepare the new Action Plan on Human Rights with the participation of all stakeholders<sup>5</sup>.

At this stage, the Turkish authorities would like to indicate that the measures aiming to enhance the standards of freedom of assembly and association is also included in the action plan which is currently prepared in view of the European Court's and Committee's findings.

## *E – INFORMATION ON PROJECTS AND TRAINING ACTIVITIES*

### 1) Judges and Public Prosecutors

The Turkish authorities would like to provide information on the project on “*Improving the effectiveness of investigations of allegations of ill-treatment and combating impunity in Turkey*”, which is implemented in cooperation with the Council of Europe. As noted by the Committee, this project is the direct outcome and follow-up of the Informal Working Group. It aims at contributing to the improvement and strengthening of the judges and prosecutors' capacity to effectively conduct investigations to combat ill-treatment and impunity.

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<sup>5</sup> [http://inhak.adalet.gov.tr/duyurular/faaliyet\\_duyurular/2018/aralik/duyuru4/inhakcalisma.html](http://inhak.adalet.gov.tr/duyurular/faaliyet_duyurular/2018/aralik/duyuru4/inhakcalisma.html)

The project has started in February 2018 and planned to finish in July 2019. The launching conference, the first meeting of the implementation committee, a workshop and the first round-table meeting were held within the first half of the 2018.

The training of trainers was realized with the participation of 22 judges and public prosecutors on 24 – 28 September 2018. The second meeting of the implementation committee was held in Ankara on 25 October 2018. Furthermore, an international workshop was held in Ankara on 26 – 27 October 2018. A study visit was conducted with the participation 14 judges and public prosecutors in Strasbourg on 17 – 18 December. Lastly, the second round-table meeting was held in Istanbul on 20 December 2018. The project will continue its activities in an effective way in 2019 as well<sup>6</sup>.

## 2) Security Forces

The Turkish authorities would like to recall that detailed information on projects aiming to improve security forces' practise with respect to intervention in the public meetings and demonstrations has already been provided in the latest action plan of 11/01/2018.

In addition to that, the authorities would like to submit brief information on an EU twinning project, notably the project of Enhancing The Capacities of Both Chief Civil Administrators About Crowd Control and The Civil Inspectors About Effective Investigation. This project is implemented in cooperation with the UK's ministry of interior. It is planned that trainings on crowd management during the public meetings and demonstrations are provided for 800 local governors and 400 superior police officers. The first training was held on 5 – 9 November 2018.

Moreover, the authorities would like to provide brief information on training activities realized in 2018. The Department of Security within the General Directorate of Security Affairs provided 12.652 personnel with in-service distance trainings on the use of tear gas, defence rifles, the use and storage of equipment and ammunitions. Furthermore, in-service trainings on the topics of Intervention in the Public Events as well as Human Rights and Proportionate Use of Force were provided to the relevant personnel.

## V CONCLUSIONS

Turkish authorities would like to point out that; except for five cases specified above, no further individual measures are necessary. In other cases, where the European Court found a violation

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<sup>6</sup> <https://www.coe.int/en/web/national-implementation/projects-by-geographical-area/turkey-effectiveness-of-investigation-of-ill-treatment>

of Article 3, reopening of investigations is not possible due to statute of limitations. As explained above the expiration of limitation periods requires discontinuation of criminal investigations and proceedings as it is a condition for punishment.

As regards general measures, the Turkish authorities would like to draw the Committee's attention to the progress in practice. The authorities will continue to update the Committee on further developments.