

Mandates of the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on minority issues; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 44/8, 43/4, 43/16, 43/8 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged failure of national authorities to carry out a thorough investigation on the killing of lawyer and human rights defender Mr. Tahir Elçi.

Mr. Elçi, member of the Kurdish minority, was a prominent figure within the international and domestic lawyers' community. He had practiced law for around 25 years. At the time of his death, he was the President of the Diyarbakır Bar Association. He was well known for having acted on behalf of victims of human rights violations in a number of leading cases brought before the European Court of Human Rights (ECtHR) concerning the rights of persons belonging to the Kurdish minority, for example, the forced evictions of Kurdish villages, enforced disappearances, summary executions, and torture and ill-treatment by the security and/or state-affiliated forces.

On 1 December 2015, Special Procedures mandate holders expressed concerns over the killing of Mr. Elçi, and urged Turkish authorities to carry out a thorough, independent and transparent investigation and bring those responsible to justice (AL TUR 4/2015). We would like to seize this opportunity to thank your Excellency's Government for its response, received on 4 January 2016.

According to the information received:

Mr. Elçi's killing

During the summer of 2015, violent clashes occurred between members of the Kurdistan Workers' Party (PKK) and the Turkish armed forces in south-eastern Turkey. The Government adopted stringent measures affecting the lives of thousands of civilians in the region and imposed 24-hour curfews in many cities, sometimes for months on end. Mr. Tahir Elçi, among others, started legal actions against the unlawful security measures adopted by the Government and local administrative authorities. He also advocated to address the increasingly violent situation in the region.

On 12 October 2015, during a TV interview, Mr. Elçi shared his views on the Kurdish issue and the end of the peace process on a national channel, CNN Turk. Following his interview, he received numerous death threats and insults through social media and telephone. Government supporters and pro-government media appeared to start a campaign of intimidation and harassment against him.

A few days later, on 20 October 2015, an arrest warrant was issued against him by the Bakırköy 2nd Criminal Judgeship of Peace, pursuant to a request from the Bakırköy Public Prosecutor. He was arrested and subsequently charged with an alleged offence of “propagandising for a terrorist organisation through the press,” which carries a sentence of imprisonment of up to 7.5 years. Mr. Elçi was subsequently released by the court on the condition of not leaving the country until the end of the investigation against him. His prosecution was reportedly due to start in April 2016.

As a part of activities to denounce the instable security situation in the south-eastern region, Mr. Elçi organised, in his capacity as the President of Diyarbakır Bar Association, a press conference to draw attention to the damage that armed clashes inflicted on the cultural and historic heritage in the region. The press conference took place in front of a historic minaret damaged by security operations during the morning of 28 November 2015.

During this conference, an armed clash took place between two armed PKK militia members and the police, and Mr. Elçi was shot dead. The exact circumstances of his death were unclear, as it was not known if Mr. Elçi had been caught in cross-fire or targeted by the assailants.

Failure of Turkey to effectively investigate Tahir Elçi’s killing

Despite assurances given by the Prime Minister that four investigators had been assigned to the case, it appears that no independent effective investigation was carried out on the killing of Mr. Elçi. Notwithstanding the fact that the police officers at the scene may have been regarded as suspects, the investigations were reportedly carried out by the police itself.

In 2016, the Diyarbakır Bar Association asked the research agency Forensic Architecture to examine the evidence in their possession, and to independently investigate the circumstances of Mr. Elçi’s death. As he was killed during a press conference, multiple cameras captured the moments leading up to his death. After a detailed forensic investigation of the video footage of the scene at the time Mr. Elçi was killed, Forensic Architecture concluded that three police officers and two PKK members were engaged in active shooting at the time of the killing.

In December 2018, the results of the analysis carried out by Forensic Architecture were submitted to the public prosecutor in Diyarbakır. The report, published in February 2019, concluded that: (i) Mr. Elçi was killed by a single bullet fired; (ii) neither of the two PKK members appear to have fired the fatal shot; (iii) all of the shots fired in the investigative time frame have similar sonic signatures and show no auditory evidence of a long-range weapon fired

from a considerably different distance; and (iv) three police officers (A, C, and D) had a direct line of fire towards Mr. Elçi, and are seen discharging their weapons multiple times. Of them, police officer C is the only officer who discharges his weapon with a clear, unobstructed view towards Elçi.¹

Following the publication of the Forensic Architecture report, the case had been passed between a number of prosecutors, and limited progress was made. However, in March 2020, charges were finally issued in the case. The public prosecutor submitted a 40-page indictment to the Diyarbakır Criminal Court, which explicitly referenced the findings in the Forensic Architecture report.

However, we received allegations that the indictment has many serious flaws, for example, in its determination of the events, legal classification of the acts, and sentencing request against the police officers.

The indictment charges the three officers identified in the report with involuntary manslaughter. It accuses those officers of negligence, though it repeatedly outlines the prosecutor's interpretation that the officers only intended to 'neutralise' the two militants from the PKK. The charges against the officers allegedly carry a possible prison sentence of between two and six years.

Additionally, however, one of the PKK militants is also charged with voluntary manslaughter (homicide). The indictment suggests that the situation of general chaos at the time of the shooting made it impossible to identify who fired the shot which killed Mr. Elçi, and it could not be excluded that one of the PKK militants had fired the shot. This postulation is in direct contradiction of the findings in the Forensic Architecture report, which concluded that "none of the forty gunshots that are visible or audible during the period of the shooting (during which time multiple cameras were recording the scene) were fired by the two PKK militants", and that "the only shots that could have been that which killed Elçi were fired by one of the three officers we identified."²

The indictment does not only cover the killing of Mr. Elçi, but also the killing of two police officers nearby, just moments before. The two PKK militants are also charged with the murder of those officers. Although the charges may as such be reasonable, there seems to be no justification for their being associated with the charges relating to Mr. Elçi's death. Mr. Elçi's lawyers petitioned the court to refuse the indictment on the basis that it misidentifies the crime and that it brings together perpetrators and incidents that do not have a strict legal connection. Nevertheless, the court admitted the indictment.

Trial before the Diyarbakır 10th Heavy Penal Court

The first hearing before the Diyarbakır 10th Heavy Penal Court took place on 21 October 2020.

In their submission to the court, the lawyers representing the Elçi family argued that State authorities failed to protect Mr. Elçi, despite the threats he

¹ https://content.forensic-architecture.org/wp-content/uploads/2019/03/FA-TE-Report_12_English_public.pdf

² <https://forensic-architecture.org/investigation/the-killing-of-tahir-elci>

had received following the interview on CNN Turk; that the two PKK suspects had been closely followed by the police in Diyarbakır on the day of the incident, and their movements had been known to the police before the incident; that neither the victim nor other lawyers from the Diyarbakır Bar Association had been warned about a potential security operation against suspects who were likely armed; that the security forces planned and carried out the operation against the two suspects without proper regard for the safety of the public, and without taking any necessary measure to mitigate potential harm to civilians; and that the police officers at the scene did not use their firearms carefully and diligently.

Mr. Elçi's defence team also noted with concern that the onsite investigation was not carried out promptly, but only 110 days after the death of Mr. Elçi, i.e. between 17 and 18 March 2016.

According to the prosecution, the reason for this delay was the ongoing armed clashes in the area. The crucial evidence from the scene, including the bullet that killed Tahir Elçi, disappeared during this time. If this information is confirmed, this would represent a significant failure of Turkish authorities to preserve evidence and to carry out an effective, transparent, and prompt investigation into the death of Mr. Elçi.

There were additional serious defects in the investigations carried out in 2016, including:

- the police officers who were at the scene and fired their guns were not questioned as suspects by the prosecutor until early 2020, more than four years after the killing;
- several apparent inconsistencies in the statements of those investigated were not adequately followed up by the prosecution;
- the prosecutor refused to hear several witnesses put forward by the lawyers of Mr. Elçi's family, and did not summon the police officers who were responsible for the planning and execution of the operation and monitoring of the press conference;
- the video recordings from the security cameras around the scene and the MOBESSE (police security cameras in the area) were tampered with (relevant parts covering the time of the killing had been deleted) or missing;
- the expert reports in possession of the prosecutor (e.g. the report from the national forensic medicine institute) claimed that the time of the death of Mr. Elçi could not be determined and the suspects could not be identified, whereas the expert reports obtained by the Elçi family's lawyers, e.g. the report of the Forensic Architecture and a forensic medicine expert, reached a contrary conclusion on both matters.

During the court hearing of 21 October 2020, the Diyarbakır 10th Heavy Penal Court reportedly denied the request made by Mr. Elçi's wife to be heard at the beginning of the hearing in order to submit her requests as the complainant.

Without the authorisation of the court to intervene as a formal party to the proceedings, Mr. Elçi's wife is prevented from questioning the suspect, which is a right that is granted to the victims under the Code of Criminal Procedure.

The court also refused to hear the accused police officers in person, and insisted on hearing them through SEGBIS, an official video communication system. As a result, the suspects were not visible to the family of Mr. Elçi or his lawyers during their interrogation, because the screen size was too small and far away from the family and the defence team. Furthermore, there were several technical issues that allegedly made it difficult to hear the statement of the suspects, and the court did not manage to have these technical issues resolved, as requested by Mr. Elçi's lawyers.

It is also reported that on several occasions, the court did not allow Mr. Elçi's defence team to take the floor or submit its requests, threatening the lawyers that if they insisted on their requests, they would be expelled from the courtroom.

Because of the alleged intimidations addressed to the defence team, Mr. Elçi's lawyers asked the judges to recuse themselves. It is reported, however, that the court did not rule on this request, despite the fact that in accordance with the rules of procedure, the recusation request should have been dealt with as a matter of priority.

The recusal request was later referred to the Diyarbakır 11th Heavy Penal Court, and was subsequently rejected.

Without prejudging the accuracy of the information made available to us, we express serious concern about the significant delay and the serious defects in the investigations carried out in 2016. If confirmed, the events described above would amount to a serious breach of a number of international and regional standards relating to the protection of the right to life. According to these standards, States must put in place all appropriate measures to investigate and, where appropriate, prosecute the perpetrators of any incident resulting in unlawful deprivations of life, including incidents involving allegations of excessive use of force by the police or armed forces.

We express further concern at the alleged violations of the procedural guarantees that the defence team of Mr. Elçi has allegedly been subject to during the first hearing before the Diyarbakır 10th Heavy Penal Court, which resulted in the arbitrary rejection of several of the requests presented by the lawyers representing the Elçi family. The perceived biased attitude of the court towards Mr. Elçi's family and defence team could give rise, if confirmed, to a violation of the principles of judicial independence and equality of arms, enshrined *inter alia* in article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003.

Finally, we express concern about the safety of human rights defenders and others who report on the rights of persons belonging to the Kurdish minority. We are seriously concerned that prior to his killing, Mr. Elçi had been charged with an alleged offence of "propagandising for a terrorist organisation through the press," in an apparent retaliation of the exercise of his right to freedom of expression. We are deeply concerned that the threats, judicial harassment and subsequent killing of Mr.

Elçi was in response to his human rights work, and that this will have a chilling effect on civil society and deter other human rights defenders from carrying out their legitimate work in the country.

In connection with the above alleged facts and concerns, please refer to the Annex on Reference to international human rights law, attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to my attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide detailed information on the reasons behind the five-year delay in the conduct of investigations into the unlawful killing of Mr. Elçi, and explain to what extent this delay can be regarded as consistent with the obligation of Turkey under article 6 of the ICCPR.
3. Please provide information on the allegedly serious defects in the initial investigations carried out in 2016, which resulted in the loss of evidence that could have proved essential for the identification and prosecution of the person responsible for the death of Mr. Elçi.
4. Please provide information on the serious flaws that the indictment presents in relation to the alleged responsibilities of the police officers and one of the PKK militant, the reconstruction of the events made by the prosecutor, the legal classification of the acts and the sentencing request against the police officers and the PKK militant.
5. Please comment on the alleged violation of the fair trial guarantees and the principle of equality of arms that occurred during the first hearing before the Diyarbakır 10th Heavy Penal Court, and explain to what extent these events can be regarded as being compatible with the rights of the victim's family under article 14 of the Covenant.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Government's attention to the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003.

Article 6 of the ICCPR provides that every individual has the right to life and security of the person, that this right shall be protected by law, and that no person shall be arbitrarily deprived of his or her life.

In General Comment No. 36, the Human Rights Committee observed that investigations into allegations of violations of article 6 must always be independent, impartial, prompt, thorough, effective, credible and transparent. In the event that a violation is found, full reparation must be provided, including, in view of the particular circumstances of the case, adequate measures of compensation, rehabilitation and satisfaction. States parties are also under an obligation to take steps to prevent the occurrence of similar violations in the future. It further highlighted that investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death, and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations. Investigations should explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates.

The Minnesota Protocol further notes, inter alia, in relation to the **promptness** of investigations, that the authorities must conduct an investigation as soon as possible and proceed without unreasonable delays (para 23) and that a crime scene should be secured at the earliest possible opportunity and unauthorized personnel should not be permitted entry (para 59). In relation to the **effective and thoroughness** of investigations, it notes that investigators should, to the extent possible, collect and confirm (for example by triangulation) all testimonial, documentary and physical evidence and be capable of ensuring accountability for the unlawful death (para 24), and should, at a minimum, take all reasonable steps to recover and preserve all probative materials, identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death (para 25). Additionally, in relation to the **independence and impartiality** of investigations, it notes that investigators and investigative mechanisms must be, and must be seen to be, independent of undue influence and investigations must be independent of any suspected perpetrators and the units, institutions or agencies to which they belong (para 28).

Article 14 of the Covenant establishes the right a fair and public hearing by a competent, independent and impartial tribunal established by law and provides a set of minimum procedural guarantees that must be made available in full equality to all parties of legal proceedings.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

We would also like to refer your Excellency's Government to the Basic Principles on the Role of Lawyers. Principle 16 requires States to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent that lawyers be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics. Furthermore, the Basic Principles provide that it is the duty of the competent authorities to ensure that lawyers have access to appropriate information, files and documents in their possession or control in sufficient time, so as to enable them to provide effective legal assistance to their clients (principle 21). Such access should be provided at the earliest appropriate time.

In relation to the situation of human rights defenders working on the rights of persons belonging to the Kurdish minority, we remind your Excellency's Government of the duty to respect and ensure the right to freedom of opinion and expression in accordance with article 19 of the ICCPR. Any restriction on the rights enshrined in Article 19 (2) must be compatible with the requirements in Article 19 (3). The scope of the right to freedom of expression includes even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19 (3), CCPR/C/GC/34 para. 11. However, it is not compatible with Art. 19 (3), for instance, to invoke laws protecting national security or otherwise, in order to suppress or withhold from the public information of legitimate public interest that does not harm national security, or use such laws to prosecute journalists or human rights defenders for having disseminated such information, *id.* para. 30. As indicated by the Human Rights Committee, under no circumstance can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest [...] be compatible with article 19", *id.* para. 23.

We would also like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN

Declaration on Human Rights Defenders, in particular articles article 9, paragraph 3, point c), which provides for the right to provide legal assistance in defending human rights and fundamental freedoms; and article 12, paragraphs 2 and 3, which provides that the State shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

Finally, we would like to bring to your Excellency's Government's attention the international standards regarding the protection of the rights of persons belonging to minorities, in particular article 27 of the ICCPR and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which refers to the obligation of States to protect the existence and the identity of minorities within their territories and to adopt the measures to that end (article 1) as well as to adopt the required measures to ensure that persons belonging to minorities can exercise their human rights without discrimination and in full equality before the law (article 4).