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**“COURAGEOUS COURTS:
SECURITY, XENOPHOBIA AND
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**The State of Emergency and the Principle of Non-refoulement: The
Example of Turkey**

REPORT BY

**Mr. Mücahit AYDIN, Rapporteur-Judge
Constitutional Court of Turkey**

1. Last year, my colleague Mr Koksal made a presentation here on the topic of migration. I will further elaborate on this topic since it continues to be a hot issue both in Turkey and in Europe. And it is very much in line with the subject of the mini conference.

Today I will focus on the principle of non-refoulement and the challenges against it during the state of emergency in Turkey.

In general terms, principle of non-refoulement prohibits a state from returning aliens to a country in which they would face a real risk persecution, torture or ill-treatment.

Similarly, under well-settled case-law of European Court of Human Rights, the absolute nature of Article 2 and 3 forbids expulsion of such persons to a country where exists a real threat of death penalty or torture.

And this is also the legal regime in Turkey. Article 55 of the Law numbered 6458 states that those about whom substantial grounds exist for believing that they would face death penalty and torture in the receiving country cannot be deported.

Such claims are subject to judicial review and some procedural safeguards exist to ensure that those persons are not deported before such claims are addressed. Under article 53 of the Law 6458, persons in question can appeal against deportation orders at administrative courts and upon the appeal deportation is automatically suspended.

If they are not satisfied with the judgment of the administrative court, they can lodge an individual application to the Constitutional Court, and the Court, under article 49 of the law numbered 6216, may also order stay of execution of the deportation order until the judgment reached on the merits.

So far the Court rendered many stay of execution orders in this scope.

2. Now let me provide some general information about the situation in Turkey for last couple of years.

First, Turkey is recently suffering from intense attacks of terrorist organizations, PKK and DAESH or ISIS. Just to name two of them, in January 2017, in the New Year's Eve, ISIS attacked a night club in Istanbul, 46 people killed, most of them were foreigners. In March 2016, PKK made an attack in Ankara, in the heart of city, 38 people killed, 120 of them wounded.

Besides that, Turkey faced an influx of migrants from Syria and northern Iraq, about 3 million. And many terrorists, either members of PKK or ISIS infiltrated from borders during this influx.

Also, Turkey has experienced a heinous and very costly coup attempt by FETO terrorist organization in July 15. Right after, the government proclaimed the state of emergency, and issued many emergency decrees. Thousands of members of security forces, military, police and others are dismissed.

In short, Turkey became very susceptible to terrorist attacks after what it has experienced recently.

And the issue of aliens considered to be threatening public and national security reached a very sensitive point.

In this environment, the government brought an exception to the automatic suspension upon appeal rule with the emergency decree numbered 676. Accordingly, persons related to terror or those considered to be threat for public order or national security, will be deported upon an administrative order. And the appeal to administrative court will not stop the deportation process automatically. Also, an interim measure by the administrative courts may not be effective because the court has 7 days to address such requests, and the argument of the relevant administrative authority must be obtained also.

Therefore practically, the migration authority, may deport any alien before the deportation order is reviewed by judiciary.

3. Against this background, those persons resorted directly to the Constitutional Court against deportation orders also requesting interim measure. The court received many applications in that regard and issued many interim measures. In those decisions the Court developed its case law and provided some general principles. And the Court's case-law is pretty much in line with the case law of European Court of Human Rights.

The court first noted that positive obligation of the state under right to life and prohibition on torture requires that an effective legal remedy exists against deportation orders. And in order to be an effective remedy, deportation process must be automatically suspended upon appeal against the order. If automatic suspension does not exist, it cannot be regarded as an effective legal remedy.

The court therefore stated that challenging deportation orders on the ground of national security or terror before administrative courts does not constitute an effective legal remedy, and therefore those person may directly apply to the constitutional court against deportation orders. Upon such applications, the court will examine both the request on interim measure and allegations of violation.

The court also stated, however, a mere allegation that the applicant faces risk of death penalty or torture will not be automatically suffice to issue an interim measure. In order for an interim measure, the allegations must have a credible basis must be arguable. (Applications: 2015/3941 and 2016/22418).

So far, the court ordered interim measures for vast majority of applications and the total number is about 200.

In short, the Constitutional Court employed interim measure mechanism in order to provide effective protection for persons facing the risk of death or torture upon deportation to their country. In other words, the court substituted the lack of suspension mechanism with directly involving in the process.

The court also provided principles for reviewing the merits of such applications. If applicants made arguable allegations that prompts further inquiry, then it is upon the Court to make a thorough examination of the circumstances in the receiving country and the situation of the applicant based on all relevant information and documents, not only those presented by the applicant. In that regards, reports of international organizations play a crucial role. Therefore, in a way the burden shifts from the applicant to the Court to make a thorough inquiry.

So far, the Court found violation on merits on one occasion. Indeed it is very recent and the decision has not been published yet. In this case, an Uzbek citizen at the age of entered to Turkey legally in 2009 at the age of 25 and requested asylum stating that he was subject to persecution in his country because he was involved in opponent youth movement and also practiced his religion Islam. The applicant is granted the status of temporary refugee by the

United Nations, and he was ordered by Turkish authorities to stay within the limits of the city of Gaziantep. He married in Turkey and had no kids. In 2015, he was caught in a border town between Syria and Turkey in a car with Syrian plate, with no id card on him. Following, the authorities considered that he was trying to cross Syrian border illegally and therefore a deportation order was issued on the ground of national security. The applicant challenged this order before the competent administrative court, but it was rejected based on the assessment of security authorities. The applicant applied to Constitutional Court stating that ill-treatment and torture is widespread in Uzbek prisons and he would face death or torture if he expelled.

The Constitutional Court held that those allegations had a credible basis, therefore it was upon the administrative court to examine the situation in Uzbekistan and the particular situation of the applicant. But the administrative court failed to address those credible allegations relying upon assessments of security forces. The Constitutional Court thus found a violation of ill-treatment ban in this case (2015/18582).