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APLICACIÓN DE LA RESOLUCIÓN 60/251 DE LA ASAMBLEA GENERAL, DE 15 DE MARZO DE 2006, TITULADA "CONSEJO DE DERECHOS HUMANOS"

Nota verbal de fecha 7 de marzo de 2007 dirigida a la Oficina del Alto Comisionado para los Derechos Humanos por la Misión Permanente de Turquía ante la Oficina de las Naciones Unidas en Ginebra

La Misión Permanente de la República de Turquía ante la Oficina de las Naciones Unidas en Ginebra y otras organizaciones internacionales con sede en Suiza saluda atentamente a la Oficina del Alto Comisionado para los Derechos Humanos y por la presente tiene el honor de transmitirle los comentarios y las observaciones del Gobierno de la República de Turquía en relación con el informe (A/HRC/4/40/Add.5) del Grupo de Trabajo sobre la Detención Arbitraria acerca de la misión que realizó en Turquía del 9 al 20 de octubre de 2006[*].

La Misión Permanente de la República de Turquía agradecería que el documento adjunto se distribuyera como documento oficial del cuarto período de sesiones del Consejo de Derechos Humanos.

[*] Se reproduce en el anexo como se presentó, en el idioma original únicamente.

ANNEXE

The observations of the Government of the Republic of Turkey regarding the report of the Working Group on Arbitrary Detention (Mission to Turkey from 9 to 20 October 2006)

(A/HRC/4/40/Add.5)

1. The views and observations of the Government of the Republic of Turkey regarding the report (A/HRC/4/040/Add.5) by the Working Group on its visit to Turkey from 9 to 20 October 2006, are as follows:

Definition of terrorism and terrorist offender (paragraphs 71 and 72)

2. In paragraph 71 of the report, it is stated that the Working Group shares the concerns of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin, with respect to the definition of terrorism in Article 1 of the Anti-Terror Law of 1992 in terms of the principle of legality, as enshrined in article 15 of International Covenant on Civil and Political Rights. In this respect, it is suggested that the "*definition of terrorism is formulated in a way that allows for an overly broad application of the term*" and that "*there is no requirement that a terrorist offender must have committed a violent crime*".

3. Turkey's comments and observations on the Preliminary Note (E/CN.4/2006/98/Add.2) prepared by the Special Rapporteur Mr. Martin Scheinin concerning his visit to Turkey, are contained in the document "A/HRC/2/G/3" which was circulated during the Second Session of the Human Rights Council. Turkey has also submitted her views on the final report (A/HRC/4/26/Add.2) of Mr. Martin Scheinin, to the Fourth Session of Human Rights Council (12 March – 5 April 2007). A brief summary of Turkey's views on the opinions of the Special Rapporteur concerning the definition of terrorism, are provided herewith.

4. The principle of legality is regarded as a fundamental principle of Turkish criminal law, which is safeguarded by Article 38 of the Constitution as well as Article 2 of the Criminal Code. In line with this principle, "terrorism" is clearly articulated in the Anti-Terror Law. The terms "terrorism", "terrorist crimes" and "terrorist offenders" are separately defined under various articles of the Anti-Terror Law. The main elements, pre-requisites, thresholds and in some cases exclusions related to these terms are set forth therein.

5. In Article 1 of the Anti-Terror Law "terrorism" is defined as "any kind of acts which constitute an offence perpetrated by a person or persons who are members of an organization, through use of force and violence and by employing any of the methods of coercion, intimidation, oppression, suppression or threat for the purpose of altering the fundamentals of the Republic stated in the Constitution, its political, legal, social, secular and economic order, impairing the indivisible integrity of the State with its territory and nation, endangering the existence of the Turkish State and its Republic, weakening or annihilating or seizing the State authority, destroying fundamental rights and freedoms, impairing the internal and external safety of the State, public order or public health."

6. According to Article 1 of the Anti-Terror Law the main elements of terrorism are “force and violence”, “membership to an organization” and “ideology”. Using force and violence as well as employing any of the tactics of coercion, intimidation, suppression or threat are pre-requisites for terrorism.

7. A terrorist offender is a member of an armed organization that has been formed to attain the purposes set forth in Article 1 of the Anti-Terror Law and/or who commits terrorist crimes to advance these purposes, alone or with other members, on behalf of the armed organization.

8. The “terrorist crimes“ and “crimes committed for the purpose of terrorism“ are enumerated in Articles 3 and 4 of the Anti-Terror Law. Instead of creating new crimes, these provisions stipulate that certain offences in Turkish Criminal Code, the relevant articles of which have been referred to therein, constitute terrorist crimes when committed to attain the aims and purposes defined in Article 1 of the Anti-Terror Law. These crimes (such as crimes against the security of the State, murder, trafficking in human beings etc.) are grave and violent in nature, in line with the definition of terrorism in Article 1 of the Anti-Terror Law.

9. In view of the above, the scope of terrorism is clearly defined in the Anti-Terror Law and is consistent with the principle of legality.

10. Several articles of the Anti-Terror Law were amended by the Law No. 5532, which was adopted on 29 June 2006 by the Turkish Grand National Assembly. However, these amendments do not broaden the scope of terrorism defined in Article 1 of the Anti-Terror Law. The Law No. 5532 has only amended the title of Article 1 and has repealed its 2nd and 3rd paragraphs. The amendment introduced to Article 3 of the Anti-Terror Law regarding terrorist crimes, is aimed at harmonizing the Article numbers corresponding to that of the new Criminal Code.

11. In paragraph 71 of the report it is stated that “*the Working Group fully shares the concern raised by the Special Rapporteur Mr. Martin Scheinin about the severe limitations the Anti-Terror Law may put on the freedom of expression, association and assembly*.“

12. The suggestion that “the provisions of the Anti-Terror Law may severely limit the exercise of the freedom of expression, association and assembly” is groundless. Furthermore, freedom of expression is not an absolute right under international law. Therefore, certain restrictions are permitted to ensure respect for the rights and reputation of others, or for the protection of national security, public order, public health or morals. These restrictions are explicitly set forth in Article 19/3 of the International Covenant on Civil and Political Rights (ICCPR). Whereas, Article 20 of ICCPR makes it obligatory for States Parties to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Furthermore, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) introduces another restriction to the freedom of speech, by bringing obligation to States to penalize by law “all dissemination of ideas based on racial superiority or hatred, or incitement to racial discrimination as well as all acts of violence.”

13. Neither are freedom of peaceful assembly and freedom of association absolute rights under international law. Restrictions may be placed on the exercise of these rights in conformity with the law and, wherever necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. These restrictions are set forth in Article 21 and 22 respectively of the International Covenant on Civil and Political Rights (ICCPR).

14. Similar provisions also exist in the European Convention on Human Rights.

Access to legal counsel in proceedings concerning terrorism suspects

(paragraph 73)

15. In paragraph 73 of the report it is stated that "*the Working Group is concerned about the restrictions to the right to be assisted by counsel of one's own choosing contained in the 2006 amendments to the Anti-Terror Law"*. In this context, it is indicated that the restrictions introduced with the recent amendments to the Anti-Terror Law constitute a "*heavy-handed interference with defence rights in terrorism cases*".

16. The new Article 10(e) of the Anti-Terror Law sets a general rule that documents, files and papers of the defence counsel cannot be examined during the investigation. However, the same article provides for an exception to this rule, limited to cases in which there is evidence that the defence counsel is liaising between the members of the terrorist organization for organizational purposes. In this case, the judge may order that an official be present during the meetings and that the documents exchanged between the suspect and the defence counsel be examined by the judge. However, such decisions by the judge are subject to appeal. The purpose of this provision is to prevent terror suspects from communicating with other members of the terrorist organization after they are apprehended. Terrorist organizations have developed a so-called "alarm system" which triggers an alert process aimed at eliminating the evidence, organizational information and documentation when any member is apprehended. The restriction provided in Article 10(e) of the Anti-Terror Law is a precautionary measure against such terrorist tactics, deemed necessary under certain circumstances and on the basis of concrete evidence that needs to be found justifiable by the judge. Judicial scrutiny is a safeguard against arbitrary practices.

17. Article 10(b) of the Anti-Terror Law states that a terror suspect can appoint only one defence counsel during the detention period. In the case of ordinary offences, 3 lawyers are allowed to be present in statement-taking during investigation. However, due to the complex nature of terrorist crimes and heavy work load which needs to done expeditiously during the detention period as well as to prevent abuse of rights by terrorist organizations which has been experienced in the past on a large scale, the number of defence counsel to be appointed during the detention period has been reduced to one, with the introduction of an amendment to Article 10(b) of the Anti-Terror Law.

18. Turkey is of the opinion that the above-mentioned measures introduced to Article 10 of the Anti-Terror Law neither constitute a "heavy-handed interference with defence rights" nor prevent the effective exercise of defence rights in terrorism cases.

Executions of prison sentences of persons found guilty of terrorism offences

(paragraphs 76, 77 and 99)

19. In Article 76 of the report, concern is raised with respect to conditions under which persons convicted of terrorist crimes benefit from conditional release.

20. Conditional release provided for persons convicted of terrorist crimes are governed by Articles 107/4 and 108 of the Law on Enforcement of Penalties and Safeguard Measures No. 5275, as referred to in Article 17/1 of the Anti-Terror Law.

21. Article 107/4 of the Law No. 5275 reads, "In case of conviction of setting up an organization to commit crime or leading such an organization or conviction of an offence committed within the framework of activities of such an organization, those who have served 36 years of the aggravated life-term imprisonment to which they are sentenced to, those who have served 30 years of the life-term imprisonment, and others who have served 3/4th of their term in penitentiary institutions can benefit from conditional release." In this respect, as a general rule, persons convicted of terrorist crimes can benefit from conditional release after serving 3/4th of their term. In case of multiple terms, serving 28 years of the term is required to benefit from conditional release. Whereas, persons convicted of ordinary crimes can benefit from conditional release after serving 2/3rd of their terms in good faith. In principle, persons convicted of terrorist crimes have the right to benefit from conditional release, however, the period for conditional release is longer than that of ordinary crimes, due to the fact that the process for rehabilitation and integration into society of such prisoners are more challenging and require a longer process. On the other hand, several exceptions to this rule are provided in Article 17 of the Anti-Terror Law.

22. Every convict has the constitutional right to be treated equally in prison. The conditions and procedures for imposing disciplinary sanctions in prisons are set forth in detail in the Law No. 5275 in accordance with the principle of legality. Regarding the application of disciplinary sanctions, the Law No. 5275 makes no distinction in terms of the nature of crimes committed by convicts, be it terrorist or ordinary crimes, nor on any other grounds. As is the case with other legal systems, the purpose of disciplinary sanctions is to maintain order and security in the penitentiary institutions as well as to protect the well-being and safety of all the prisoners, and definitely not to re-punish prisoners due to the nature of the crimes which they were convicted of. It should be stressed that solitary confinement is the most serious form of disciplinary sanction which is imposed only on restricted grounds, such as intimidating or attacking other inmates, attempt to murder, taking hostage, sexual assault, sexual exploitation, arson and fleeing from prison, pursuant to the Law No. 5275. If a prisoner believes that the disciplinary sanction imposed against him/her is arbitrary, discriminatory or in contravention of the Law No. 5275, the prisoner has the right to complain to enforcement judges and to appeal to the Heavy Penal Court. Therefore, the suggestion in the report that "*disciplinary sanctions are imposed with great frequency*" against prisoners convicted of terrorist crimes, reflects a vague generalization which is unsubstantiated.

23. In paragraph 77 and 98 of the report it is indicated that the situation of terror suspects is a major stain on Turkey's efforts to eliminate arbitrary detention which cannot be justified with reference to the Government's uncontested duty to combat terrorism.

24. The suggestion that "arbitrary" detentions occur in connection with charges or convictions on terrorism, is unsubstantiated. Turkey's policy in countering terrorism is conducted in conformity with the relevant law and in line with its obligations stemming from international instruments, of which Turkey is party. The new Criminal Procedure Code has introduced many safeguards against arbitrary practices.

25. The length of the custody period has been brought in line with Turkey's international obligations and the case-law of the European Court of Human Rights. All convictions are based on judgments rendered by competent courts upon the application of the Turkish Constitution and the relevant laws. All judgments rendered as such, are subject to appeal. As for detentions pending trial, the necessity of a continuing detention is reviewed ex officio by the competent

judges each month during the trial period. Finally, persons who claim to be unjustly detained have the right to apply for compensation to the competent courts under the relevant laws. They can also apply to the European Court of Human Rights, after the exhaustion of domestic remedies.

Length of remand detention

(paragraphs 39, 75, 101)

26. It is suggested in paragraph 39 of the report that the maximum duration of detention may reach 6 to 10 years depending on the interpretation of Article 102(2) of the Criminal Procedure Code. In Paragraph 75 of the report the correct interpretation of the article is given. However, it is stated that the Article is not entirely clear and that some interlocutors "*understood Article 102(2) to provide that the maximum duration is two years to be extended for compelling reasons by up to three years, thereby reaching a total of five years, which doubled under Article 252(2) would allow remand detention in terrorism cases for up to ten years.*"

27. Article 102/2 of the Criminal Procedure Code states that "The maximum duration of arrest in cases that fall within the competence of Heavy Penal Courts is 2 years. Under compelling circumstances, this period may be extended with providing its reasons; however, extended period cannot exceed 3 years in total." The correct interpretation of this provision, is that the duration of extension under compelling circumstances cannot exceed 1 year and that the total duration of arrest with the extension cannot exceed 3 years (in total). It would only be logical that the extension period under exceptional circumstances would not be longer than the general rule for the duration of arrest.

28. According to Article 250/2 of the Criminal Procedure Code, the duration of arrest envisaged in the Law are doubled for offences set forth in paragraph 1(c) of Article 250, which are mostly terrorist crimes. In this respect, the time limits in Article 102 are doubled for terrorist crimes. Under normal conditions, a terror suspect can be held on remand for a maximum period of 4 years. On the other hand, under exceptional and compelling circumstances, the 4-year period may be extended up to 6 years in total. In other words, with the extension under exceptional circumstances the total duration of remand cannot exceed 6 years. Therefore, the suggestion that "the duration of detention on remand may reach ten years for terrorist crimes" is inaccurate and reflects a misinterpretation of the provision.

Failure to retro-actively apply the ban on statements

made to the police in the absence of a lawyer

(paragraph 78)

29. In paragraph 78 of the report, concern is raised with respect to the safeguard in Article 148 (4) of the Criminal Procedure Code for not being applicable to statements extracted under torture in the absence of a lawyer before 1 June 2005.

30. The new Criminal Procedure Code which entered into force on 1 June 2005, contains many safeguards for suspects and accused persons against unlawful practices and for the effective exercise of defence rights. In this framework, the Criminal Procedure Code provides for the right to be assisted by a defence counsel and ensures that any statement should be made of free will

and that statements extracted through prohibited methods such as torture or ill-treatment shall not be taken as a basis for any judgement. Article 148(4) states that "The statement taken by law enforcement officials in the absence of defence counsel can not be a basis for a judgement unless verified by the suspect or the accused before the judge or the court".

31. Many of these safeguards have not been introduced to the criminal justice system for the first time with adoption of the new Criminal Procedure Code. Similar checks and balances aimed at protecting suspects and accused persons against unlawful or arbitrary practices, existed also in the former Criminal Procedure Code No. 1412 in various forms. For instance, Article 135 of the Law No. 1412 provided the right to access to a defence counsel, assignment of a defence counsel by the State free of charge, presence of a defence counsel at all stages of statement-taking and interrogation. Article 135/a ensured that any statement should be made of free will, prohibited unlawful methods for taking statement such as torture, ill-treatment and other methods preventing free will and envisaged that statements taken through prohibited methods cannot be regarded as evidence even with the consent of the suspect.

32. In view of the above, defence rights were provided fully to suspects and accused persons before 1 June 2005 and no obstacle existed for them to exercise their right to be assisted by a defence counsel at all stages of investigation and prosecution. If a suspect or an accused person objected to the content of any statement taken in the absence of his/her defence counsel, such a statement alone was not considered sufficient for a conviction. Courts have discretionary power to assess the value of each and every evidence submitted to the court and to consider all the evidence together before rendering a judgement. In this respect, there has not been a protection gap in terms of safeguards against torture or other degrading treatment or of guarantees to ensure that any statement should be of free will before the entry into force of the new Criminal Procedure Code. Evidence obtained through torture has always been regarded as unlawful evidence, which entailed criminal liability.

33. Therefore, any statement taken before 1 June 2005 in the absence of a defence counsel during a case that is pending as of 1 June 2005, can be renewed in the presence of a defence counsel on various grounds. For instance, such a renewal can be requested on the basis of an objection that the statement was not made of free will or that it was extracted under torture, ill treatment, pressure, force or other prohibited methods. Renewal can also be ordered by the court if it is not convinced that the statement or confession is indeed made of free will. This aspect is also given due consideration by the Court of Cassation. In addition, provisions of the new Criminal Procedure Code apply to statements taken following the decision of reversal.

34. On the other hand, if there is an allegation that a statement was obtained by use of torture against a suspect or an accused before 1 June 2005, it would be investigated thoroughly by the relevant authorities.

Vulnerability of non-Turkish detainees and detention of foreigners

(paragraphs 79, 80, 86-90)

35. In paragraph 79 of the report it is stated that "*foreign detainees, whether deprived of their liberty on remand or serving a sentence, are in a particularly vulnerable situation in most if not all countries. In Turkey, this vulnerability is exacerbated by a scarcity of effective interpreters in the criminal justice system*". In addition, in paragraph 80 of the report it is stated that "the

Working Group is concerned about a procedural obstacle to contacts between foreign detainees and their families in the home country".

36. The situation of a foreigner who has been detained or arrested in Turkey is reported without delay to the Consulate of the country of which they are nationals, provided that the foreigner does not object to such a notification, pursuant to Article 95 of the Criminal Procedure Code, Regulation on Apprehension, Detention and Statement-Taking and Vienna Convention on Consular Relations. In custody, they are permitted to telephone a relative in their country. Whether the relative has been informed of the situation or not falls within the responsibility of the relevant foreign mission. In this respect, the duty of the Turkish authorities on this matter terminates when the relevant foreign mission is contacted, upon the consent of the detainee.

37. Such foreigners are requested to fill in and sign the "Notification Form for Foreigners Arrested, Detained, Convicted or Deceased" in Turkish and other foreign languages which contains information on their rights.

38. In order to proceed expeditiously, their statements are taken with the assistance of interpreters and the relevant foreign missions are immediately contacted. If an interpreter that speaks the language of the foreigner cannot be provided, the assistance of experts at the Universities is requested.

39. According to Article 202 of the Criminal Procedure Code, if an accused or a suspect does not speak Turkish, the substantial points of the allegations and defence put forward in the hearing are translated through interpreters assigned by the court.

40. In cases where a foreigner does not have the financial means or necessary documents in order to leave the country, he/she is accommodated in special guest houses for foreigners until necessary documents/money are provided.

41. Foreigners who have been apprehended for their involvement in various offences are assisted to leave the country after the completion of proceedings conducted in accordance with Laws No. 5682 and 5683.

42. If the foreigner does not have enough money to afford the travel costs, necessary steps are taken to facilitate that it is born by his/her own financial means first and if this is not possible, by the relevant foreign mission or by relatives in the country who are contacted through the relevant foreign mission. In the case that it is not possible to find the necessary means to pay for the costs as explained above, the travel costs of the foreigner to enable him/her to leave the country are assumed by public means.

Juvenile Justice

(paragraphs 81 and 82)

<u>Decision to join a juvenile trial with an adult trial</u>

43. In paragraph 81 of the report, it is stated that "*the provision whereby.. the adult court dealing with a case involving also a juvenile defendant may decide to join the minor's case to the adult trial, can in many cases nullify the important guarantee of specialised prosecutors and courts.*"

44. Article 3 of the Child Protection Law No. 5395 defines the term "child" as "persons who have not completed the age of 18, even though majority may be attained earlier". The term "court" referred to in the Law is defined as "Juvenile Court" and "Heavy Juvenile Court". Article 17 of the Law provides for separate investigation and Article 22 envisages separate trial to be conducted against child defendants.

45. In cases involving juvenile persons and adults in the same offence Article 17 of the Law shall apply. Article 17 reads as follows:

"(1) In a case where a child commits an offence together with an adult, the investigation and trial are conducted separately.

(2) In such a case the Court may postpone the trial against the child until the result of the case before the general court, when deemed necessary, besides imposing necessary measures for the child.

(3) In cases when it is considered imperative to conduct the cases jointly, a decision to join the cases may be rendered by the general courts at all stages of trial, provided that it is approved by the courts. In this case the joined cases are seen before the general courts."

46. As it would be observed, if an adult and a child commit an offence together, in principle, investigation and trial shall be conducted separately. When deemed necessary, the juvenile trial is suspended until the end of the trial of the adult at the general court. Lastly, if it is deemed absolutely necessary, the two cases may be joined upon the approval of the two courts. This provision is exceptional in nature which can be applied in very limited cases in practice.

Incidents which took place in Diyarbakır from 28 March to 1 April 2006

47. In paragraph 82 of the report it is stated that "*the massive arrests and detention of minors following the riots in Diyarbakır from 28 March to 1 April 2006 evidence that these concerns are not only of a theoretical nature. More than 200 minors were apprehended during and following the riots…. According to the report of an inquiry into the events by several bar associations, neither the families of the children nor SHÇEK were informed after the apprehensions and the earliest interview with lawyers took place 12 hours after apprehension*."

48. The incidents referred to in paragraph 82 of the report, erupted in Diyarbakır during the funeral of several PKK/KADEK/KONGRA-GEL terrorists, who lost their lives in a counter terrorist operation. These incidents, which later spread to the neighbouring provinces, were orchestrated by the terrorist organization PKK/KADEK/KONGRA-GEL through a provocation campaign on its affiliated web-pages and TV channels. The unwarranted demonstrations led to a series of acts of violence, affray, intimidation, use of firearms and weapons, invasion of private and public property, damage to public and private property, disturbing public order as well as private and public safety. These acts, which were provacated by the terrorist organization PKK/KADEK/KONGRA-GEL, did not constitute "riots" contrary to the suggestion in the report. It is deplorable that the terrorist organization PKK/KADEK/KONGRA-GEL encouraged deliberately the involvement and participation of children in these incidents, as a tactic, through its provocation campaign. The law enforcement authorities took necessary measures to ensure the safety of children. Furthermore, they did not intervene in the unlawful processions in order not to jeopardize the safety of the children among the crowds. In the course of the investigation initiated in connection with the incidents, minors were separated from the adults and all the legal

proceedings were conducted by the specialized staff of the child unit at the Directorate for Security. Their families were informed of their apprehensions and they had access to their lawyers in accordance with due proceedings. When the investigation stage was completed they were referred by the child unit to the judicial authorities, separately from the adults.

49. As regards the allegation that "*the earliest interview with lawyers took place 12 hours after apprehension*", it is groundless. No restriction exists in the Child Protection Law that could delay the communication of juveniles with their lawyers.

Notification to families and "Social Services and the Child Protection Agency" (Sosyal Hizmetler ve Çocuk Esirgeme Kurumu, SHÇEK) of detention or remand detention of the child

50. The situation of the child who has been detained or arrested is communicated immediately to the family of the child, if the child has a family, in accordance with applicable provisions.

51. As regards the involvement of SHÇEK in juvenile cases, Article 3 of the Child Protection Law No. 5395 makes a distinction between the "child in need of protection" and the "child drawn into crime". The "child drawn into crime" is defined as "a child who is subjected to investigation or prosecution on criminal charges or against whom a safety measure is imposed due to his/her conduct".

52. According to Article 6 of the Law No. 5395, public authorities are under obligation to inform SHÇEK of the situation of children who are in need of protection. The child or persons responsible for the care of the child may apply to SHÇEK to place the child under protection.

53. However, such a compulsory notification does not exist for public authorities in the case of "children drawn into crime". In this respect, there is no deficiency or shortcoming in the legislation in terms of notification of the situation to the family or SHÇEK in cases of detention or remand detention of the child.

Legal basis for protective and supportive measures for children

54. Judges of juvenile courts may grant order for protective and supportive measures envisaged in the Law No. 5395 for children in need of protection as well as those drawn into crime, upon the request of the mother, father, guardian, SHÇEK, Public Prosecutor or ex officio. Following such an order by the judge, the child is rendered protective and supportive services by SHÇEK. Before granting an order, the judge may instruct SHÇEK to conduct a social examination of the child in question.

55. The judge may also decide to place the child under protection of SHÇEK besides safety measures. Taking into account the progress in the development of the child, the judge may decide to lift or change the protective and supportive measures. This decision may be also given by the judge of the place where the child currently stays. However, in this case the decision is notified to the judge or the court that has rendered the previous decision.

56. The measure terminates automatically when the child completes the age of 18. Implementation of the decisions on measures are reviewed by the judge or the court that has imposed the measure every three months at the latest. The judge or the court may lift the measure considering the results of the implementation of the measure, extend its period or change the measure ex officio or upon the request of the supervisory authority, parent, guardian,

person who has undertaken the care of the child, person or authority implementing the measure or the public prosecutor.

57. In the existence of circumstances necessitating urgent protection, a child may be placed under care and supervision by SHÇEK. In this case, the application for urgent protection order should be submitted to the juvenile judge within 5 days. The judge decides on the application within 3 days. The judge may also decide that the place of the child be kept confidential and that personal relationship with the child be established. Urgent protection order can be rendered for a period limited to 30 days. During this period SHÇEK conducts a social assessment with regard to the situation of the child. If SHÇEK concludes that a measure is not necessary, it informs the judge of its opinion and the services that it may provide for the child. The judge decides as to whether the child should be sent to his/her family or whether to impose any other appropriate measures. If SHÇEK concludes that a measure should be taken for the child, it requests from the judge that necessary protective and supportive measures be ordered.

58. As it would be observed, the above-mentioned provisions of Articles 7, 8 and 9 of the Child Protection Law constitute the legal basis for holding children in rehabilitation centres to implement the protective and supportive measures by the courts.

Detention of juveniles

59. Article 16 of the Child Protection Law states that " (1) Children who have been detained shall be held in the child unit of the law enforcement authority. (2) In the case that a child unit does not exist within the law enforcement authority, the child is held separately from adults in custody. "

60. Child Protection Law does not establish an exclusion for detention period. Therefore, under the conditions envisaged in the Law, a child may be detained for a maximum period of 24 hours as a measure in accordance with general provisions. In this respect, there exists no deficiency in terms of the rights of the child.

61. Child units have been set up within 81 Provincial Directorates for Security at both provincial and district level. 2051 staff of child units have received special training on the rights of the child since 2001.

Arrest of juveniles

62. Article 20 of the Child Protection Law provides for judicial control measures (such as imposing restriction to stay in certain areas, ban on going to certain places, prohibiting contact with designated persons) to be imposed against a "child drawn into crime" in the course of investigation or trial. If it is not possible to obtain any result from these measures or in the case of non-compliance with the measures, the child may be arrested as a last resort.

63. Article 21 of the Child Protection Law establishes a ban on the arrest of children who have not completed the age of 15 in respect of offences carrying sentences, upper limit of which do not exceed 5 years.

64. Subject to the above-mentioned conditions set forth in the Child Protection Law, the time limits for detention on remand in the Criminal Procedure Code are applicable for juveniles. In this respect, no deficiency exists in terms of the rights of the child.

Facilities for involuntary holding of persons with disabilities

(paragraph 16)

65. In paragraph 16 of the report, it is stated that "While nearly all SHÇEK (Directorate for Social Services and Child Protection) institutions are open, the Rehabilitation Centres have some closed wards, i.e. person accommodated in those wards are in fact deprived of their freedom for their own protection".

66. Protection, care and rehabilitation of persons with disabilities who cannot cope with the conditions and requirements of a normal life, as well as rendering and planning services that enable such persons to live independently in the society, fall within the responsibility of SHÇEK. Those persons with disabilities in the Rehabilitation Centres affiliated to SHÇEK who may harm themselves or others, receive special care in protected wards provided that the necessity to keep them under control is recommended by a doctor's report. Examination and treatment of psychiatric patients are carried out in hospitals affiliated to the Ministry of Health and the relevant department of Universities.

Deprivation of liberty on grounds of mental health (paragraphs 54, 91 - 94)

67. Legal provisions on deprivation of liberty on grounds of mental health are not limited to Articles 432 and 433 of the Turkish Civil Code, as suggested in paragraphs 54 and 92 of the report. The placement to mental health institutions for the purposes of treatment and rehabilitation of persons, who constitute risk to society due to mental illness, mental infirmity, habitual drunkenness or substance addiction and whose personal protection cannot be provided otherwise, is governed by the Turkish Civil Code No. 4721. Whereas, protective and safety measures to be imposed against persons, who are found to have mental illness during their conduct which constitutes a crime under the laws, are governed by the Turkish Criminal Code No. 5237.

68. The relevant articles of the Turkish Civil Code and Criminal Code are as follows:

<u>Turkish Civil Code</u>:

- "An adult who lacks capacity to sustain his/her life or requires support permanently for his/her protection and care or poses risk to the security of others due to mental illness or mental infirmity shall be restrained; administrative authorities, notaries and courts that acknowledge the existence of a condition necessitating a person to be placed under guardianship, in the discharge of their functions, are under obligation to inform the competent guardianship authority of this situation". (Article 405)

- "An adult who poses a risk of poverty and shortage to himself/herself and his/her family due to habitual drunkenness or substance addiction and in need of permanent care and protection for this reason or who poses a risk to the security of others due to the same reasons shall be restrained." (Article 406)

- The concept of "restraining" is defined as "appointment of a guardian to protect the interests of a person related to his/her personality and property as well as to represent him/her in legal proceedings." (Article 403)

- "In public guardianship, the guardianship authority is the competent 'Court of Peace', the supervisory authority is the competent 'Court of First Instance'." (Article 397)

- "No one can be restrained on grounds of habitual drunkenness or substance addiction… without being heard (by the court). Restraining order on grounds of mental illness or mental infirmity can only be granted upon a report by the Board of Health. The judge, taking the report into account, may hear a person to be restrained before giving a decision." (Article 409)

- In general, "the guardianship authority may decide to terminate the guardianship if the reason necessitating guardianship no longer exists. Restrained person or any other concerned persons may request that the guardianship be lifted (Article 472). Decision to lift the guardianship over a person who has been restrained on grounds of mental illness or mental infirmity can only be granted on the basis of a report by the Board of Health confirming that the reason necessitating guardianship no longer exists (Article 474). A person who has been restrained due to habitual drunkenness or substance addiction may request that the guardianship be lifted provided that no complaint has been lodged against him/her related to the reason necessitating him/her to be placed under guardianship for at least one year." (Article 475).

- "A person under guardianship who has the capacity to perceive and distinguish, as well as other concerned persons may complain to the supervisory guardianship authority against any conduct of the guardian." (Article 461)

- "A minor for whom a guardian has been appointed in the absence of parent ship, may be placed in an institution for protection by the guardianship authority upon the request of the guardian or in compelling circumstances by the decision of the guardian who shall immediately inform the guardianship authority of this situation." (Article 446 entitled "deprivation of liberty for the purpose of protection"). In the case of persons who have been restrained, the guardian may place the restrained person in an institution or hold him/her there in the existence of compelling circumstances, in accordance with the provisions on deprivation of liberty for the purpose of protection. However, the guardian shall immediately inform the guardianship authority of this situation."

- "An adult, who poses risk to society due to mental illness, mental infirmity, habitual drunkenness or substance addiction, epidemic of serious nature or the state of being vagabond, may be placed or held in an appropriate institution for treatment, education or rehabilitation, should his/her personal protection cannot be provided otherwise. Public officials, who acknowledge the existence of any of the above-mentioned reasons in the discharge of their functions, are under obligation to inform the competent guardianship authority of this situation. The person in question is discharged from the institution as soon as his/her state of conditions permit." (Article 432)

- "The decision to place or hold a person in an appropriate institution rests with the guardianship authority in the place of residence or in urgent cases in the current place of stay of the person in question. The guardianship authority, which has decided on the placement or holding of a person in an institution, has the authority to order the release of the person from the institution." (Article 433)

- "In cases where a restrained person is placed or held in an institution, or other measures relating to guardianship need to be taken with respect to an adult, the guardianship authority in

the place of stay or the concerned persons referred to in special laws, are under obligation to report the situation to the guardianship authority in the place of residence." (Article 434)

- "A person placed in an institution as well as his/her relative can appeal to the supervisory authority (Court of First Instance) against this decision within 10 days upon notification of the decision. This right (of appeal) may also be exercised against the decision on the rejection of request for release." (Article 435)

- "Deprivation of liberty for the purpose of protection is governed by the Legal Procedural Law, notwithstanding the following rules:

1. Before giving a decision, the person concerned must be informed of its reasons and of his/her right to appeal to the supervisory authority against the decision by written notification.

2. A person who is placed in an institution must be informed, through written notification, that he/she has the right to lodge an appeal to the supervisory authority against the decision of deprivation or rejection of the request for release within 10 days.

3. Any request requiring a court's decision should be conveyed to the competent judge without delay.

4. The guardianship authority or the judge that has decided on the placement of a person to an institution, may postpone the consideration of this request due to the special circumstances of the situation.

5. The decision on the situation of persons who has mental illness, mental infirmity, habitual drunkenness or substance addiction or epidemic posing serious danger, can only be taken upon the report of the Board of Health. If the guardianship authority has previously consulted a witness expert, the supervisory authority may renounce to this." (Article 436)

- "The person concerned may be provided with legal aid, when deemed necessary. The judge hears the person in question before giving a decision." (Article 437)

69. In addition to the above-mentioned provisions of the Turkish Civil Code, the Criminal Code also contains provisions which envisage safety measures specific to patients with mental illness to be enforced against persons whose mental disorder has been detected in the course of committing an offence. Article 57 of the Criminal Code reads as follows:

"(1) Safety measures for the purposes of protection and treatment are imposed against persons who have mental illness during the course of their conduct. Such persons against whom safety measures are imposed, are placed under protection and treatment in high security health institutions.

(2) Persons with mental illness who are subject to safety measures, may be discharged by the decision of the court or the judge upon the report by the Board of Health of the concerned institution, which confirms that risk for the society no longer exists or is reduced on a large scale.

(3) The report of the Board of Health states as to whether there is a need for medical control and monitoring of the person due to the nature of the mental illness and the action carried out, and if so, its duration and frequency.

(4) Medical control and monitoring are provided within the period and frequency indicated in the report through transfer of such persons by the Office of the Public Prosecutor to the health institutions with competent experts and necessary technical equipment.

(5) If it is established during the medical control and monitoring that the risk for society has increased due to the mental illness of the person, safety measures for the purposes of protection and treatment are re-imposed. In this case, the proceedings referred to in the first and the following paragraphs are re-applied.

(6) In the case that a person's capacity to manage his/her own conduct decreases due to the illness related to the act he/she committed, the imprisonment to which he/she is convicted, can be commuted in whole or partial, to safety measures specific to persons with mental illness, provided that its duration remains the same, by the decision of the court upon the report prepared by the Board of Health of the institution where the person is placed, pursuant to paragraphs 1 and 2 of this article.

(7) Hospitalization of offenders with addiction to drugs, stimulating substances or alcohol, to special health institutions for treatment shall be decided (by the court) as a safety measure. The treatment of such persons continues until they quit alcohol, drug or stimulating substance addiction. Such persons may be discharged from the institution by the decision of the court or the judge upon the report prepared by the Board of Health of the institution in this respect."

70. In accordance with the above-mentioned provisions, the Circular issued by the Ministry of Health No. 14160 (2005/155) dated 13 October 2005 sets forth the rules to be followed for the outpatient or hospitalised treatment of persons with mental disorders when they apply or are transferred to a health institution. According to this Circular;

- For the outpatient or hospitalised treatment of a minor or an incapacitated person under guardianship in a medical institution, the permission of the guardianship authority in the place of residence is required.

- In the absence of such permission for treatment from the guardianship authority, it must be ensured that the guardian should seek permission from the guardianship authority.

- If the state of health of a patient who is transferred for treatment poses risk to himself/herself or his/her surrounding, the guardian may proceed with the hospitalisation, however, the health institution must monitor and verify that the competent guardianship authority is informed of the hospitalisation.

- The state of the minor or an adult who is not under guardianship but for whom treatment or protection due to mental illness or mental infirmity is deemed necessary by the doctor of the health institution, should be immediately communicated by the concerned institution to the guardianship authority of the place where the patient currently resides or stays.

71. In view of the above, provisions on commitment to health institutions on grounds of mental health are not limited to Articles 432 and 433 of the Turkish Civil Code and legal procedural safeguards do exist for persons who are transferred to such institutions.
