

DECISION No. 38/1994 (TURKEY)

Communication addressed to the Government of Turkey on
20 September 1993.

Concerning Soner Onder, on the one hand, and the Republic of
Turkey, on the other.

1. The Working Group on Arbitrary Detention, in accordance with the methods of work adopted by it and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government concerned the above-mentioned communication received by it and found to be admissible, in respect of allegations of arbitrary detention reported to have occurred.
2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question.
3. (Same text as para. 3 of Decision No. 35/1994.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government of Turkey. The Working Group transmitted the reply provided by the Government to the source and the latter has provided the Working Group with its comments. The Working Group believes that it is in a position to take a decision on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.
5. According to the communication, a summary of which was transmitted to the Government, Soner Onder, aged 17, a student at Istanbul Technical University, was detained by police following a demonstration on 25 December 1991. He was reportedly taken to Istanbul Police Headquarters and interrogated at the Anti-Terror Branch until 8 January 1992, when he was formally arrested by Istanbul State Security Court and sent to Bayrampasa Prison. According to the source, the demonstration on 25 December 1991 was held by the youth organization of the illegal Kurdish Workers' Party (PKK). Following the demonstration an arson attack was carried out on a department store, in which 12 people died. Soner Onder was detained when police detained, in the area of the incident, several hundred youths whose identity papers showed a birthplace in the south-eastern (mainly Kurdish) provinces. Soner Onder's trial began in February 1992 before Istanbul State Security Court No. 2. Reportedly there were 22 defendants in the trial, but except for seven of them, all have been conditionally released. Soner Onder was charged with membership of an armed organization, possession of an explosive substance, multiple killing, criminal damage and criminal damage for seditious purposes. Soner Onder reportedly signed a confession while in police custody, but retracted when brought before the prosecutor on 8 January 1992, claiming that he had signed the confession, while being kept blindfolded and without any knowledge of its contents, because he had been tortured. The source alleged that there was evidence to support his claim of torture, including an examination by the Forensic Medicine Institute 24 days after he was taken into police custody, which reportedly revealed that he still had "considerable swelling on one testicle". The source further noted that there were several other contradictions between the confession and Soner Onder's version: according to the confession, Soner Onder met a person named Lütfü Yavuz on 25 December, before the attack

on the store and received from him several Molotov cocktails in a bag. He then participated in the demonstration and threw a Molotov cocktail at a shop. The official police report of his detention stated that he was captured at the scene of the crime, together with five other defendants, holding a Molotov cocktail. But according to Soner Onder's own version, on the morning of 25 December 1991, the day of the incident, he attended a Christmas service, since he is a Syriac Christian, after which he caught a minibus to return to his sister's home. The minibus was stopped by police and the identity cards of all the passengers were checked. He was then detained and taken for questioning as his card revealed that he had been born in the south-eastern province of Mardin, a centre of PKK armed activity. The Working Group was subsequently informed that Soner Onder was sentenced, on 18 October 1994, to life imprisonment.

6. The Government - which confirms the date of the arrest during the above-mentioned illegal demonstration organized by the PKK - gives a slightly different account of events. First of all, it points out that the demonstration turned violent when Molotov cocktails were thrown, setting fire to several shops and banks. Twelve people died in the fire. According to the Government, when he was picked up, Soner Onder was searched and found to be in possession of a Molotov cocktail. When he was being questioned, he admitted to taking part in the demonstration and throwing the Molotov cocktail (after taking it from a friend of his called Lütfü Yavuz) at the Cetinkaya department store, which was exactly where the 12 people died. The Government confirms that when he appeared in court on 9 January 1992 the accused pleaded not guilty; he denied the charges against him after protesting that the statement in which he confessed to the charges had been taken under duress, while he was blindfolded. The witnesses for the defence, as well as the persons who had signed the report concerning Soner Onder's arrest, were heard by the court and their statements were given due consideration.

7. Further information and comments were provided by the source on the observations of the Government of Turkey, as follows. According to an observer chosen by the source to attend one of the hearings in the State Security Court, on 10 May 1994, the Public Prosecutor told him in a conversation before the hearing that he was going to request the death sentence, for the accused had been identified by an eyewitness. According to the observer, this testimony must be weighed up very carefully: the fact that the witness was the brother of one of the women who died in the fire must be borne in mind in view of the understandable state of emotion in which he gave testimony, while still under the shock of a tragic loss.

8. Moreover, according to the source, the Prosecutor admitted to the observer that the report of arrest, according to which Soner Onder was picked up at the scene of the attack holding a Molotov cocktail, had been signed "by mistake" by a police officer who was tired because he had been on duty too long. He further admitted that, in point of fact, Soner Onder had been picked up in a minibus some distance from the scene of the attack, which is what the accused and other witnesses had been claiming from the outset.

9. In conclusion, the source considers that the accused's version, namely that he had to retract his confession in court because it had been obtained

under torture, was backed up by the following accurate and concordant circumstantial evidence:

(a) Sonor Onder was held "incommunicado" while he was being questioned "in breach of Justice Ministry circulars then in force";

(b) The medical certificate confirming that there had been ill-treatment was drawn up by an authorized medical service;

(c) No inquiry was ordered when the accused claimed that he had confessed under torture.

When the witness was called on to identify him at the first hearing, Soner Onder was not put in the middle of a group of people unconnected with the trial, as is customary to ensure the credibility of the test, but was placed in the middle of the other persons accused, in the dock. However, a number of them, who had also been identified by the witness, were able to prove that they had not taken part in the attack and were released. Other witnesses stated that they had seen Soner Onder elsewhere at the time the attack had occurred, yet the Prosecutor did not ask any questions to evaluate that testimony.

10. In view of these factors, the Working Group considers that the question of principle raised by the case before it is as follows: does the fact that the detention was ordered on the basis of evidence resulting from confessions extracted under torture confer on it an arbitrary character?

11. Before reaching its decision, the Working Group examined further information on the issue contained in:

(a) The relevant General Comments of the Human Rights Committee;

(b) The reports of the Special Rapporteur on the question of torture;

(c) The reports of the Committee against Torture, in particular documents concerning the report submitted by Turkey to the Committee in accordance with article 19 of the Convention, and the report of the on-site inquiry carried out by a delegation of the Committee in Turkey from 6 to 18 June 1992.

12. The Working Group considers that the question of principle raised must be examined not only bearing in mind international provisions which prohibit the practice of torture under any circumstances, but specifically in the light of those provisions which either explicitly refer to the inadmissibility of evidence obtained under torture or, with a view to preventing torture, imply that no one should be compelled to testify against himself or to confess guilt, namely:

Article 14.3 (g) of the International Covenant on Civil and Political Rights: "In the determination of any criminal charge against him, everyone shall be entitled ... Not to be compelled to testify against himself or to confess guilt". (Cf. category III.C.1.g of the Working Group's working methods (E/CN.4/1992/20, annex I));

Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which refers to the case in which an authority takes undue advantage of the situation of a detained person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person (Cf. category III.A.13 of the above-mentioned working methods.);

Above all, article 15 of the Convention against Torture, under which "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

13. The Working Group notes that this article can be invoked against Turkey by virtue of international provisions and in application of internal provisions. At the international level, Turkey has ratified the Convention against Torture and when presenting its periodic report to the Committee, the representative of the Government of Turkey explicitly stated on two occasions that article 15 was fully and directly applicable in Turkey (CAT/C/SR.62, paras. 6 and 19). At the national level, this rule is set out in several texts of internal law. Article 17/3 of the 1982 Constitution, which solemnly condemns torture ("No one shall be subjected to torture or ill-treatment; no one shall be subjected to a penalty or treatment incompatible with human dignity"), is supplemented by article 38, paragraph 5, which states that "no one shall be compelled to make a statement that would incriminate himself or one of his next of kin", a provision that is reproduced in article 35 of the Code of Criminal Procedure.

14. Furthermore, the Working Group has taken into consideration article 245 of the Penal Code, under which the practice of torture is punishable by imprisonment of three months to three years and temporary disqualification from holding public office. It has also considered article 243 of the Code, which brings the maximum penalty up to five years of hard labour, with permanent disqualification from office when torture was used to extract a confession.

15. In order to prevent public officials prosecuted for such practices from invoking clemency under article 245, the Supreme Court of Appeal, in two decisions of principle, confirmed the specific scope of article 243 by including the "motive" (obtaining a confession) among the elements of the offence, whereas article 245 covers torture as a practice solely intended to cause suffering (Decisions Nos. 3143/4070 of 18 June 1981 and E.1987/8-186, K.1987/424 of 5 October 1987 of the Criminal Section of the Supreme Court of Appeal, quoted in the periodic report submitted to the Committee against Torture by the Government of Turkey, CAT/C/7/Add.6, paras. 26 to 28).

16. This case law was reinforced by the Criminal Procedure Reform Act of 18 November 1992, which prohibits torture and similar practices during questioning. It provides that the judge cannot take into consideration statements obtained under duress (A/48/44/Add.1, paras. 24 and 26).

17. Furthermore, the Working Group has borne in mind the following additional factors. When he appeared before the Committee, the Turkish representative

twice emphasized the fact that forensic physicians from the Forensic Institute "were fully independent". The regulations issued by the Ministry of the Interior on 22 September 1992, which were forwarded to the Committee against Torture and concern the conditions for persons placed in custody, state inter alia that "The doctor who carries out the above-mentioned medical examinations must be a physician from the Forensic Institute". The Working Group concludes therefore that:

(a) It is difficult to challenge the certificate testifying to the blows received by Soner Onder, since it was drawn up by a physician from the Forensic Institute;

(b) The representative of the Government of Turkey declared before the Committee: "The prosecutors are responsible for investigating any allegation or information relating to torture" (CAT/C/SR.61, para. 9). However in this particular case, no initiative was taken along those lines by the Prosecution Service;

(c) Since a medical certificate testifying to the use of torture was produced, in accordance with the practice of the Supreme Court of Appeal it was for the prosecution to "prove that the testimony reflects the accused person's free will and support it with other evidence in the legal proceedings". (Decision No. 1988/2015-3291, dated 28 September 1988, and Decision No. E.1989/1-90-K-144, dated 17 April 1989, of the First Criminal Department, referred to in the report of Turkey, see CAT/C/7/Add.6, para. 66).

18. The Working Group considers that in this case the evidence collected, in view of the contradictions and inaccuracies referred to above, is not sufficient to act as an exception to the principle laid down in article 15 of the Convention against Torture, as well as the above-mentioned provisions of internal law. The Working Group therefore considers that the fact that the detention was ordered on the basis of evidence obtained from a confession extracted under torture confers on it an arbitrary character.

19. In the light of the above the Working Group decides:

The detention of Soner Onder is declared to be arbitrary, being in contravention of article 5 of the Universal Declaration of Human Rights, article 7 of the International Covenant on Civil and Political Rights and article 15 of the Convention against Torture, to which Turkey is a Party, and falling within category III of the principles applicable in the consideration of the cases submitted to the Working Group.

20. Consequent upon the decision of the Working Group declaring the detention of Soner Onder to be arbitrary, the Working Group requests the Government of Turkey to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles incorporated in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, as well as in article 15 of the Convention against Torture, in particular by taking measures towards the release of Soner Onder from prison.

Adopted on 1 December 1994.