TRANSLATION

TO: Members of the Parliamentary Investigative Committee for elucidating the matter of the expulsion of six Turkish nationals on 29 March 2018

FROM: Tienmu Ma (USA), Committee Expert*

DATE: 17 December 2018

SUBJECT: Report with Recommendations (Expert Report)

I. Introduction

This Report is issued on the basis of the "Terms of Reference" unanimously approved by the members of this Committee, with the subject "Expert Report for analyzing evidence in the matter under investigation."[1] According to these Terms of Reference, the Committee has requested my opinion on three specific topics:

(1) "Assessment of the respect for procedures and rules during the removal of the Turkish nationals";

(2) "Assessment of the respect for basic rights and liberties of foreign nationals"; and

(3) "Assessment of compliance with national legislation and international instruments in the field of the protection of basic human rights and liberties."[2]

Furthermore, these Terms of Reference assign me the responsibility of "drafting a final report with recommendations for the Committee," and stipulate that "the report with recommendations (Expert Report) must be submitted to the Committee in writing."[3]

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* B.A., Columbia University; B.Phil., University of Oxford; M.Phil., New York University; J.D., Yale Law School.

[1] Parliamentary Investigative Committee for elucidating the matter of the expulsion of six Turkish nationals on 29 March 2018, Terms of Reference, signed on 29 October 2018, p. 1.

[2] *Id*.

[3] *Id.*, Part I, paras. 1 and 2.

In compliance with the requirements of Law No. 03/L-176 on Parliamentary Investigation, this Report represents my independent and impartial opinion relating to the matter under investigation.[4] No draft of this Report, either full or partial, and no part of the legal assessment included herein, was shared with any other person, until a full version of the Report was delivered to the Committee.[5]

Aside from the introduction (Part I), the Report divides into three main parts. First, Part II puts forth a comprehensive statement of the relevant facts relating to the expulsion of the six Turkish nationals. Second, on the basis of these facts, Part III puts forth a legal assessment of the case, concentrating on the three points cited above from the Terms of Reference. And finally, on the basis of this legal assessment, Part IV offers a series of specific recommendations, taking special consideration of the legislative powers of the Assembly of the Republic of Kosovo.

II. Statement of Facts

A. Types of evidence available to the Parliamentary Investigative Committee and standards for evaluating their relative credibility

Before embarking on a legal assessment of the case, it is necessary first to conduct a finding of facts with the greatest possible exactitude that the evidence allows. The factual findings put forth in this part of the Report are based on three different kinds of evidentiary sources made available to this Committee:

(1) Copies of documents and communications, as primary-source materials, submitted by state institutions involved in the expulsion of the six Turkish nationals;

(2) Official reports issued by oversight institutions that have conducted their own investigations into the matter;

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[4] *See* Article 13, para. 2 ("The Committee is entitled to ask for an *independent* expert's expertise while accomplishing their tasks"; emphasis added), and Article 21, para. 5 ("Experts give their expertise based on the principle of professionalism and *impartiality*"; emphasis added).

[5] A full draft of the Report was submitted to the Committee on 10 December 2018. Following this date, changes to the text of the Report have mainly been of a technical and linguistic nature.

(3) Transcripts from interviews of witnesses during Committee hearings, in relation to these witnesses' personal role, or the role of the institutions they belong to, in the expulsion process.

Given the availability of these three kinds of evidence,[6] this Committee is in a uniquely favorable position to issue a much more comprehensive statement of the relevant facts than has been possible until now. Nevertheless, the considerable volume of the available evidence has also given rise to a special difficulty: regarding some crucial points in the sequence of events leading up to the Turkish nationals' expulsion, a number of inconsistencies have arisen in the evidence presented, especially in some of the statements made by witnesses interviewed directly by the Committee.

To be clear, it is not the position of this Report that these inconsistencies were necessarily the result of perjured testimony before the Committee. This is a matter that, in the end, lies within the purview of the State Prosecutor to assess, on the basis of the relevant provision of the Criminal Code of the Republic of Kosovo.[7]

Considering, however, that these inconsistencies in the evidence can pose a serious obstacle to the accuracy of the Report's factual findings, even this Report must necessarily rely on an assessment of the relative credibility of various pieces of evidence. In this respect, the Report has relied on five basic principles for conducting such an assessment. These principles, for the sake of transparency, must be made explicit, as follows.

First, this Report has followed the principle that a piece of evidence that has been corroborated by other sources enjoys greater credibility than a piece of evidence that has not been corroborated by any other source. In line with this principle, all factual findings in this Report have been confirmed by more

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[6] In line with standard legal usage, the term "evidence" in this Report is given a wide meaning, one that is also reflected in the Law on Parliamentary Investigation, Article 3, para. 1, subpara. 7 ("Evidence – any information, proof, document or a fact that contributes to issuing the conclusions from the investigation").

[7] *See* Code No. 04/L-082, Criminal Code of the Republic of Kosovo, Article 391, para. 1 ("Whoever, having taken an oath before an authority competent to administer affidavits or oaths, and thereafter signs an affidavit or states any matter that he or she does not believe to be true, or knowingly conceals or omits to state any matter relevant to the proceedings shall be punished by a fine or by imprisonment of up to three (3) years").

than one source, or by one of the independent institutions that have conducted their own investigations of the matter.[8] This principle is based on accepted standards for human rights monitoring reports.[9]

Second, in general, a piece of evidence that comes from an *objective* source enjoys greater credibility than a piece of evidence that comes from a *subjective* source. An *objective* source is a source that was not involved in the process of expelling the six Turkish nationals, and that does not represent some institution that was involved in that process, whereas a *subjective* source is one that *was* involved in the expulsion process, or that represents some institution that was so involved.[10] Nevertheless, even a subjective source can enjoy a higher level of credibility if it offers evidence that goes against its own interests, for example, a witness who testifies that he failed to comply with his legal obligations.

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[8] These institutions are the Ombudsperson of the Republic of Kosovo and the Police Inspectorate of Kosovo. *See* Report No. 214/2018 (*ex officio*) of the Ombudsperson of the Republic of Kosovo in connection with the arrest and forced removal of six Turkish nationals from the territory of the Republic of Kosovo (henceforth: "Report of the Ombudsperson"); and Report No. 1/2018 of the Extraordinary Inspection on the Respect for Procedures and Rules by the Kosovo Police during the Forced Removal of the Turkish Nationals from the Territory of the Republic of Kosovo (henceforth: "Report of the Police Inspectorate"). The Ombudsperson is an independent institution at the constitutional level (*see* Constitution of the Republic of Kosovo, Article 132, para. 2), whereas the Police Inspectorate, even though it exercises its powers within the Ministry of Internal Affairs, is independent of the Kosovo Police (*see* Law No. 03/L-231 on Police Inspectorate of Kosovo, Article 6, para. 1).

[9] *See* Office of the United Nations High Commissioner for Human Rights, MANUAL ON HUMAN RIGHTS REPORTING, Chapter 13, p. 9 ("Human rights reports should be written on the basis of *corroborated information*"; emphasis in text). It should be noted, however, that official documents submitted to the Committee (*e.g.* official decisions issued by state institutions) are considered evidence whose authenticity has been confirmed by the institutions that submitted it.

[10] In this respect, the Report of the Ombudsperson and the Report of the Police Inspectorate can once again be mentioned as objective sources with a high level of credibility. It should be emphasized, though, that these two reports enjoy a greater level of credibility only in connection with their *factual* findings, whereas their *legal* assessments do not enjoy any special status beyond the merits of the substantive arguments they put forth.

Third, a piece of evidence that comes from a first-hand source enjoys greater credibility than a piece of evidence that comes from a second- or third-hand source. According to this principle, a witness who has followed an event from up close, or who has participated in it directly, is given priority over a witness who is acquainted with the event only on the basis of the accounts of others.

Fourth, the closer in time a piece of evidence is to an event, the greater its credibility. With the passage of time, a person's memory becomes increasingly less clear and sharp, and the danger of intervention or pressure on the part of others grows with each passing day. Thus, for example, a report submitted immediately after the expulsion of the six Turkish nationals would enjoy greater credibility than an account provided a long time after the fact.

Fifth, a piece of evidence that contains contradictions within itself is less credible than a piece of evidence that is consistent in its positions and claims. This principle is especially applicable in assessing the credibility of witnesses interviewed directly by the Committee.

These, then, are the five principles that have been followed in this Report relating to the assessment of the relative credibility of evidence in the Committee's possession. Nonetheless, before we continue, it should be emphasized that these principles have not been sufficient in every case to resolve conflicts in the evidence presented. In those cases in which contradictions could not be resolved, evidence from both sides of the conflict will be cited explicitly.

B. The Kosovo Intelligence Agency's finding that six Turkish nationals posed a threat to national security

On 12 and 19 March 2018, a senior official from the Kosovo Intelligence Agency (henceforth: "KIA") went personally to the Department for Citizenship, Asylum and Migration (henceforth: "DCAM") of the Ministry of Internal Affairs (henceforth: "MIA"), to review the records of six Turkish nationals:

(1) Hasan Huseyin Demir, date of birth May 1976;
(2) Kahraman Demirez, date of birth 11 December 1981;
(3) Mustafa Erdem, date of birth 6 January 1972;
(4) Yusuf Karabina, date of birth 18 January 1974;
(5) Osman Karakaya, date of birth 1 January 1972; and

(6) Cihan Ozkan, date of birth 20 September 1989.[11]

Five of these nationals had valid residence permits.[12] Out of these five, three had permanent residence permits (Kahraman Demirez, Mustafa Erdem, and Yusuf Karabina), whereas two (Hasan Huseyin Demir and Cihan Ozkan) had temporary residence permits.[13] The temporary residence permit of the sixth Turkish national, Osman Karakaya, had already expired, and he applied for a renewal on 27 March 2018.[14]

On 19 March, upon reviewing the records of three of the nationals in question, the KIA official verbally informed the DCAM officials that the KIA had these six nationals under surveillance.[15]

Three days later, on 22 March 2018, the then-KIA Director, Mr. Driton Gashi, sent a letter to the then-Minister of the MIA, Mr. Flamur Sefaj, requesting that the residence permits of the five Turkish nationals with valid permits be revoked, on the ground that they posed a threat to national security. Six days later, on 28 March 2018, Mr. Gashi sent Mr. Sefaj another letter, requesting that the application of the sixth Turkish national, Mr. Karakaya, for renewal of his residence permit, be rejected.[16]

The content of these letters is classified. Nevertheless, other evidence available to the Committee is sufficient to support a factual finding that, whatever threat the six Turkish nationals posed to national security, that threat was *not* of such a nature as to pose the risk of a terrorist attack or

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[11] *See* official e-mails of 12 and 19 March 2018, exchanged between Mr. Valon Krasniqi, DCAM Director; Mr. Shkodran Manaj, then-Head of the Division for Foreigners of the DCAM; and Mr. Qazim Susuri, Officer for Foreigners at the Division for Foreigners. *See also* testimony of Mr. Krasniqi, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 22 October 2018*, pp. 52–53; testimony of Mr. Manaj, *id.*, pp. 7–9; and testimony of Mr. Susuri, *id.*, pp. 25–26.

[12] *See* Report of the Police Inspectorate, p. 11; and testimony of Mr. Krasniqi, *op. cit.*, p. 47.

[13] *See* Report of the Police Inspectorate, p. 11.

[14] *See id.*, p. 12. The Committee also has a copy of Mr. Karakaya's application.

[15] *See* testimony of Mr. Manaj, *op. cit.*, p. 8; and testimony of Mr. Susuri, *op. cit.*, p. 26.

[16] *See* testimony of Mr. Manaj, *op. cit.*, p. 10; and testimony of Mr. Krasniqi, *op. cit.*, p. 37.

some other violent act. This finding is based on the following three pieces of evidence.

First, during his interview before this Committee, Mr. Gashi, who was himself the author of the two KIA letters, confirmed precisely this fact. Mr. Gashi testified: "There was no danger of a terrorist act, there was no danger. A terrorist act, no, it was not that."[17] Mr. Gashi then also testified that the members of the ideological group to which the six Turkish nationals belonged "were not violent" and that this group "is not violent or does not achieve or does not have . . . an ideology that achieves its aims through violence as do other organizations that are likewise Islamic."[18]

Second, a police report submitted the day after the expulsion was carried out explained that police units outside the Kosovo Police's Directorate for Migration and Foreigners (henceforth: "DMF") had not been involved in the expulsion operation, because it had been "the KIA's preliminary assessment that *these nationals are not in the category of dangerous persons*."[19]

Third, as circumstantial evidence, it can be noted that KIA and DCAM officials did not request that the Kosovo Police take the necessary steps to arrest and expel the Turkish nationals until 28 March, six days after the first letter was sent from the KIA to the DCAM.[20] In other words, officials from both institutions had knowledge of the KIA's assessment—at least in connection with five of the Turkish nationals—by 22 March at the latest, and yet, they let all of the Turkish nationals remain free. It can be reasoned that, if there had been a real danger that a terrorist attack or some other violent

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[17] Testimony of Mr. Gashi, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 15 November 2018*, p. 11.

[18] *Id.*, pp. 36 and 37.

[19] This was one of a number of reasons offered. *See* Post-Operational Report of 30 March 2018, submitted by DMF Director Rrahman Sylejmani, p. 2; emphasis added.

[20] *See* Report of the Police Inspectorate, p. 9 ("on 28 March 2018, the Border Department held a meeting with KIA and DCAM officials, during which they were informed of the revocations and the necessity of removing [the Turkish nationals]"); and testimony of Mr. Shaban Guda, Director of the Border Department of the Kosovo Police, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, pp. 97 ("We were informed of this matter on 28 March") and 99 ("I repeat once again. On the 28th the decisions on the revocation of the residence permits were given to us, on 28 March").

act would be carried out, the KIA and the DCAM surely would not have waited almost a week to inform the Police about the danger posed by the persons in question, and about the need to arrest them.

On the basis of these three pieces of evidence, we may draw a factual conclusion that the six Turkish nationals did not pose a danger of carrying out a terrorist attack or some other violent act.

To be as clear as possible, it should be emphasized that this Report neither contests nor endorses the KIA's assessment that the persons in question posed a threat to national security. In order to endorse or contest this assessment, it would be necessary to analyze the content of the KIA's letters, which contain classified information. Even without analyzing the content of these letters, however, the three pieces of evidence analyzed above are more than enough to confirm that, whatever threat the persons in question might have posed, that threat was not of a terrorist or violent nature.

C. The Department of Citizenship, Asylum and Migration's decisions revoking the Turkish nationals' residence permits

On 23 March, after receiving the first letter from the KIA, the Minister of the MIA, Mr. Sefaj, held a meeting with the Secretary General of the MIA, Mr. Lulzim Ejupi, and the DCAM Director, Mr. Krasniqi.[21] During this meeting, Mr. Sefaj ordered that the KIA's request be processed in accordance with the law.[22]

On the same day, after the meeting with Mr. Sefaj, Mr. Krasniqi invited to his office Mr. Manaj, the then-Head of the Division for Foreigners of the DCAM, together with Mr. Susuri, an Official for Foreigners at the Division for Foreigners. During this meeting, these three officials together decided to

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[21] *See* testimony of Mr. Krasniqi, *op. cit.*, p. 45; testimony of Mr. Manaj, *op. cit.*, p. 10; and testimony of Mr. Ejupi, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 30 November 2018*, p. 38.

[22] *See* testimony of Mr. Krasniqi, p. 37; and testimony of Mr. Sefaj, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 5 December 2018*, p. 5.

issue decisions revoking the residence permits of the five Turkish nationals mentioned in the KIA's first letter.[23]

According to these three officials' interpretation of the law, revoking the residence permits of the nationals in question was *obligatory* upon receipt of the KIA's letter. On the basis of this interpretation, they *automatically* issued decisions revoking the residence permits,[24] that is, without themselves analyzing whether the information put forth in the KIA's letter fulfilled the legal criteria for counting as a "threat to national security."[25] All of the decisions revoking the residence permits were signed by Mr. Manaj and Mr. Susuri.

After issuing the decisions revoking the residence permits, the DCAM did not immediately take measures to notify the five Turkish nationals of those decisions.[26] In his testimony, Mr. Manaj explained that, in cases in which residence permits are revoked for reasons having to do with a threat to national security, the DCAM transfers the notification process to the Kosovo Police: "In practices that have been followed, the party is notified by the Kosovo Police . . . , due to the fact that the party cannot be made aware that he is a danger to national security, because he could first reveal an official secret or he could achieve his planned aim. That is to say, every time the

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[23] *See* testimony of Mr. Krasniqi, *op. cit.*, p. 37; testimony of Mr. Manaj, *op. cit.*, f. 10; and testimony of Mr. Susuri, *op. cit.*, pp. 27–28.

[24] *See* testimony of Mr. Krasniqi, *op. cit.*, p. 53 ("If they [the KIA] assessed that a person poses a threat to security, we are civil servants we cannot reject, we cannot refuse or contest the requests or the reports of the KIA"); testimony of Mr. Manaj, *op. cit.*, p. 12 ("I considered and still consider that failure to act even for one minute while I am in that position is a refusal of official duty and, as a consequence, this is also a crime"); and testimony of Mr. Susuri, *op. cit.*, p. 35 ("That is, that letter obligated us *automatically* to issue that decision for revocation"; emphasis added). *See also* testimony of Mr. Sefaj, *op. cit.*, p. 7 ("if a foreign national is considered by the KIA and is cited by the KIA . . . as a danger to national security, his residence permit must be revoked"). In support of this interpretation, Mr. Manaj provided to this Committee a legal opinion issued by the MIA Legal Department after the expulsion was carried out.

[25] The legal definition of the concept "threat to the security of Kosovo" is found at Article 2, para. 1 of Law No. 03/L-063 on the Kosovo Intelligence Agency (henceforth: "Law on the KIA").

[26] As discussed below, measures were not taken to notify the parties of the revocation of their residence permits until the day of the expulsion.

decision is delivered through the mechanism of force, through the police, and he is isolated."[27]

Regarding the sixth national, Mr. Osman Karakaya, who had applied for a renewal of his temporary residence permit, the situation was different. In all of the material that the DCAM submitted to this Committee, there is no indication that, to this day, any official decision has been issued either approving or rejecting his application for the renewal of his permit.[28]

D. The operation for expelling the six Turkish nationals

§ 1

The operation for expelling the six Turkish nationals was carried out on 29 March 2018, one week after the AKI sent the DCAM its first letter. The day before, on 28 March, a meeting was held with the participation of the following officials: Mr. Krasniqi, DCAM Director; Mr. Guda, Director of the Border Police; Mr. Sylejmani, DMF Director; and two KIA officers.[29] According to the evidence available to the Committee, this meeting was the first time that the DCAM informed the Police about the revocation of the residence permits of the five Turkish nationals who had valid permits.[30] Furthermore, through an official e-mail, the DCAM notified the DMF that Mr. Karakaya's application for renewal of his residence permit would be rejected.[31]

During the meeting, the KIA officers reported that they had already finalized the transportation arrangements, specifically air transportation. This fact has been confirmed by two of the meeting's participants. First, when Mr. Guda was asked during his testimony whether the Police had been involved in securing plane tickets, among other things, for the expelled persons, he

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[27] Testimony of Mr. Manaj, *op. cit.*, p. 21.

[28] On this point, *see also* Report of the Police Inspectorate, p. 12. As will be seen below, before the expulsion operation was carried out, the DCAM sent an e-mail to the DMF notifying the latter that Mr. Karakaya's application *would not be approved*; nevertheless, a *final decision* has never been issued, at least judging from the evidence available to this Committee.

[29] *See* Report of the Police Inspectorate, p. 9

[30] *See id.*, and testimony of Mr. Sylejmani, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, p. 117.

[31] *See* Report of the Police Inspectorate, p. 9.

answered: "We did not do so because the Kosovo Intelligence Agency made all of the arrangements for them. In other cases, the Ministry of Internal Affairs Department for Citizenship Migration and Asylum takes care of all the logistics, infrastructure for deportation. In this case, the Kosovo Intelligence Agency was the agency that made all of the arrangements."[32]

Second, Mr. Sylejmani testified: "He [the KIA officer] said, the transport as well, . . . transport, tickets, everything . . . you have no reason to involve yourself in that because we handle it, *the Intelligence gentleman*, we have handled those things."[33] Then, once again, specifically in relation to transportation arrangements, tickets, and the place where the removal would take place, Mr. Sylejmani testified: "In fact, at one moment [the KIA officers] said to me Colonel *you are asking us a lot of questions, don't involve yourself in everything, we have handled all of those matters, everything that you are asking about, these things have been dealt with, that is why we have come here*."[34]

At the same meeting on 28 March, the engagement of police units for the operation was also discussed. In spite of the assessment that the persons in question posed a threat to national security, the KIA officers requested that as few police units as possible be included in the operation. This was for two reasons. First, as stated above, "according to the KIA's preliminary assessment," the six Turkish nationals were not "of the category of dangerous persons," and thus, there was no need to involve a large number of units.[35] The second reason for not including a large number of units in the operation was its confidential nature.[36]

Before the meeting ended, the KIA officers handed Mr. Sylejmani an envelope containing maps for orientation, photos for the purpose of identifying the persons to be expelled, photos of the locations where they could be found, and other information related to their identities.[37]

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[32] Testimony of Mr. Guda, *op. cit.*, p. 94.

[33] Testimony of Mr. Sylejmani, *op. cit.*, p. 117; emphasis added.

[34] *Id.*, p. 130; emphasis added.

[35] *See* Post-Operational Report of 30 March 2018, *op. cit.*, pp. 1–2; and testimony of Mr. Sylejmani, *op. cit.*, p. 117.

[36] *See* Post-Operational Report of 30 March 2018, *op. cit.*, pp. 1–2.

[37] *See* Report of the Police Inspectorate, p. 9. *See also* testimony of Mr. Sylejmani, *op. cit.*, p. 117.

§ 2

After this first meeting on 28 March, Mr. Sylejmani called another meeting, in which he assigned two police officers to lead the two respective teams that would carry out the operation.[38] These police officers were Sergeant Ibrahim Mustafa and Lieutenant Hamit Rukiqi. It was planned that six police squads would be involved over the entire operation, with each squad comprising two police officers. Three squads would be led by Mr. Mustafa, whereas the other three would be led by Mr. Rukiqi.

§ 3

On 29 March 2018, the day of the expulsion, the DMF Director, Mr. Sylejmani, issued six orders for forced removal from the Republic of Kosovo.[39] The basis for these orders was the prior decisions for revoking the residence permits of five Turkish nationals, as well as the e-mail from the Director of the DCAM, which had asserted that the sixth Turkish national's application for renewal of his residence permit would be rejected.

Around 6:30 in the morning, a final meeting was held in advance of the operation, in which the following officials took part: Mr. Sylejmani; the two police officers whom he had chosen as team leaders, Messrs. Mustafa and Rukiqi; as well as the two KIA officers. At this meeting Mr. Sylejmani handed the two team leaders (1) the decisions revoking the residence permits and (2) the forced removal orders, so that they could present them to the Turkish nationals upon arresting them.[40]

Furthermore, Mr. Sylejmani instructed the team leaders to exchange telephone numbers with the KIA officers, so that the police officers could remain continuously informed regarding the movements of the six Turkish nationals.[41]

The need to communicate constantly with the KIA officers throughout the entire operation was the result of the fact that the police officers, before being

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[38] *See* Report of the Police Inspectorate, p. 9.

[39] *See id*.

[40] *See* testimony of Mr. Mustafa, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, pp. 46–48; and testimony of Mr. Rukiqi, *id.*, pp. 69 and 72.

[41] *See* testimony of Mr. Mustafa, *op. cit.*, p. 45; and testimony of Mr. Rukiqi, *op. cit.*, p. 69. *See also* Police Officer Report of Mr. Rukiqi (6 April 2018), p. 1.

included in the operation, had not been informed at all about the identity or locations of the Turkish nationals, information that was in the sole possession of the KIA officers.[42] Therefore, during the entire operation, the KIA officers were in constant communication with the two team leaders.[43] As was confirmed by Mr. Mustafa: "I mainly communicated with this KIA officer. . . . As a matter of fact, he called me every two or three minutes."[44] During the time the police officers were making the arrests, the KIA officers, together with Mr. Sylejmani, were stationed inside the DMF building.[45]

According to information that the KIA officers had provided at the morning meeting, the Turkish nationals were expected to be found at two different locations: (1) in the region of Lipjan and Prishtina, near the Marigona Residence, and (2) in Gjakova.[46]

Around 7:00, the police squads distributed themselves across the planned locations.[47] The leader of the team positioned in the locations near the Marigona Residence, Mr. Mustafa, received a telephone call from one of the KIA officers and was informed that Mr. Yusuf Karabina, one of the six Turkish nationals, was in a vehicle coming in their direction.[48] Based on the team leader's assessment, a decision was made to stop the vehicle, inside of which were also Mr. Karabina's wife and son, and to arrest Mr. Karabina.[49]

According to the police officers who carried out the arrest, the team leader, Mr. Mustafa, after verifying Mr. Karabina's identity, requested that he exit the vehicle and come to the police car so that he could be notified regarding

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[42] *See* testimony of Mr. Mustafa, *op. cit.*, p. 34; testimony of Mr. Rukiqi, *op. cit.*, p. 68; and testimony of Mr. Guda, *op. cit.*, p. 93.

[43] *See generally* testimony of Mr. Mustafa, *op. cit.*; and testimony of Mr. Rukiqi, *op. cit.*

[44] Testimony of Mr. Mustafa, *op. cit.*, p. 39.

[45] *See* Report of the Police Inspectorate, p. 10.

[46] *See* testimony of Mr. Sylejmani, *op. cit.*, p. 118; Police Officer Report of Mr. Rukiqi, *op. cit.*, p. 1; and Report of the Police Inspectorate, p. 9.

[47] *See* Report of the Police Inspectorate, p. 10.

[48] *See id.*; and testimony of Mr. Mustafa, *op. cit.*, p. 34.

[49] *See* Report of the Police Inspectorate, p. 10; and testimony of Mr. Mustafa, *op. cit.*, p. 34.

the revocation of his residence permit.[50] But according to the police officers' testimony, Mr. Karabina attempted to resist, as well as to restart the car and flee from the scene, whereas his wife and son continuously obstructed the arrest.[51] According to Mr. Mustafa, it was necessary to use "proportional force" to calm the situation and to remove them from the vehicle.[52]

This version of events clearly diverges from the version presented by Mr. Karabina's wife, who was also interviewed by this Committee. According to Ms. Karabina's testimony, she and her 15-year-old son did not attempt to obstruct the arrest, but only tried to record the event with their mobile telephones. According to Ms. Karabina, it was their attempt to record the arrest that resulted in the police officers' use of force. One of the officers, according to her, grabbed her son by the throat and removed him from the vehicle.[53]

After managing to place Mr. Karabina in handcuffs, the police officers departed the scene in the direction of Prishtina, leaving Mr. Karabina's wife and son at the scene of the arrest.[54]

In the meantime, Mr. Mustafa Erdem, also one of the six Turkish nationals, went to the DCAM to inquire about Mr. Karabina. The same police squad that had arrested Mr. Karabina also arrested Mr. Erdem and sent both Turkish nationals to the DMF building.[55]

At around 9:07, the third police squad received a telephone call from one of the KIA officers. The KIA officer informed the squad that Mr. Osman Karakaya was in his home and ordered the police officers to arrest him.

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[50] *See* testimony of Mr. Mustafa, *op. cit.*, p. 34; and testimony of Police Officer Rrustem Haliti, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, p. 64.

[51] *See* testimony of Mr. Mustafa, *op. cit.*, pp. 34–35; and testimony of Mr. Haliti, *op. cit.*, p. 63.

[52] *See* testimony of Mr. Mustafa, *op. cit.*, p. 35.

[53] *See* testimony of Ms. Jasemin Karabina, wife of Mr. Yusuf Karabina, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 5 December 2018*, pp. 47–48.

[54] *See* testimony of Mr. Haliti, *op. cit.*, p. 63; and testimony of Mr. Mustafa, *op. cit.*, p. 35.

[55] *See* Report of the Police Inspectorate, p. 10; and testimony of Mr. Mustafa, *op. cit.*, p. 35.

When the police officers arrived at the house, they found Mr. Karakaya's wife, and then Mr. Karakaya himself. After confirming his identity, they informed him of the revocation of his residence permit and arrested him.[56]

§ 4

The second police team, comprising three police squads, arrived in Gjakova at around 8:00.[57] At about the same time, one of the KIA officers informed one of the squads, by telephone, that the three persons being sought had entered Gjakova's Mehmet Akif College, where they were employed as teachers. The KIA officer ordered the squad immediately to enter the school and to arrest them.[58] Only one of the three Turkish nationals, however, had his identifying documents on him. That was Mr. Cihan Ozkan, whereas the two other persons who were detained, Mr. Kahraman Demirez and Mr. Hasan Huseyin Demir, did not have their documents on them.[59]

Regarding the third person, problems arose in identifying him, due to the fact that, in the materials prepared by the KIA on the person in question, there were two photographs of different people.[60] As the DMF Director, Mr. Sylejmani, explained in his testimony: "There were two photographs, two pieces of paper, one blurry, the other a bit clearer, and that one seemed to me, and to the officer that led the Gjakova team [Mr. Rukiqi], that it was not the same person, this one was one person, this one was another person."[61]

Mr. Rukiqi testified that when he noticed this problem, he sought clarification from the KIA officer and was ordered to arrest whichever one of the persons in the two photographs he encountered first: "we stopped and we wanted clarification on how to proceed in this manner, how we could proceed,

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[56] *See* Report of the Police Inspectorate, p. 10; and Police Officer Report of Mr. Isa Maqastena (no date), pp. 1–2. The notification regarding the revocation of the residence permit, it seems, was a mistake, considering that, as noted above, Mr. Karakaya's residence permit had already expired and he had applied for a renewal of his permit.

[57] *See* Report of the Police Inspectorate, p. 10.

[58] *See* Police Officer Report of Mr. Rukiqi, *op. cit.*, p. 2.

[59] *See id.*, p. 2; and Report of the Police Inspectorate, p. 10.

[60] *See* Report of the Police Inspectorate, p. 10; testimony of Mr. Rukiqi, *op. cit.*, p. 69; testimony of Mr. Guda, *op. cit.*, pp. 92–93; and testimony of Mr. Sylejmani, *op. cit.*, p. 122.

[61] *See* testimony of Mr. Sylejmani, *op. cit.*, p. 122.

which one was the person in question, I am not giving you clarifications, our mandate was such that, even at the first moment, whichever photograph was met, *whichever photograph was encountered from these two faces you are obligated to detain him* and immediately, immediately . . . immediately go directly to the Prishtina Airport."[62]

As is now widely known, the person detained was *not* the person for whom a decision for residence-permit revocation, or a forced removal order, had been issued. Instead of arresting that person, Mr. Hasan Huseyin Demir, the police officers arrested Mr. Hasan Huseyin Gunakan.[63]

§ 5

In the case of some of the Turkish nationals, the police officers did not inform them of their rights, specifically the right to an attorney and the right to contact a family member. There were three main causes of this failure to inform.

First, the KIA officers[64] had requested that the police officers either (1) not allow the Turkish nationals to communicate with other persons, or (2) not communicate themselves with the Turkish nationals. For example, during his testimony, Mr. Mustafa, the leader of the Prishtina team, was asked whether he had given the Turkish nationals the opportunity to contact their family members or their attorneys. Mr. Mustafa's answer was: "No, because we were requested verbally by the KIA officers, as well as by the Colonel, that they not be allowed to communicate,"[65] whereas Mr. Rukiqi, the leader of the Gjakova team, testified that the KIA officers had even requested that the police officers themselves not communicate with the detained persons.[66]

Second, the failure to inform the detained persons of their rights was the result of some of the police officers' opinion that such notification is obligatory

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[62] Testimony of Mr. Rukiqi, p. 69; emphasis added. *See also* testimony of Mr. Guda, *op. cit.*, pp. 92–93.

[63] *See* Report of the Police Inspectorate, p. 10.

[64] As will be seen below, one of the witnesses asserted that this had been the request of Mr. Sylejmani as well.

[65] Testimony of Mr. Mustafa, *op. cit.*, p. 52.

[66] *See* testimony of Mr. Rukiqi, *op. cit.*, p. 74. *See also* Report of the Police Inspectorate, p. 15 (referring to "the insistence not to communicate with the Turkish nationals during the operation").

only in cases of arrest, whereas, according to them, the six Turkish nationals were only "escorted" or "detained" but were not "arrested." In this respect, the Head of the Inspection Department of the Police Inspectorate, Mr. Bekim Pira, testified: "If you talk with the police, the entire time they call it escorting, regarding the reading of rights, rights are read only when they are arrested. . . . They call it escorting. Even in their reports on the operation it says: we escorted them."[67]

Third, at least two police officers attempted to justify their failure to inform the Turkish nationals of their rights by arguing that, even if the Turkish nationals had managed to contact an attorney, it would have been useless, because filing a complaint would not have suspended the execution of the forced removal order. For example, Mr. Mustafa, when he was asked during his interview regarding the matter of rights notification, he answered as follows: "Insofar as we issued a forced removal order, and it is stated there: 'An appeal does not suspend the execution of the decision,' everything was all right with us."[68]

Nonetheless, some of the police officers at least attempted to inform the Turkish nationals of their rights. But even these attempts were not successful in every case, because some of the Turkish nationals did not understand Albanian. For example, Police Officer Xhemajl Kransiqi testified: "We tried a little to read him something of his rights, he just shrugged his shoulders, and we did not discuss it further with him"; "as far as I know he didn't understand Albanian at all."[69] "We tried to speak," Police Officer Naile Cakolli testified. But "[a]t the moment that we spoke, he just shook his

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[67] Testimony of Mr. Pira, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 22 October 2018*, p. 37. *See also* testimony of Mr. Mustafa, *op. cit.*, p. 46 ("we did not arrest anyone. . . . We detained them, we escorted them"). In his testimony Mr. Pira makes it clear that, according to him, the police officers' claim that the six Turkish nationals were only "escorted" but not "arrested" was erroneous. *See* Mr. Pira's testimony, *op. cit.*, p. 36 ("But I consider it to be an arrest. This is what we call an arrest").

[68] Testimony of Mr. Mustafa, *op. cit.*, p. 54. *See also* testimony of Mr. Sylejmani, *op. cit.*, p. 150.

[69] Testimony of Mr. Krasniqi, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, pp. 84 and 85.

head." [70] When asked whether the person in question had understood Albanian, Ms. Cakolli answered: "In my opinion, no."[71]

§ 6

Sometime after 9:00, after all of the arrests were completed, the DMF Director, Mr. Sylejmani, decided that all of the detained persons would be transported to the Prishtina International Airport to be expelled.[72] Before that time, Mr. Fazli Fazliu, Chief of the airport's Immigration Unit, under the auspices of the Kosovo Police, had decided that the Turkish nationals would be processed through the airport's VIP zone and that a "facilitated border crossing" would be arranged.[73]

These were the requests of the KIA officers, communicated to Mr. Fazliu through Mr. Sylejmani.[74] In the meantime, Mr. Sylejmani, together with the two KIA officers, arrived at the airport.[75]

§ 7

Around the same time as the six Turkish nationals departed for the airport, the Turkish authorities' airplane, in which the Turkish nationals would be sent to Turkey, landed on the runway.[76]

Two days before, on 27 March, the air transport company Birlesik Insaat of Turkey had requested a taxi flight permit from the Department of Civil

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[70] Testimony of Ms. Cakolli, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, p. 87.

[71] *Id*.

[72] *See* Report of the Police Inspectorate, p. 10.

[73] Testimony of Mr. Fazliu, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 29 October 2018*, pp. 8–9. *See also* testimony of Mr. Sylejmani, *op. cit.*, p. 121.

[74] *See* testimony of Mr. Guda, *op. cit.*, p. 92; and testimony of Mr. Sylejmani, *op. cit.*, p. 130.

[75] *See* testimony of Mr. Sylejmani, p. 121; and Report of the Police Inspectorate, p. 10.

[76] According to Letter No. 770/18 of 18 September 2018, sent to the Chairman of this Committee by the Minister of the Ministry of Infrastructure, Mr. Pal Lekaj, the airplane that would transport the Turkish nationals arrived at 9:03 (citing data from the operational center of the airport).

Aviation of the Ministry of Infrastructure.[77] The company in question requested a flight permit for business purposes, with one passenger arriving and one passenger departing. The date planned for the flight was 30 March.[78]

But on 28 March, the company sent another request, changing the requested date to 29 March, as well as the purpose of the flight. The purpose specified in the first request was "business," whereas the purpose specified in the new request was "private flight." Regarding the number of passengers, just as with the first request, the second request also had one passenger arriving and one passenger departing.[79]

On the same day, the then-Acting Director of the Department of Civil Aviation, Mr. Ismail Berisha, issued a decision approving the flight.[80]

§ 8

Following the arrival of the airplane from Turkey, the Turkish nationals also began arriving at the airport in police cars. This Committee has possession of a number of pieces of evidence confirming that, while being processed through the airport, Mr. Hasan Huseyin Gunakan, who had mistakenly been identified as Mr. Hasan Huseyin Demir, attempted to tell the officials involved in the operation that he was not the person for whom a decision for residence-permit revocation and a forced removal order had been issued.

The first piece of evidence comes from the DMF Director, Mr. Sylejmani, who testified that Mr. Gunakan "said no, sir, I'm not him. . . . I'm not he said Demir Gunakan something like that, I'm not him."[81] Upon receiving this information, Mr. Sylejmani questioned Mr. Gunakan regarding the photographs the Police had received as a part of the materials provided by the KIA: "I said is this your photograph, he said yes. The photograph is mine, . . . but *these aren't my personal data. Therefore I cannot accept the decision*."[82]

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[77] *See* e-mail of 27 March 2018, from Gozen Air Services Flight Support, to the Department of Civil Aviation.

[78] *See id*.

[79] *See* e-mail of 28 March 2018, from Gozen Air Services Flight Support, to the Department of Civil Aviation.

[80] *See* Decision No. MI37/2018 of 28 March 2018.

[81] Testimony of Mr. Sylejmani, *op. cit.*, p. 122.

[82] *Id.*; emphasis added.

After finishing the conversation, Mr. Sylejmani instructed Mr. Gunakan to write his personal data on a sheet of paper: "I said please, I got a blank sheet of paper for him I said write your name exactly, *according to your documents where you were born, . . . your birthdate*. He wrote it here, I said wait over there."[83]

With these personal data, Mr. Sylejmani went to consult with the two KIA officers: "I went to these KIA officers . . . I said what we discussed in the office this person says I'm not him, now *should we proceed on the basis of the photograph or on the basis of the personal data*."[84]

According to Mr. Sylejmani's testimony, "the KIA agent spoke with his chain of command, one or two minutes. Colonel he said, the person in the photograph is him, he is the person who is supposed to go. Here *a technical error was made with the name, but we will correct it in the meantime*, he said he is going. . . . [T]his person is him, what is important is that this is the person *we'll correct the data later on*."[85]

Later on in his testimony, Mr. Sylejmani recounted: "I, insofar as I had the opportunity, said *this person with these personal data is not him*, look at his personal data Gynakan. . . . He [the KIA officer] communicated with his chain of command and I do not know with whom. . . . He told him the person's photograph because they saw when he came out there that it was him. We made a typo just with the name . . . . *So do not worry about the name*. They gave me that instruction because I told them *at least when we go, when we return from the action, send it to me so that we can then change the order but anyway we cannot give it to him anymore because he'll be gone*."[86]

Mr. Sylejmani's account, if it turns out to be true, is an extraordinarily important piece of evidence, because it would show that he, together with at least one KIA officer, *with full knowledge*, brought about the expulsion of an individual for whom there had not been any lawful decision for revoking his residence permit, nor any lawful order for his forced removal.

In order to assess the truthfulness of Mr. Sylejmani's testimony on this point, we must consider two other pieces of evidence as well.

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[83] *Id.*; emphasis added.
[84] *Id.*; emphasis added.
[85] *Id.*; emphasis added.
[86] *Id.*, p. 147; emphasis added.

TRANSLATION

The first piece of evidence comes from the Police Officer Report of Mr. Rukiqi. In that Report, which is dated 6 April 2018, only eight days after the operation, Mr. Rukiqi writes: "In passing through the VIP zone, the national who according to the data was Hasan Huseyin Demir, born on 10.05.1976 . . . I heard him from a distance giving notice that he was not Hasan Huseyin Demir but Hasan Huseyin Gunakan. The notification was given before crossing the point for the inspection of documents, and since the Colonel was present, he dealt with the matter and after some time he said everything was in order and he requested that he [Mr. Gunakan] be deported as well."[87]

The second piece of evidence comes from Mr. Pira, the Head of the Department of Inspection of the Police Inspectorate of Kosovo. In his testimony before this Committee, Mr. Pira said the following, apparently on the basis of a video recording: "When they sent him to the airport he [Mr. Gunakan], it is apparent in the sequence, it appears that he says I am not him. He . . . says I am not him, but at that point the video does not capture a part, and it appears that a communication takes place between the Director of the Division for Foreigners and Migration [Mr. Sylejmani], he converses with someone . . . . [H]e says I am not him, but it appears that through the communication it is said he must be expelled."[88]

The evidence coming from Messrs. Rukiqi and Pira give sufficient confirmation for a finding that Mr. Gunakan attempted to inform the officials involved that he was not the one against whom a decision for revoking the residence permit and a forced removal order had been issued. But, as is emphasized by Mr. Pira himself,[89] we still lack evidence that can confirm definitively that the person or persons with whom Mr. Sylejmani went out to consult were the KIA officers.

Nonetheless, it must also be emphasized that the evidence discussed above is at least *consistent* with Mr. Sylejmani's assertion that he consulted with the KIA officers, and it *confirms* other elements of his account, such as: (1) the fact that Mr. Gunakan told Mr. Sylejmani that he was not the person for whom the decision and the order had been issued; (2) the fact that Mr. Sylejmani consulted *with someone* regarding Mr. Gunakan; and (3) the fact that, after receiving clarification, he returned and informed the other police

[87] Police Officer Report of Mr. Rukiqi, *op. cit.*, p. 2.

[88] Testimony of Mr. Pira, *op. cit.*, p. 18.

[89] *See id*.

officers that Mr. Gunakan, even though he was not the person from whom the decision and order had been issued, nonetheless had to be deported. Aside from these three points, we can add another: (4) the Committee does not have any evidence that Mr. Sylejmani, at the time in question or at any time throughout the operation, consulted with *any other person besides* the two KIA officers.

On the basis of these four points, we can say that, even though the truth of Mr. Sylejmani's account cannot be definitively established in its entirety, it is also the case that, at least at this point in time, we do not have any better explanation for the evidence laid out above other than that Mr. Sylejmani is telling the truth.

§ 9

Before being taken to the airplane, the six Turkish nationals were subject to an abbreviated border-crossing procedure. First, as we have already established, at least some of the Turkish nationals did not have identifying documents on them.[90] Furthermore, aside from the lack of identifying documents, not all of them had valid travel documents.[91] In the absence of valid travel documents, it can be observed that the square stamp certifying departure from the Prishtina Airport has been placed on the second page of each forced removal order, copies of which have been made available to this Committee.[92] Another abbreviation of the procedures was that police officers did not enter the six Turkish nationals' personal data in the Border Management System for entry and exit.[93]

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[90] On this point, *see also* Report of the Police Inspectorate, p. 18 ("Not all of the Turkish nationals had identifying documents on them").

[91] *See id.*, p. 18 ("In completing the border check valid travel documents could not be made available"; "During the border control at the VIP sector, it can be observed that not all of the Turkish nationals presented legal travel documents"). In his testimony before the Committee, the Director of the Border Police, Mr. Guda, argued: "They had residence permits, which is a valid document for foreigners" (*see* testimony of Mr. Guda, *op. cit.*, p. 112). The problem with this argument is that the residence permits were no longer valid documents, given that they had been revoked six days earlier.

[92] *See also* Report of the Police Inspectorate, p. 18.

[93] *See id.*, p. 19.

After this shortened border-crossing procedure was completed, airport police officers escorted the six Turkish nationals, one by one, to the Turkish authorities' airplane.[94] The airplane departed for Turkey at around 10:50.[95]

E. Relevant events following the expulsion

§ 1

Upon learning of the expulsion of the six Turkish nationals in the afternoon of 29 March, the Prime Minister of the Republic of Kosovo, Mr. Ramush Haradinaj, demanded an explanation from the then-Director of the Kosovo Police, Mr. Shpend Maxhuni; the then-KIA Director, Mr. Gashi; the then-Minister of the MIA, Mr. Sefaj; and the Minister of the Ministry of Justice, Mr. Abelard Tahiri. Each of them received a letter from Mr. Haradinaj with the same content: "I demand from you, in compliance with your constitutional and legal responsibilities, a full and accurate report regarding the matter of the six Turkish citizens' detention and deportation from Kosovo. Why were their residence permits revoked? Why were they detained? Why were they deported with haste and in secret?"[96]

The next day, on 30 March, the Prime Minister sent Mr. Gashi and Mr. Sefaj another letter, demanding their immediate resignation from their positions, on the basis that "yesterday's actions in this case were completely unacceptable and contrary to our values and principles as a people and as a state," and that "I was not informed in advance or in due time" by the KIA and the MIA, respectively.[97]

§ 2

In the days following the expulsion, with the aim of establishing whether the air transport company Birlesik Insaat had submitted false information in its request for a flight permit, the then-Acting Director of the Department of Civil Aviation, Mr. Berisha, sent three requests to other institutions for data regarding the passengers on the Birlesik Insaat flight of 29 March 2018. The requests were sent to (1) the operational management staff of the Prishtina

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[94] *See id.*, p. 11; testimony of Mr. Guda, *op. cit.*, p. 97; and testimony of Mr. Fazliu, *op. cit.*, p. 14.

[95] *See* Report of the Police Inspectorate, p. 11.

[96] Letter Nos. 601/2018, 602/2018, 603/2018, and 604/2018.

[97] Letter Nos. 610/2018, 611/2018.

Airport;[98] (2) the Director of the Border Department of the Kosovo Police, Mr. Guda;[99] and (3) the Head of the Division for Civil Aviation Security of the MIA, Mr. Kastriot Gashi.[100]

None of the requests turned out to be fruitful. The airport management staff answered simply that: "they did not declare any passengers or passenger list, something that they were not obligated to declare if they had only crew."[101]

Mr. Guda answered: "The Kosovo Police was not informed about the air operation of 29 March 2018 of the air transport company 'BIRLESIK INSAAT,' from Turkey, with the itinerary Ankara – Prishtina – Ankara, therefore it did not have the opportunity in advance to request information relating to the passengers transported by this company to enter into the territory of the Republic of Kosovo. The police do not keep lists of passengers that air transport companies transport/bring into the territory of the Republic of Kosovo. These lists are kept by the companies, as well as by the airport authority."[102]

The Head of the Division for Civil Aviation Security, Mr. Gashi, answered that: "The Department for Public Safety of the MIA does not receive (possess) data on who enters and exits the border-crossing point of PIA 'Adem Jashari.'" He suggested that Mr. Berisha contact the Border Police.[103]

Lacking the requisite information, Mr. Berisha concluded that there was not a sufficient factual basis to impose penalties on the air transport company in question.[104]

§ 3

On the basis of lawsuits filed in the name of the six Turkish nationals by their attorney, Mr. Urim Vokshi, the Department of Administrative Matters

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[98] *See* e-mail of 10 April 2018, from Mr. Berisha to Mr. Aritay Gokmen.

[99] *See* Letter No. 41/2018 of 10 April 2018, from Mr. Berisha to Mr. Guda.

[100] *See* e-mail of 13 April 2018, from Mr. Berisha to Mr. Gashi.

[101] *See* e-mail of 10 April 2018, from Mr. Gokmen to Mr. Berisha.

[102] Letter No. 3458 of 17 April 2018, from Mr. Guda to Mr. Berisha.

[103] E-mails of 13 April 2018 and 25 April 2018, from Mr. Gashi to Mr. Berisha.

[104] *See* testimony of the Minister of the Ministry of Infrastructure, Mr. Lekaj, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 21 November 2018*, p. 8; and testimony of Mr. Berisha, *id.*, p. 27.

of the Basic Court of Prishtina has, up to now, vacated three decisions for revoking the residence permits.[105] Likewise, that court has vacated one decision of the Appeals Commission on Foreigners, which had left standing the forced removal orders.[106] The remaining cases are still being reviewed by the courts.

III. Legal Assessment

On the basis of the above factual findings, we can now proceed to the legal assessment. As indicated in the Introduction to this Report, this legal assessment is limited to the three points set out in the Terms of Reference:

(1) "Assessment of the respect for procedures and rules during the removal of the Turkish nationals";

(2) "Assessment of the respect for basic rights and liberties of foreign nationals"; and

(3) "Assessment of compliance with national legislation and international instruments in the field of the protection of basic human rights and liberties."[107]

A. Regarding the procedure followed in issuing the decisions revoking the Turkish nationals' residence permits

We must evaluate whether DCAM officials acted in accordance with the law when they decided *automatically* to revoke the Turkish nationals' residence permits after receiving the KIA's letter. According to these officials, the automatic revocation of residence permits is a legal obligation that stems from Law No. 04/L-219 on Foreigners, Article 6, which we must now analyze carefully.

The relevant part of the Article provides: "Security checks of foreigners for the purpose of determining the reasons related to national security shall be

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[105] *See* Judgment of the Basic Court of Prishtina, Department of Administrative Matters, A.no. 1030/2018 (16 October 2018); Judgment of the Basic Court of Prishtina, Department of Administrative Matters, A.no. 1032/2018 (25 September 2018); and Judgment of the Basic Court of Prishtina, Department of Administrative Matters, A.no. 1033/2018 (25 September 2018).

[106] *See* Judgment of the Basic Court of Prishtina, Department of Administrative Matters, A.no. 1430/18 (20 November 2018).

[107] Terms of Reference, *op. cit.*, p. 1.

carried out by the Kosovo Intelligence Agency . . . , as provided in Article 2 of the Law on Kosovo Intelligence Agency."[108]

The MIA Legal Department has issued a legal opinion on this provision, among other provisions. As has been noted in the Statement of Facts, this legal opinion has been cited by Mr. Manaj, the then-Head of the Division for Foreigners, as a justification for automatically carrying out the KIA's request.

Aside from quoting the text of Article 6 of the Law on Foreigners, the MIA's legal opinion mentions that provision only twice:

(1) "On the basis of a KIA request regarding matters relating to state security, foreigners permanently residing in the Republic of Kosovo *may* have their permanent residence permit revoked according to the Law on Foreigners and sub-legal acts flowing from it";[109] and

(2) "The Division for Foreigners of the Department for Citizenship, Asylum and Migration (DCAM) is *obligated* to revoke foreigners' permanent residence permits when the Kosovo Intelligence Agency requests this for reasons of endangering state security, as provided in Article 6 of Law No. 04/L-219 on Foreigners."[110]

As is obvious from the italicized words in these two passages, the MIA's Legal Opinion puts forth two divergent interpretations of Article 6. According to the first interpretation, foreigners "*may* have their permanent residence permit revoked" on the basis of a KIA request, whereas according to the second interpretation, the DCAM, specifically the Division for Foreigners, is "*obligated* to revoke permanent residence permits" on the basis of such a request.

These interpretations are clearly distinct. Regarding the first interpretation, no one would deny it: it is obvious that, on the basis of a KIA assessment, the DCAM *may* revoke the residence permit of a foreigner—at least if the KIA's assessment is consistent with legal criteria for establishing a threat to

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[108] Law No. 04/L-219 on Foreigners (henceforth: "Law on Foreigners"), Article 6, para. 1. The version of the Law cited throughout this Report is the one that was in force on the day of the expulsion, not the current version, which has been amended and supplemented by Law No. 06/L-036 on Amending and Supplementing the Law No. 04/L-219 on Foreigners.

[109] MIA Legal Opinion, p. 5; emphasis added.

[110] *Id.*, p. 6; emphasis added.

national security (see below). Regarding the second interpretation, however, the Legal Opinion offers no explicit argument for it.[111] In the absence of such an explicit argument, the MIA's Legal Opinion does provide a sufficient basis for the three DCAM officials' position that any KIA request for the revocation or refusal of residence permits for foreigners must automatically be implemented as a matter of legal obligation.

Instead, in order to extract the meaning of Article 6 of the Law on Foreigners, it is important to note that the Article refers expressly to another legal provision. Specifically, it provides that the KIA carries out security checks for foreigners "*as provided in Article 2 of the Law on Kosovo Intelligence Agency*."[112] And in turn, Article 2 of the Law on the KIA, which sets out the KIA's *legal scope of operation*, provides: "The KIA shall *gather information* concerning threats to the security of Kosovo."[113]

In other words, when Article 6 of the Law on Foreigners states that "security checks of foreigners . . . shall be carried out by the Kosovo Intelligence Agency," this means that these checks are to be carried out within the framework of the KIA's competency as *an information gatherer*. Therefore, in the context of Article 6 of the Law on Foreigners, the KIA's role is *only to gather information on threats that foreigners may pose to national security*. After such information is gathered, it is shared with the institution responsible for deciding whether to refuse or revoke residence permits. That institution is the DCAM.

This legal interpretation has been expressly confirmed by Mr. Shkëlzen Sopjani, the KIA Inspector General, in his testimony before this Committee: "The KIA's role in this case is to gather information relating to possible threats to national security";[114] and further: "The KIA notifies, informs, and shares analyses, information with other institutions. This is according to law."[115]

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[111] *See id*.

[112] Law on Foreigners, Article 6, para. 1; emphasis added.

[113] Law on the KIA, Article 2, para. 1; emphasis added.

[114] Testimony of Mr. Sopjani, *Transcript of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 21 November 2018*, p. 61.

[115] *Id.*, p. 57. Therefore, it is not completely accurate, from a legal perspective, to speak of a "request" of the KIA for revocation or non-renewal of a foreigner's residence permit. Nowhere in the law—neither in the Law on Foreigners nor in the

However, after the information is gathered by the KIA as a part of its security checks, and after that information is shared with the DCAM, nowhere in the law is it stated that the DCAM is *powerless* to analyze whether the information received from the KIA is consistent with the legal criteria for establishing a threat to national security. These legal criteria are expressly provided for, also in Article 2 of the Law on the KIA:

"As a threat to the security of Kosovo shall in any event be considered a threat against the territorial integrity, integrity of the institutions, the constitutional order, the economic stability and development, as well as threats against global security detrimental to Kosovo, including:

(i) terrorism;
(ii) the incitement to, aiding and abetting or advocating of terrorism;
(iii) espionage against Kosovo or detrimental to the security of Kosovo;
(iv) sabotage directed against Kosovo's vital infrastructure;
(v) organized crime against Kosovo or detrimental to the security of Kosovo in any other way, including money laundering;
(vi) inciting the disaffection of security personnel;
(vii) trafficking of illegal substances, weapons or human beings;
(viii) illegal manufacturing or transport of weapons of mass destruction, or their components, as well as materials and devices necessary for their manufacture;
(ix) illegal trafficking of products and technologies under International Control;
(x) activities that contravene international humanitarian law;
(xi) acts of organized violence or intimidation against ethnic or religious groups in Kosovo; and
(xii) matters relating to severe threats to public health or safety."[116]

The logic of the three DCAM officials leads us to an unacceptable conclusion: according to that logic, the DCAM, upon the KIA's request, would be obligated *automatically* to issue a decision for the revocation or non-renewal

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Law on the KIA—is the authority to make such a request provided for. The only authority that the KIA has, within the framework of the Law on Foreigners, is to *collect information* concerning threats that foreigners may pose to national security—no more, no less. It is not within the authority of the KIA to instruct other institutions on how they should act on the basis of the information it gathers.

[116] Law on the KIA, Article 2, para. 1.

of residence permits, *even if the DCAM concludes that the information provided by the KIA clearly fails to fulfill the legal criteria listed above*.

Nowhere does Article 6 of the Law on Foreigners impose such an obligation to ignore a failure to fulfill these legal criteria. Indeed, to the contrary, according to Law No. 05/L-031 on General Administrative Procedure, the DCAM, as the body responsible for issuing the administrative act, has a number of other elementary duties. For example, given that the revocation and non-renewal of a residence permit is an "administrative action that for the purpose of public interest protection may restrict a right or may affect a legitimate interest of a person," the DCAM is obligated to ensure that that administrative action be "proportional to the goal of public interest that it seeks to produce,"[117] because "[a]n administrative act is unlawful when . . . it does not comply with the principle of proportionality."[118]

The principle of proportionality requires, *inter alia*, that an administrative action be "necessary to attain the purpose prescribed by law."[119] In the case of the six Turkish nationals, the legal purpose of the act was to eliminate threats to national security, *according to the legal definition of that term set out above*. Therefore, in the case of the six Turkish nationals, it was the DCAM's duty, in accordance with the principle of proportionality, to analyze the information provided by the KIA and to assess whether the revocation or non-renewal of their residence permits was, as a matter of fact, necessary for the protection of national security, *on the basis of the legal criteria set out above*. And, whenever the information provided by the KIA is not consistent with those criteria, the DCAM is obligated not to issue a decision for the revocation or non-renewal of residence permits, and instead to request that the KIA provide it with additional information or reasoning, with the aim of verifying the fulfillment of the legal criteria.

To summarize: the foregoing analysis has revealed that the DCAM had a legal obligation:

(1) to assess whether the information provided in the KIA's letters was consistent with the legal criteria for constituting a "threat to the security of Kosovo"; and

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[117] Law No. 05/L-031 on General Administrative Procedure, Article 5, para. 1.

[118] *Id.*, Article 52, para. 1, subpara. 7.

[119] *Id.*, Article 5, para. 2, subpara. 1.

(2) in the event that this information was not consistent with those legal criteria,

(a) not to issue decisions revoking the residence permits of the Turkish nationals, and

(b) to request that the KIA provide additional information that could serve to verify fulfillment of the criteria set out by law.

Insofar as DCAM officials automatically revoked the residence permits of the Turkish nationals without proceeding through the steps outlined above, they acted in violation of their legal duties, with respect to the procedure that they followed.

B. Regarding the respect for legal procedures and international human rights standards during the expulsion operation

§ 1

It is difficult to deny that the most serious violation during the operation for the expulsion of the six Turkish nationals—a violation not only of the law but also of human rights—was the expulsion of a person without any lawful order whatsoever for his expulsion. The expulsion of an individual under such circumstances constitutes a direct violation of Article 55, para. 1, of the Constitution of the Republic of Kosovo ("Fundamental rights and freedoms guaranteed by this Constitution *may only be limited by law*"; emphasis added), Article 1, para. 1, of Protocol No. 7 to the European Convention on Human Rights ("An alien lawfully resident in the territory of a State shall not be expelled therefrom *except in pursuance of a decision reached in accordance with law*"; emphasis added), and Article 13 of the International Covenant on Civil and Political Rights ("An alien lawfully in the territory of a State . . . may be expelled therefrom *only in pursuance of a decision reached in accordance with law*"; emphasis added).[120]

[120] As stated in Article 22 of the Constitution of the Republic of Kosovo, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, as well as the International Covenant on Civil and Political Rights and its Protocols "are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions."

Furthermore, regarding Mr. Gunakan, it should be noted that Administrative Instruction (MIA) No. 09/2014 on Returning of Foreigners with Illegal Residence in the Republic of Kosovo, Article 21 ("Wrong return"), para. 1, provides that: "Requesting state will retake every returned foreigner within 6 months starting from the day of transfer of the returned person, if it is proved that conditions for return were not fulfilled at the moment when the crime has been committed."[121] The competent institution in such cases is the Division for Readmission and Return of the DCAM.[122] The Committee, however, has not received any evidence showing that this Division, to this day, has made any request to retake Mr. Gunakan's.

In any case, even before we get to the point at which Mr. Gunakan was mistakenly expelled, a long series of violations, irregularities, and inconsistencies with laws and sub-legal acts in force, as well as with constitutional and international human rights standards, were observable throughout the expulsion process. In order to prevent mistaken expulsions in the future, it is essential to understand that, at a number of points in the operation, Mr. Gunakan's mistaken expulsion could have been avoided if state authorities had fully respected the procedures laid out in the Constitution, the law, and the requisite sub-legal acts.

§ 2

The KIA's role in preparing and carrying out the expulsions must be analyzed and assessed in detail.

According to Article 3, para. 1 of the Law on the KIA: "The KIA shall have no executive functions." In line with this provision, the KIA officers did not have

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[121] The term "requesting state" in this Administrative Instruction "means Republic of Kosova that submits request for readmission or for transit pass to the foreign country" (Article 2, para. 2, subpara. 2).

[122] Administrative Instruction No. 09/2014 on Returning of Foreigners with Illegal Residence in the Republic of Kosovo, Article 25, para. 2, provides that: "In these cases, implemented are *mutatis mutandis* procedural provisions and all information regarding the identity and nationality of the foreigner who will be retaken, should be given." According to the prior procedural provisions of the Administrative Instruction, the institution responsible for procedural matters relating to the process of readmission and return is the Division for Readmission and Return.

a legal basis for exercising executive powers during the expulsion operation. This would have been the exclusive role of the Kosovo Police.[123]

The issue of whether the KIA officers indeed exercised executive powers during the expulsion operation, thereby usurping the role of the police, was a frequent topic of discussion during this Committee's interviews. Nonetheless, on the basis of evidence provided to the Committee, it cannot be established definitively that the KIA, in violation of Article 3 of the Law, in fact exercised executive powers during the operation.

The lack of clarity surrounding this issue is obvious, for example, in the testimony of Mr. Rukiqi, the police officer who led the Gjakova group during the expulsion process. On the one hand, Mr. Rukiqi clearly attested to the fact that he received direct orders from the KIA officers during the operation. For example, referring to the two different photographs he had received from the KIA officers, Mr. Rukiqi stated that these officers "*ordered* that, at the moment that one of the persons in the photos is seen, . . . [w]hichever of them is met, it is *a distinct order*, . . . to take him immediately from here directly to the Airport."[124] This suggests that the KIA officers did indeed exercise executive powers during the operation.

But on the other hand, when he was asked whether the KIA officers had the right to give him orders, he responded: "The Colonel [Rrahman Sylejmani] was there, it is the highest rank of the Kosovo Police."[125] This shows that, at least up to a point, Mr. Rukiqi interpreted the KIA officers' orders as being endorsed by Mr. Sylejmani, who was his superior in the chain of command. This suggests that it was Mr. Sylejmani, and not the KIA officers, who retained ultimate executive authority during the operation.

Despite the lack of clarity regarding the issue of whether the KIA exercised executive powers in violation of Article 3 of the Law, this issue is not as important to analyzing the case as it might seem on first glance. The reason is that there is another provision in the Law on the KIA that places strict limits on that agency's permissible activities. The provision in question is one we have already analyzed above in assessing the DCAM's actions. Article 2 of

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[123] *See* Law on Foreigners, Article 97, para. 1 ("Forced removal of a foreigner from the territory of the Republic of Kosovo shall be . . . carried out by Border Police").

[124] Testimony of Mr. Rukiqi, *op. cit.*, p. 80; emphasis added.

[125] *Id.*, p. 74.

the Law on the KIA, which sets out the KIA's *legal scope of operation*, provides that: "The KIA shall *gather information* concerning threats to the security of Kosovo.[126] Aside from this function, no other function is included within the KIA's scope of operation, according to the law.

To be as clear as possible, there are many activities that could serve the purpose of information gathering, and the Law expressly provides that "the KIA shall have its own information collection capabilities."[127] But what is clear from these provisions is that *every activity of the KIA that does not serve the purpose of information gathering in one way or another, falls outside the KIA's scope of operation and is therefore illegal.*

According to this legal standard, before we ask whether the KIA officers exercised executive powers during the expulsion process, thereby violating Article 3 of the Law on the KIA, we must first ask whether the KIA officers had a legal basis to take part in the expulsion operation in the first place, *in any capacity whatsoever, even a non-executive capacity*.

Insofar as the operation for the expulsion of the six Turkish nationals did not have any information-gathering purpose whatsoever, it follows that the two KIA officers' participation in the operation, including their arrangement of transportation for the expelled persons, fell outside of the KIA's permissible scope of operation and must be considered illegal.

This, of course, does not mean that the KIA can never collaborate with other institutions. But the law is clear that any such collaboration must be for the purposes of gathering information concerning threats to the security of Kosovo. For example, the collaboration between the KIA and the DCAM, for the purpose of making it possible for KIA officers to access records in the possession of the DCAM, serves an information-gathering purpose, and is therefore permissible according to law. It is also possible—once again, for information-gathering purposes—for the KIA to take part in police operations, as long as those operations are of such a kind as to yield information important to national security.

But it is clear that the operation for the expulsion of the six Turkish nationals was not such an operation. That operation had the aim not of gathering some new piece of information, but of executing orders that were

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[126] Law on the KIA, Article 2, para. 1; emphasis added.

[127] *Id.*, Article 2, para. 2.

issued on the basis of information previously gathered. In an operation of this kind, the participation of KIA officers was illegal.

§ 3

The negative consequences of the KIA officers' participation in the operation became even more damaging due to another defect: the lack of a detailed memorandum stipulating the grounds of coordination between the Police and the KIA during joint operations. According to Article 8, para. 2 of the Law on the KIA: "A memorandum on cooperation, assistance and *mutual coordination of the activities between the KIA and the Kosovo Police*, the Ministry of Internal Affairs, and other relevant governmental institutions shall be signed after the appointment of a KIA Director" (emphasis added).

As has already been indicated, there are specific cases in which the participation of the KIA in police operations may be consistent with the law. For such cases, a memorandum of cooperation that clearly defines the KIA's role in such operations is necessary. In his testimony before this Committee, the DMF Director, Mr. Sylejmani, explained the importance of a such a memorandum as follows: "if this document, regulation, kind of agreement existed, . . . it could have specified that I could say yes, when you have people from the KIA, you can say here is what we have to do, you have to stop and then I have to act."[128]

But a memorandum of this kind does not exist,[129] and its non-existence leads to a lack of legal security for detained persons, as well as insufficient protection of their human rights. The example of Mr. Gunakan's misidentification shows why such a memorandum is necessary. We have seen above that, due to the KIA officers' instructions, the Gjakova team leader, Mr. Rukiqi, ignored his own doubts regarding Mr. Gunakan's identity. A memorandum of coordination between the Police and the KIA, if it had existed, could have stipulated, for example, that police officers—and not KIA

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[128] Testimony of Mr. Sylejmani, *op. cit.*, p. 127. On this point, *see also* Report of the Police Inspectorate, p. 13.

[129] The only cooperation agreement that has been made available to this Committee regulates an entire different area, specifically the matter of building up the human resources of the KIA. *See* Cooperation Agreement between the Kosovo Police and the Kosovo Intelligence Agency (31 August 2009), p. 2 ("This cooperation consists in the temporary transfer of Kosovo Police Officers to the Kosovo Intelligence Agency for the purposes of helping this Agency in building up its human resources").

officers—are to have the exclusive authority and responsibility of verifying the identity of detained persons.[130]

§ 4

In the forced removal orders issued by the DMF, a number of defects of law can be observed.

First, none of the legal criteria for issuing such an order was fulfilled.[131] Article 97, para. 1 of the Law on Foreigners sets out five conditions under which a foreigner can be subject to forced removal:

"Forced removal [Largimi me forcë] of a foreigner from the territory of the Republic of Kosovo shall be decided and carried out by Border Police in cases when a foreigner:

1.1. has entered illegally in the territory of the Republic of Kosovo and there is a reasonable doubt that will use its territory to cross illegally towards other countries;
1.2. did not leave the Republic of Kosovo within the time-limits, specified in the return decision , without any objective justification, or after leaving the territory and within the period of the entry ban, re-enters the territory of the Republic of Kosovo;
1.3. did not leave the territory of the Republic of Kosovo up to sixty (60) days after the expiry of the visa, residence permit or time-limit laid down in this law, for the foreigners entering without a visa;
1.4. has been readmitted by another country within the framework of readmission agreements in force in the Republic of Kosovo;
1.5. is convicted of a criminal offense for which the legislation of the Republic of Kosovo provides a minimum sentence of one (1) year imprisonment."

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[130] Law No. 04/L-076 on Police, Article 16, para. 1, subpara. 6, provides that: "A Police Officer has power to identify other person only when . . . the person should be arrested or detained." This provision, however, does not specify that (1) the police officer is *obligated* to verify identity in cases of reasonable doubt, or that (2) in joint operations carried out by the Police and the KIA, it is the police officer, not the KIA officer, who enjoys the authority and bears the responsibility of verifying the identity of detained persons. Point (2), at least, could be stipulated in a memorandum of coordination between the Police and the KIA.

[131] On this point, *see also* Judgment of the Basic Court of Prishtina, A.no. 1430/18, *op. cit.*, pp. 3–4.

None of these criteria, which have nothing to do with threats to national security, was fulfilled in the case of the six Turkish nationals. Therefore, the issuance of forced removal orders in this case was illegal.

The orders in question suffer from another defect as well: in the reasoning offered for the orders, it is claimed that the orders had been issued "[o]n the basis of Article 6 and Article 99, paragraph 2 of the Law on Foreigners."[132] But neither of these provisions provides a legal basis for issuing such an order. First, as is evident in the title of Article 6 ("Rejection or revocation of residence permit for national security circumstances"), this provision can serve as a legal basis only for issuing a decision for rejecting or revoking residence permits, but not for issuing a forced removal order. Second, according to the text of Article 99, para. 2: "The *removal* order [Urdhri i *dëbimit*] shall be enforced immediately, in case the presence of the foreigner constitutes a threat to public order and state security" (emphasis added).[133] As is obvious, this provision can only serve as a legal basis for a removal order ("urdhër i dëbimit") but not for a forced removal order ("urdhër për largim me forcë").[134] Without support from these two provisions, the forced removal orders in the case of the six Turkish nationals are left hanging in mid-air, without any legal basis whatsoever.

The orders in question have one final deficiency in law: the form of the orders is not consistent with some of the requirements stipulated in Article 97, para. 8 of the Law on Foreigners, which provides: "To a foreigner shall be communicated in writing, in one of the official languages and in English . . . , explaining . . . the date and place where [the order] will be executed [and] mode of his transportation to the place of destination[.]"

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[132] *See* p. 1 of each forced removal order.

[133] The English translation of the Law on Foreigners, which does not count as an official version of the law, translates "dëbim" and "largim" with the same word: "removal," whereas in fact, the proper translation of "dëbim" is "expulsion." As is explained below, the two orders in question, "urdhër për *largim me forcë*" and "urdhër i *dëbimit*" are, according to the law, two distinct types of order, despite being (mis)translated almost identically as "forced removal order" and "removal order," respectively.

[134] On this point, *see also* Judgment of the Basic Court of Prishtina, A.no. 1430/18, *op. cit.*, p. 3.

But from the copies of the orders in possession of this Committee, it can be observed that the orders (1) were not presented to the six Turkish nationals in English, (2) did not specify the place where the orders would be executed, and (3) did not specify the mode of transportation to the place of destination.

In light of these legal deficiencies, can the lawfulness of these orders be vindicated if we interpret them as *removal* orders ("urdhra të *dëbimit*") rather than forced removal orders ("urdhra për largim me forcë")? As a matter of fact, on the second page of each order, where the "legal guidance" is given, the order refers to itself as a "forced removal-*removal* order [urdhër për largim-*dëbim* me forcë]" (emphasis added).

But the orders in question cannot be saved in this manner, because the legal criteria for *removal* orders ("urdhra të *dëbimit*") were not fulfilled, either.

First, according to the Law on Foreigners, Article 99, para. 1, the removal order ("urdhri i dëbimit") is issued by the DCAM, not by the DMF.[135] Therefore, even if we interpret the orders issued against the six Turkish nationals as removal orders ("urdhra të dëbimit"), those orders would still be illegal, because they were issued by the DMF, rather than by the DCAM.

Second, according to Article 101, para. 1, an appeal against a removal order ("urdhër i dëbimit") is addressed to the Basic Court, whereas the orders issued against the six Turkish nationals provide: "This forced removal-removal order [urdhër për largim-dëbim me forcë] . . . can be contested by appeal to the Appeals Commission on Foreigners,"[136] as provided for by law in the case of forced removal orders ("urdhra për largim me forcë"),[137] but not for removal orders ("urdhra të dëbimit").

In the end, then, the forced removal orders that were issued in the case of the six Turkish nationals turn out to be "neither fish nor fowl," an amalgamation

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[135] On this point, the Report of the Police Inspectorate, pp. 13–14, claims that Administrative Instruction (MIA) No. 09/2014, Article 8, para. 1 ("Forced removal order [Urdhri për largim me forcë] shall be issued by DMF") contradicts the Law on Foreigners, Article 99, para. 1 ("The removal order [Urdhri i dëbimit] shall be given by DCAM"). But this contradiction evaporates if we keep in mind that, according to the Law on Foreigners, the forced removal order ("urdhër për largim me forcë") and the removal order ("urdhër i dëbimit") are distinct kinds of order issued on the basis of distinct criteria.

[136] *See* p. 2 of each order.

[137] *See* Law on Foreigners, Article 98, para. 1.

of two different kinds of order that has no basis anywhere in the law and that does not fulfill the legal criteria for either kind of order on its own.

Even though the problem highlighted here can seem entirely of a technical nature, we will see below that this unlawfully amalgamated forced removal-removal order ("urdhër për largim-dëbim me forcë") had negative consequences for the Turkish nationals' opportunity to exercise their right to appeal the orders.

§ 5

One of the basic principles of criminal procedure is that any person deprived of liberty has the right to be informed of his rights. This principle finds expression not only in the law but also in the Constitution.

For example, Code No. 04/L-123 of Criminal Procedure, Article 13, para. 1, stipulates: "Any person deprived of liberty shall be informed promptly, in a language which he or she understands, of:

> 1.1. the reasons for his or her arrest;
>
> 1.2. the right to legal assistance of his or her own choice; and
>
> 1.3. the right to notify or to have notified a family member or another appropriate person of his or her choice about the arrest."

Likewise, the Constitution of the Republic of Kosovo, Article 29, paras. 2 and 3, provide: "Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation," and: "Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing."

Finally, particularly in the case of a forced removal order, Administrative Instruction (MIA) No. 09/2014 on Returning of Foreigners with Illegal Residence in the Republic of Kosovo, Article 12, para. 6 provides: "The foreigner shall be provided legal counseling and representation when it is needed, and also the judicial assistance."

In the case of the six Turkish nationals, these rights were not respected.

First, we noted in the Statement of Facts that, upon the KIA officers' request, some police officers who took part in the expulsion operation either (1) did not inform the Turkish nationals at all of their rights to contact their family members or attorney, or (2) did not permit them any such contact.

Second, we also noted that, even in those cases in which police officers tried to inform the persons in question of their rights, they informed them only in Albanian, a language that at least some of the Turkish nationals did not understand. And although some police officers testified that it had been clear that the detained persons did not understand Albanian, none of those officers took any steps to secure an interpreter to aid them in fulfilling their legal and constitutional duty to inform the detained persons of their rights *in a language they understand*.

Aside from the failure to inform the Turkish nationals of their rights, it is also worrying that some police officers attempted to justify this failure of notification with fallacious reasoning. As we saw in the Statement of Facts, there were two examples of such reasoning: (1) the Turkish nationals were not arrested but only "escorted" or "detained," and thus there was no obligation to notify them of their rights; and (2) insofar as an appeal would not have suspended the execution of the forced removal orders, there was then no reason to inform the Turkish nationals of their rights to a legal defense.

Both of these lines of reasoning are erroneous.

First, in the context of this case, there is no relevant distinction between arrest on the one hand, and "escort" or "detention" on the other. As is set out in the legal and constitutional provisions cited above, the obligation to notify a person of his rights begins from the moment he is *deprived of liberty*. The name by which that deprivation is called is of no importance.[138]

Second, it is not within the purview of a police officer's authority to evaluate how useful it would be for a person deprived of liberty to have access to an attorney. In *every* case of deprivation of liberty, a police officer is obligated, according to the relevant legal and constitutional provisions, to notify the detained person of his rights—and to give this notification *promptly*.

Furthermore, on the basis of the police officers' own testimony, it seems that the advice of legal counsel would not have been as useless as those officers had thought. For example, an attorney could have advised the six Turkish nationals to seek asylum. According to two of the police officers involved in the operation, if asylum had been requested, "we would have been obligated

[138] On this point, *see also* Report of the Police Inspectorate, p. 15.

right then and there to stop everything."[139] This assessment is also consistent with Law No. 04/L-217 on Asylum, which was in force on the day of the expulsion. According to Article 20, para. 1 of that law: "The asylum seeker has the right to reside in the Republic of Kosovo until a final decision is taken."[140] Thus, the failure to notify the six Turkish nationals of their rights not only was a violation of the law and Constitution, but it could have deprived them of necessary information regarding a path by which they could have remained in the Republic of Kosovo while their case was being appealed.

§ 6

The Law on Foreigners and the Administrative Instruction on Returning of Foreigners with Illegal Residence in the Republic of Kosovo set out clear obligations on the part of the DCAM, and especially on the part of the Division for Readmission and Return (henceforth: "DRR") of the DCAM, during the expulsion process. In the process of expelling the six Turkish nationals, however, the DCAM did not respect any of these obligations. The obligations that went unfulfilled are the following.

First, the Law on Foreigners, Article 8, para. 1, subpara. 4 provides: "A travel paper to a foreigner shall be issued to a person who has no foreign travel document if . . . it is under enforced removal procedure for the purpose of removal from the Republic of Kosovo," and paragraph 3 of this Article provides: "Travel paper for a foreigner in accordance to . . . sub-paragraph . . . 1.4 shall issue the Department for Citizenship, Asylum and Migration[.]"

Second, the Administrative Instruction on the Returning of Foreigners, Article 30, paras. 1 and 2 stipulates: "For fulfilling of its task of finding his/her identity documents, Division for Readmission and Return verifies the identity and nationality of the foreigner who is subject to a return decision," and: "To perform this task, Division for Readmission and Return conducts interviews with the foreigner, the foreigner then is presented to representative consulate of his/her country of origin accredited in the Republic of Kosovo, makes linguistic expertise . . . or in writing, invites a

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[139] Testimony of Mr. Mustafa, *op. cit.*, p. 59. *See also* testimony of Mr. Sylejmani, *op. cit.*, p. 149 (confirming that the six Turkish nationals would not have been expelled if they had sought asylum).

[140] This law has now been substituted with Law No. 06/L-026 on Asylum, which nonetheless has a similar provision. *See* Article 26, para. 1, subpara. 1.

delegation of his/her country of origin for the purpose of his/her identification. The result is attached to the return file and then the foreigner is notified."[141]

Third, Article 32, paras. 1 and 2 of the Administrative Instruction provides: "For organizing the return, Division for Readmission and Return cooperates with the Ministry of Foreign Affairs and with airline companies or private travel agencies," and: "Regarding returns with airline companies, Division for Readmission and Return makes ticket booking and determines the itinerary."

Fourth, Article 37, para. 1 of the Administrative Instruction states: "DCAM administers a service at the airport which has a duty of:

1.1 Coordinating security of escort in case of forced execution of the return decision (removal) by air;
1.2 Booking of plane tickets and itinerary determination;
1.3 Providing personal assistance for return and the medication or a small amount of pocket Money.

And furthermore, paragraph 2 of the same Article stipulates: "DCAM provides medical companionship for people who need to be returned."

Fifth, Article 17, para. 6 of the Administrative Instruction states: "If the person who has to be returned holds another citizenship except the one of the state requested, Division for Readmission and Return, should take into consideration his/her desire to be returned to the state he/she wants."

One of the Turkish nationals, Mr. Mustafa Erdem, a copy of whose passport is in the possession of this Committee, is a citizen not only of Turkey but also of the Republic of Albania. The DCAM was aware of, or should have been aware of, this fact, given that Mr. Erdem had applied for a permanent residence permit as a citizen of Albania, rather than of Turkey.[142] But given that the DRR was not included at any stage in the expulsion process, Mr. Erdem's preferences on this point were not taken into consideration before he was expelled to Turkey.[143]

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[141] According to Article 2, para. 2, subpara. 6 of this Administrative Instruction, the word "return" specifically includes within its purview forced removal.
[142] *See* Confirmation of the Acceptance of the Request for Permanent Residence Permit or Renewal of Permit, Mr. Mustafa Erdem (12 February 2018).
[143] On this point, *see* Report of the Police Inspectorate, p. 18.

In the case of the expulsion of the six Turkish nationals, the failure of the DCAM to fulfill any of the legal obligations cited above had three main causes:

First, it was the DCAM's assessment that, after issuing the decisions revoking the Turkish nationals' residence permits, the subsequent procedure would be passed on to the Police, and that the DCAM did not have any further role to play.[144] As is obvious from the legal and sub-legal provisions cited above, that was a completely erroneous assessment.

Second, by arranging transportation for the six Turkish nationals ahead of time, the KIA officers took upon themselves a function that was not theirs to perform, according to law, but instead was the responsibility of the DCAM.

Third, the airport police officers, upon noticing that some of the Turkish nationals did not have their identifying documents, nor their travel documents, on them, should immediately have contacted the DCAM, and the DRR in particular, to notify them of the missing documents and to include them in the process of securing those documents, as well as of verifying the identity of the persons in question. All of these steps are obligatory according to the aforementioned legal and sub-legal provisions.

§ 7

In the Statement of Facts it was noted that the six Turkish nationals underwent a significantly abbreviated border-crossing procedure. The procedure was shortened in two respects. First, at least some of the Turkish nationals did not have their travel documents checked, insofar as they did not even have those documents with them. And second, their personal data was not entered into the Border Management System (henceforth: "BMS") for entry and exit.

Both of these shortcuts constituted deviations from standard procedures for the control of persons during border crossings. According to police officers, however, shortcuts of this kind are permitted by law in the case of "facilitated" border crossings. For example, regarding the failure to check documents, the Director of the Border Department of the Kosovo Police, Mr. Guda, testified before this Committee as follows: "Facilitated check means that no one is

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[144] *See, e.g.*, testimony of Mr. Manaj, *op. cit.*, p. 15; and testimony of Mr. Susuri, *op. cit.*, p. 27. *See also, generally,* the testimony of Mr. Krasniqi, *op. cit.*

checked. He crosses the border without being checked."[145] And regarding the failure to enter the six Turkish nationals' data in the BMS, the Chief of the Immigration Unit of the Prishtina Airport, Mr. Fazliu, testified: "Facilitated border [crossing] means not entering them at all."[146]

In order to evaluate the officials' claim that these deviations from standard procedures were permissible, we must (1) explain what those standard procedures are, and (2) check whether the deviations from these standards, specifically in the two relevant respects, was permissible under the circumstances of the six Turkish nationals' expulsion.

With respect to document checks, Law No. 04/L-072 on State Border Control,[147] Article 15, para. 2, subpara. 1 states: "Detailed border control during departure consists of . . . ascertainment if the foreigner possesses a valid travel document or any other document designated for crossing state border." And in relation to entering data in the BMS, the Standard Operating Procedure – Border Management System (DOK-05/001/2017, 25 June 2017), provides that all persons and vehicles that enter and exit from the territory of the Republic of Kosovo must be registered in the BMS.[148] The Law on State Border Control, Article 15, para. 3, subpara. 3, also states: "detailed border checks during departure should also contain . . . checks in electronic databases."

We may now continue with the question: according to legal provisions on the facilitation of border checks, were the shortcuts in the process that we have observed in the case of the six Turkish nationals permissible? We can divide this question into two sub-questions: (1) in the circumstances of the six Turkish nationals, was a facilitated border crossing permissible in the first

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[145] Testimony of Mr. Guda, *op. cit.*, p. 112.

[146] Testimony of Mr. Fazliu, *op. cit.*, p. 7.

[147] This law has been amended and supplemented twice, first by (1) Law No. 04/L-214 on Amending and Supplementing the Law No. 04/L-072 on State Border Control and Surveillance, and once again by (2) Law No. 06/L-013 on Amending and Supplementing the Law No. 04/L-072 on State Border Control and Surveillance, Amended and Supplemented with the Law No. 04/L-214. Because the second law for amendment and supplementation entered into force only after the expulsion of the six Turkish nationals (on 8 May 2018, to be precise), the version of the law cited in this Report reflects only the changes put into place by Law No. 04/L-214.

[148] This information has been taken from the Report of the Police Inspectorate, p. 19.

place, and (2) if so, does the law provide that, in such facilitated border crossings, the two specific departures from the standard procedures are permissible?

According to Article 16, para. 1 of the Law on State Border Control ("Facilitation of Border Checks"): "Border checks can be performed on a reduced capacity due to extraordinary and unexpected circumstances," and paragraph 2 of that Article defines the term "extraordinary and unexpected circumstances" as follows: "As extraordinary and unexpected circumstances on paragraph 1 of this Article are considered to be those unforeseen occurrences which bring such a traffic intensity, where waiting time at the border point lasts excessively despite usage of all the possibilities and potential human, technical and organizational resource."

There is no evidence that, at the time when the six Turkish nationals were expelled, there was "a traffic intensity," nor that "waiting time at the border point lasted excessively despite usage of all the possibilities and potential human, technical and organizational resource." Therefore, in the case of the six Turkish nationals, there is no basis for the claim that the legal conditions for a facilitated border crossing were fulfilled.

But even if we assume, for the sake of argument, that these legal conditions had been fulfilled, the procedural shortcuts that we have observed in the case of the Turkish nationals would still have been illegal. For, nowhere in the Law on State Border Control is it provided that, in the facilitation of border checks, the control of travel documents or the entry of data into the BMS can be circumvented.

To the contrary, the legal procedures for facilitated border control expressly provide: "In carrying out border control in paragraph 1 of this Article [Facilitation of Border Checks] border police officer sets the square stamp *on travel documents* of nationals of third countries during the entry and departure from the Republic of Kosovo."[149] This entails that, even during facilitated border crossings, the police officer is still obligated to check travel documents.

Furthermore, Article 17, para. 1 of the Law, which applies to border crossings generally, including facilitated crossings, stipulates the following: "The border police officer in the performance of border check for foreigner citizens

[149] Law on State Border Control, Article 16, para. 6; emphasis added.

necessarily sets the square stamp on their travel document during the entry and departure from the Republic of Kosovo" (emphasis added).[150] In the case of the six Turkish nationals, the police officers did not respect this legal obligation.

In addition, it was noted in the Statement of Facts that the square stamp was placed in each of the forced removal orders. But all of the orders contain the following note: "This document does not constitute a document for establishing identity or citizenship."[151] As can be clearly seen from Article 17, para. 1 of the Law, placing the square stamp on such a document is illegal, since it is not a travel document, nor even an identifying document.[152]

Therefore, in all of the aforementioned respects, the shortcuts in the procedures of state border crossing in the case of the six Turkish nationals violated the law.

§ 8

We must now analyze the expulsion of the six Turkish nationals on the basis of the principle of *non-refoulement*, which "prohibits[s] the involuntary transfer of anyone to a country where he or she faces a real risk of persecution or serious violations of human rights" and constitutes "a fundamental principle of international law."[153] And the Constitution of the

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[150] The law provides for only four exceptions to the legal duty to place a square stamp on the foreigner's travel document. None of these exceptions was applicable in the case of the six Turkish nationals: (1) "travel documents of heads of state, and members of their delegation whose arrival is announced officially on diplomatic way (Article 17, para. 2, subpara. 1); (2) "pilots licenses or certificates of their crew members" (Article 17, para. 2, subpara. 2); (3) "in local flight permits" (Article 17, para. 2, subpara. 3); and (4) "with the request of third country nationals he can be released from placement of the square stamp during the entry and departure from the Republic of Kosovo, if placing it, can create serious difficulties for the person" (Article 17, para. 3).

[151] *See* p. 1 of each order.

[152] On this point, *see also* Report of the Police Inspectorate, pp. 18–19.

[153] International Commission of Jurists, TRANSNATIONAL INJUSTICES: NATIONAL SECURITY TRANSFERS AND INTERNATIONAL LAW, p. 11. *See also* Report of the Ombudsperson, paras. 93–114.

Republic of Kosovo expressly states: "The Republic of Kosovo shall respect international law."[154]

Besides its status as a part of customary international law,[155] the principle of *non-refoulement* also finds expression in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is directly applicable in the Republic of Kosovo.[156] According to that Convention: "No State Party shall expel . . . a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[157]

The principle of *non-refoulement* is also a mainstay of the jurisprudence of the European Court of Human Rights (henceforth: "ECtHR"). And in the constitutional system of the Republic of Kosovo, "[h]uman rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."[158]

According to the ECtHR, it is *categorically* prohibited for a state to expel an individual to a country where his rights under Article 3 of the European Convention on Human Rights (henceforth: "ECHR") would be violated.[159] Article 3 of the ECHR stipulates: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court has emphasized the absolute status of the principle of *non-refoulement* in the case of *Chahal v. the United Kingdom*, Application No. 22414/93 (Grand Chamber) (1996). In its judgment, the Court explained: "Article 3 enshrines one of the most fundamental values of democratic society . . . . The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in

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[154] Article 16, para. 3.

[155] *See* International Commission of Jurists, TRANSNATIONAL INJUSTICES, *op. cit.*, p. 11.

[156] *See* Constitution of the Republic of Kosovo, Article 22.

[157] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, para. 1.

[158] Constitution of the Republic of Kosovo, Article 53.

[159] The ECHR is also directly applicable in the Republic of Kosovo, according to Article 22 of the Constitution.

absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."[160] The Court emphasized that Article 3 of the Convention "makes no provision for exceptions and no derogation from it is permissible . . . , *even in the event of a public emergency threatening the life of the nation*."[161]

Then, linking this absolute prohibition to the matter of expulsion, the Court continued: "*The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases*. Thus, *whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion*."[162]

If the principle of *non-refoulement* is applicable even in cases in which an individual poses a threat of violent terrorism, then, *a fortiori*, the principle is also applicable in the case of the six Turkish nationals, who, as was established in the Statement of Facts, were neither terrorists nor violent.

In line with the principle of *non-refoulement*, then, we must ask whether there was a real danger that the six Turkish nationals would be subjected to torture or to inhuman or degrading treatment or punishment if expelled to Turkey. In order to evaluate the risk of their being subjected to such treatment, "the competent authorities shall take into account *all relevant considerations including . . . the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights*."[163]

It is undeniable that in Turkey, there exists a consistent pattern of this kind of gross, flagrant and mass violations of human rights. Human Rights Watch reported in January 2018, two months before the expulsion of the Turkish nationals, that: "People continued to be arrested and remanded to pretrial custody on terrorism charges, with at least 50,000 remanded to pretrial detention and many more prosecuted since the failed coup. Those prosecuted include journalists, civil servants, teachers and politicians as well as police

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[160] Para. 79. Regarding this case, *see also* Report of the Ombudsperson, paras. 98–100.

[161] *Chahal, op. cit.*, para. 79; emphasis added.

[162] *Id.*, para. 80; emphasis added. *See also Saadi v. Italy*, Application No. 37201/06 (Grand Chamber) (2008), para. 138.

[163] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3, para. 2.

officers and military personnel. Most were accused of being followers of the US-based cleric Fethullah Gülen. Turkey's government and courts say the Gülen movement masterminded the coup attempt, and deem it a terrorist organization, labeled the Fethullahist Terrorist Organization (FETÖ). Prosecutions of individuals charged with FETÖ membership often lacked compelling evidence of criminal activity."[164]

Likewise, a report of the United Nations Office of the High Commissioner for Human Rights on the impact of the state of emergency on human rights in Turkey, also published before the expulsion of the Turkish nationals, reveals: "Credible information . . . indicates interference of the executive with the work of the judiciary . . . ; arbitrary mass dismissals of civil servants and private sector employees; arbitrary closure of civil society organizations, including prominent human rights non-governmental organizations (NGOs) and media; arbitrary detention of people arrested under state of emergency measures; *the use of torture and ill-treatment during pretrial detention*; restrictions of the rights to freedoms of expression and of movement; arbitrary expropriation of private property; and methods of collective punishment targeting family members of individuals suspected of offences under the state of emergency."[165]

On the basis of the above information, there was a more than sufficient basis, *before* the expulsion, for finding that there was a real danger that the Turkish nationals would be subjected to torture or to inhuman or degrading treatment or punishment if expelled to Turkey.

Unfortunately, according to a family member who testified before this Committee, this danger materialized in the case of at least one of the Turkish nationals, who was subjected to *sleep deprivation*,[166] one of the forms of ill-

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[164] Human Rights Watch, *Country Summary: Turkey* (January 2018), p. 2.

[165] United Nations Office of the High Commissioner for Human Rights, *Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East, January–December 2017* (March 2018), para. 7; emphasis added.

[166] *See* testimony of Mr. Mustafa Savgji Gunakan, son of Mr. Hasan Huseyin Gunakan, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 5 December 2018*, p. 39.

treatment falling within the scope of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[167]

Therefore, on the basis of the foregoing evidence, the expulsion of the six Turkish nationals under the circumstances that existed at the time of the expulsion constituted a violation of customary international law; Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 3 of the ECHR.

Two causes of these violations can be noted.

First, Article 100, para. 2 of the Law on Foreigners (read in conjunction with para. 1, subpara. 5 of that Article), provides that "a foreigner may be removed, even though [there is a reasonable doubt that the foreigner, in his/her country of origin or another country, shall be punished by death, shall be subject to torture, inhuman or degrading treatment or punishment for discriminatory reasons], if his/her residence threatens public order and security, and constitutes a threat to national security." As has already been noted, the expulsion of foreigners when there exists such a danger *is categorically prohibited* according to customary international law and international human rights instruments directly applicable in the Republic of Kosovo. Therefore, Article 100, para. 2 of the Law on Foreigners, which permits expulsion in such circumstances, is incompatible with customary international law and the respective international human rights instruments.

Second, the Republic of Kosovo lacks an institutional mechanism that (1) is included in the expulsion process and (2) is charged with the responsibility of assessing whether there is a real danger that a foreigner may be subjected to torture or to inhuman or degrading treatment or punishment in the country where he is to be expelled.

It is essential for these two problems to be rectified by law, in order for such violations not to be repeated in the future.

§ 9

Another principle of customary international law is the following: "A State shall not resort to the expulsion of an alien in order to circumvent an ongoing

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[167] *See, e.g.*, United Nations Committee Against Torture, *Concluding observations on the combined third to fifth periodic reports of the United States of America* (19 December 2014), para. 17.

extradition procedure."[168] It is possible that this principle was violated in the case of the six Turkish nationals.

According to a message from the Ministry of Justice, addressed to the Chairman of this Committee, Turkey had submitted to that ministry requests to extradite two of the now-expelled Turkish nationals. These requests had been submitted before the persons in question were expelled and had then been sent for further processing to the Basic Prosecution of Prishtina, in compliance with Article 19, para. 2 of Law No. 04/L-213 on International Legal Cooperation in Criminal Matters ("If the Ministry considers that the request meets the formal requirements, it shall pass the request to the competent Basic Prosecution Office").[169]

According to the same communication from the Ministry of Justice, these requests had still not been processed when the Turkish nationals were expelled. But after the expulsion took place, the Basic Prosecution concluded that "the two extradition requests cannot be processed because they no longer have legal effect, because these two persons have been expelled from Kosovo according to the decision of the MIA."[170]

These facts are sufficient to raise a *reasonable doubt* that the two persons in question *may* have been expelled "in order to circumvent an ongoing extradition procedure," which would constitute a violation of customary international law, according to the principle cited above.

In order to establish such a violation definitively, however, it would need to be established: (1) that some state authority was aware of the extradition requests before the six Turkish nationals were expelled; and (2) that that state authority brought about the expulsion of the two persons in question with the aim of circumventing the extradition procedure.

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[168] *See* International Law Commission, "Draft articles on the expulsion of aliens, with commentaries" (2014), Article 12. This body has been charged by the General Assembly of the United Nations with the responsibility for the progressive development and codification of international law.

[169] *See* e-mail of 5 December 2018, from the Secretary General of the Ministry of Justice, Mr. Qemajl Marmullakaj.

[170] *Id*.

Unfortunately, this Committee does not have sufficient evidence to evaluate these points decisively.[171]

§ 10

As noted in the Statement of Facts, the airplane that transported the six Turkish nationals to Turkey belonged to the air transport company Birlesik Insaat of Turkey. Because Turkey is not a member state of the European Common Aviation Area Agreement,[172] the air transport company in question had to apply to the Ministry of Infrastructure for a flight permit.[173]

According to the Regulation on the Approval of Non-ECAA Charter and Taxi Flights, Article 6, para. 1: "If a non-ECAA charter or taxi operator meets all conditions stipulated in this Regulation and the Law No. 03/L-051 on Civil Aviation, the MI will issue an operating permit."

The Regulation sets out different conditions for charter and taxi flights. The only difference between these two kinds of flight is that charter flights utilize airplanes that are approved for the transport of more than ten persons, whereas taxi flights utilize airplanes that are approved for the transport of up to ten persons.[174]

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[171] The DCAM Director, Mr. Krasniqi, testified before the Committee that he was not aware of the extradition requests when he issued the decisions for the revocation of the residence permits (*see* his testimony, *op. cit.*, p. 45), and the then-Head of the Division for Foreigners, Mr. Manaj, testified to the same (*see* his testimony, *op. cit.*, p. 19). Based on the testimony of the then-KIA Director, Mr. Gashi, however, even though the extradition requests were a topic of discussion during his interview (*see especially* his testimony, *op. cit.*, pp. 26–27), it is still not clear whether he himself, or any other KIA official, was aware of the requests in question at the time when Mr. Gashi asked the DCAM to revoke or refuse to renew the six Turkish nationals' residence permits.

[172] *See* Regulation (MI) Nr. 02/2015 on the Approval of Non-ECAA Charter and Taxi Flights, Article 3, para. 1, subpara. 2 for a list of the agreement's member states.

[173] *See id.*, Article 5, para. 1 ("All non-ECAA charter and taxi flights must have a valid operating permit granted by the MI, prior to that flight departure").

[174] *See id.*, Article 3, para. 1, subpara. 6 and 16.

According to the application submitted by the air transport company Birlesik Insaat, the airplane to be utilized had ten seats.[175] Therefore, the company's application was considered an application for a taxi flight permit.

According to Article 5, para. 4 of the Regulation: "For non-ECAA taxi flights, the application for an operating permit shall be submitted to the MIA at least one (1) working day prior to the flight departure." Insofar as the final request of the company Birlesik Insaat was submitted on 28 March, for a flight permit for 29 March, that deadline was respected.[176] Likewise, according to documents in this Committee's possession, submitted by the Ministry of Infrastructure, the air transport company sent all of the required documents and information in compliance with Article 10 of the Regulation ("Documents and information for non-ECAA taxi flights"), which includes the requirement that: "Such operator shall inform the MI for the purpose of the flight and shall submit the flight's list of passengers."[177]

Therefore, because the company in question fulfilled all the conditions for receiving a taxi flight permit, the Ministry of Infrastructure was obligated to issue the permit, in accordance with Article 6, para. 1 of the Regulation, cited above.

Nevertheless, as the Minister of the Ministry of Infrastructure, Mr. Pal Lekaj, himself admitted during his testimony before this Committee, it is now widely known that the information the company submitted regarding the flight's aim ("private flight"), as well as the list of passengers (only one passenger arriving as well as departing), were false, and could have had the aim of concealing the flight's true purpose, which was the expulsion of six persons to Turkey.

The question can now be raised: what are the penalties, according to law, that could have been imposed on the air transport company in question? In Letter No. 56/2018 of 14 May 2018, from Mr. Berisha to Mr. Lekaj, p. 2, it is stated that: "If it is confirmed that the air transport company (ab)used the flight permit for purposes other than those for which it was requested, then

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[175] *See* e-mail of 28 March 2018, from Gozen Air Services Flight Support to the Department of Civil Aviation.

[176] On this point, *see also* testimony of then-Acting Director of the Department of Civil Aviation, Mr. Berisha, *op. cit.*, p. 33.

[177] Regulation on the Approval of Non-ECAA Charter and Taxi Flights, *op. cit.*, Article 10, para. 1.

on the basis of Law No. 03/L-051 on Civil Aviation, the MI can impose penalties, suspension and revocation of the issued license for a definite or indefinite time (Article 96.2), and an administrative fine of up to one million Euros (Article 97.2), whereas sanctions for criminal conduct are provided for by Article 99 of this law."[178]

Let us analyze these provisions in greater detail. Article 96 of the Law is applicable only "[i]f a person interferes with the CAA, the Ministry [of Infrastructure], the Ministry of Internal Affairs or the AAIC in the exercise of its authority."[179] This provision is clearly inapplicable in the case of the air transport company Birlesik Insaat, because no one has alleged that any person from that company "interfered with" the respective institutions in their exercise of authority.

But Article 97, para. 2 of the Law is applicable "[i]f a person conducting an operation in commercial air transport or international commercial air transport violates any provision of the present law or any rule, regulation, or order issued hereunder." This presumably includes the Regulation on the Approval of Non-ECAA Charter and Taxi Flights.

As has been indicated above, Article 10, para. 1 of this Regulation expressly requires that, together with an application for a taxi flight permit, the operator must submit to the Ministry of Infrastructure information regarding the flight's purpose, as well as a passenger list. Insofar as the air transport company in this case submitted false information on these points, the company can be considered to have violated the relevant provision of the Regulation. It can therefore be penalized in accordance with Article 97, para. 2, specifically, with an administrative fine of up to one million Euros.

As was revealed in the Statement of Facts, however, the Minister of the Ministry of Infrastructure, Mr. Lekaj, and the then-Acting Director of the Department of Civil Aviation, Mr. Berisha, informed this Committee that the Ministry did not take any steps to penalize the company in question, due to the fact that the requests that Mr. Berisha had sent to other institutions did not yield the necessary evidence—that is, evidence that could have confirmed that the company submitted false information, specifically in relation to the purpose of the flight and the number of passengers on that flight.

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[178] In Mr. Berisha's letter, Article 97.2 is cited erroneously as Article 67.2.

[179] Law on Civil Aviation, *op. cit.*, Article 96, para. 1.

TRANSLATION

Based on communications exchanged between Mr. Berisha and the other institutions—communications that were quoted from explicitly in the Statement of Facts—it is evident that the failure to obtain the necessary evidence was the result of ineffective cooperation between the Ministry of Infrastructure and those institutions. The type of cooperation called for this kind of case is clearly described in the Law on General Administrative Procedure, according to which: "A public organ may request the assistance . . . from another public organ, for the performance of one or more necessary procedural actions, within an administrative proceeding," and: "The administrative assistance is requested . . . when knowledge of facts, documents or other evidence in the possession of the other organ is required."[180]

But instead of asking the institutions in question whether they had information regarding how many passengers had been on the air transport company Birlesik Insaat's flight on 29 March, the Ministry of Infrastructure, in order to avoid any possible confusion, should have explicitly specified that the case had to do with the flight that transported the six Turkish nationals to Turkey. And if those institutions had understood that the Ministry's request had to do with that specific case, then instead of responding that they did not possess or were not sent such data, they should have submitted other relevant evidence, such as video recordings from the airport and police reports stemming from the operation. Such evidence could have helped the Ministry of Infrastructure establish that the flight in question (1) did not have a private purpose and (2) had more than one passenger, at least on departure.

The fact that the Ministry of Infrastructure and the institutions from which it requested information have still not managed to secure the necessary evidence—now more than eight months after the events transpired—reveals a bureaucratic clumsiness that, in this case, has led to a failure to impose the penalties provided for by law. This failure could very well have damaging consequences in the future for the rule of law, as it sends a clear message to the company in question, and to other similar companies, that violating the rules in cases such as this, will not be met with legal consequences.

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[180] Article 34, paras. 1 and 2, subpara. 3. It should be noted, however, that one of the institutions from which information was requested (the Limak company) is not a public institution.

C. Regarding the respect for legal procedures and international human rights standards in relation to the right to appeal

§ 1

The six Turkish nationals were subject to two different kinds of administrative acts:

(1) decisions revoking their residence permits due to state security; and

(2) orders for forced removal-removal ("urdhra për largim-dëbim me forcë").

Aside from these two kinds of acts, we noted in the Statement of Facts that, in the case of one of the six Turkish nationals, Mr. Osman Karakaya, who had applied for a renewal of his temporary residence permit on 27 March 2018, the DCAM still has not taken a final decision either rejecting or approving his application. This failure to take a decision constitutes a violation of Article 44, para. 1 of the Law on Foreigners, which provides: "In relation with the application of a temporary residence permit, DCAM shall decide upon within thirty (30) days from the date of receipt of the application."[181]

According to the Law on Foreigners, all of the acts mentioned above, including the still-to-be-issued decision in Mr. Karakaya's case, are subject to appeal. Against a decision on the revocation or refusal of a residence permit for reasons of state security, the foreigner has a right to appeal to the "competent court."[182] Because decisions on the refusal or revocation of residence permits are administrative acts, the "competent court" in this case

[181] Can it be argued that, due to the fact that Mr. Karakaya has already been expelled, the DCAM does not need to take a final decision regarding his application? Such an argument would be unsuccessful. As will be seen below, the failure to issue a decision refusing a residence permit has made it impossible for Mr. Karakaya to contest such a refusal with a lawsuit before the Basic Court. Such a lawsuit, if it were to be successful, would have important legal consequences, for example, for any eventual request for Mr. Karakaya's return to the Republic of Kosovo. Furthermore, a judgment in favor of Mr. Karakaya could serve as a basis for his family members to demand compensation for his expulsion, in the event that the court should decide that the factual basis for the KIA's claim that he posed a threat to national security was defective.

[182] Law on Foreigners, Article 6, para. 3.

is the Department of Administrative Matters of the Basic Court of Prishtina.[183]

The matter of the forced removal-removal orders ("urdhra për largim-dëbim me forcë") is more complex. According to the Law on Foreigners, a forced removal order ("urdhër për largim me forcë") and an order for removal ("urdhër i dëbimit") are subject to different procedures for the exercise of the right to appeal. As was indicated above, the foreigner has a right to appeal a forced removal order ("urdhër për largim me forcë") to the Appeals Commission,[184] whereas against a removal order ("urdhër i dëbimit"), the foreigner has a right to appeal to the Basic Court, whose decision can then once again be appealed to the Court of Appeals.[185] In the amalgamated form of the forced removal-removal order ("urdhër për largim-dëbim me forcë") that was issued against the six Turkish nationals, the legal guidance on the second page of each order states: "This forced removal-removal order [urdhër për largim-dëbim me forcë] is an administrative act, and can be contested with an appeal *to the Appeals Commission for Foreigners*" (emphasis added). Thus, from the perspective of the appeals process, the amalgamated order follows the model of the forced removal order ("urdhër për largim me forcë") rather than the removal order ("urdhër i dëbimit").

§ 2

As was made clear in the Statement of Facts, the six Turkish nationals did not have the opportunity to exercise their right to file an appeal to the requisite authorities before they were the expelled on 29 March 2018. The question that must now be posed is: Was this lack of opportunity to exercise their legal remedies lawful? This question can be posed in connection with all of the types of acts mentioned above:

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[183] *See* Law No. 03/L-199 on Courts, Article 14, para. 1 ("The Administrative Matters Department of the Basic Court shall adjudicate and decide on administrative conflicts according to complaints against final administrative acts and other issues defined by Law").

[184] Law on Foreigners, Article 98, para. 1. The Appeals Commission on Foreigners is appointed by the Government (*see id.*, Article 9, para. 3) and is governed by Administrative Instruction (GRK) No. 01/2015 on the Composition, Tasks, Responsibilities and Decision Making Procedure of the Appeals Commission on Foreigners.

[185] Law on Foreigners, Article 101, paras. 1 and 2.

(1) decisions for the *revocation* or *refusal* of their residence permits due to state security; and

(2) orders for forced removal-removal ("urdhra për largim-dëbim me forcë").

In the case of Mr. Karakaya, he had applied for the renewal of his residence permit on 27 March 2018. Therefore, at least up until the day of his expulsion, the 30-day deadline for taking a decision on his application had not passed. But given that such a decision has still not been made even after his expulsion, Mr. Karakaya has unlawfully been deprived of his lawful right to appeal the rejection of his application.[186]

And regarding the decisions for *revoking* the residence permits of those who had valid permits, these decisions were issued on 23 March, six days before the expulsion. It will now be argued that, within this six-day period, the Turkish nationals would have had sufficient time to appeal those decisions, but for the failure of state authorities to carry out their legal obligations.

As seen above, the destination for such an appeal would have been the Department of Administrative Matters of the Basic Court of Prishtina. The Turkish nationals would have been able to request from this court, or directly from the DCAM, the suspension of the administrative act until the court rendered its final decision, "if the execution shall damage the plaintiff, whereas postponing would not bring any huge damage to the contested party, respectively the interested person."[187]

The court or the DCAM would have had to decide on such a request *within three days* upon receiving it.[188] Therefore, in the six-day period between the day the decisions were issued and the day on which the expulsion was carried out, there existed a procedural path—however narrow—for staying the execution of the revocations and, consequently, for staying the expulsion itself.

The problem in this case, then, was not an absence of *time*. The problem was an absence of *notification*. Even though the decisions had been issued on 23

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[186] As has been previously explained, such an appeal, if it turns out to be successful, could have important legal consequences.

[187] Law No. 03/L-202 on Administrative Conflicts, Article 22, para. 2. *See also* Article 22, para. 6.

[188] *See id.*, Article 22, para. 7.

March, the Turkish nationals were not notified regarding them until the day of the expulsion, and as a result, they were effectively denied their right to appeal those decisions—including the right to request a stay of the execution of those decisions.[189]

The failure to notify the parties in good time constituted a violation of the law. According to the Law on General Administrative Procedure, "[u]nless otherwise explicitly provided by law, the public organ is free to determine the most appropriate form of notifying an administrative act,"[190] but importantly, this discretion is not unlimited. Specifically, the law requires that the form of the notification be determined "by taking into consideration *the legal protection that the party is entitled to*."[191] On the basis of this principle, the DCAM was obligated to notify the Turkish nationals of the decisions that were taken, in such a way and in such a form that would have secured them the opportunity to protect their legal interests. And that did not happen.

We saw in the Statement of Facts that Mr. Manaj, the then-Head of the Division for Foreigners of the DCAM, offered a potential justification for the failure to notify the parties immediately: in cases involving threats to national security, "the decision is delivered [to the party] through the mechanism of force, through the police, and he is isolated," because "the party cannot be made aware that he is a danger to national security, because he could first reveal an official secret or he could achieve his planned aim."[192]

This justification is unsuccessful. Even if we assume that the Turkish nationals had to be isolated before being notified of the decisions that were issued against them, that does not explain why the DCAM did not inform the Police *immediately* after the decisions were issued, instead of waiting until 28 March. In the meeting held on that day (in which the two KIA officers, the DCAM Director, the Director of the Border Police, and the DMF Director took part), it was decided that the Turkish nationals would be notified of the revocation and non-renewal of their residence permits *during the operation for their expulsion*. Such a form of notification had the *effect*, even if not the

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[189] In fact, only four parties were notified of the decisions on the day of the expulsion, because Mr. Hasan Huseyin Demir was not among those expelled, due to the mistake in identifying him, and was therefore not notified that day.

[190] Law No. 05/L-031 on General Administrative Procedure, Article 108, para. 2.

[191] *Id.*, Article 108, para. 3; emphasis added.

[192] Testimony of Mr. Manaj, *op. cit.*, p. 21.

aim, of depriving the persons in question of the opportunity to exercise their right to appeal. If the DCAM had involved the Police immediately after the decisions were issued, it would have been possible both to isolate and to notify the parties as soon as possible, with the aim of securing "the legal protection that the part[ies] [are] entitled to."

The DCAM's failure to take these necessary steps in coordination with the Kosovo Police constituted a violation of the Law on General Administrative Procedure and had the consequence of denying the Turkish nationals their lawful right to appeal the revocation of their residence permits.

§ 3

The second kind of administrative act issued against the six Turkish nationals was the amalgamated forced removal-removal order ("urdhër për largim-dëbim me forcë"). As we have already noted, this kind of order was illegal, because the Law on Foreigners specifies only two different kinds of orders—the forced removal order ("urdhër për largim me forcë") and the removal order ("urdhër i dëbimit")—and does not provide for any possibility of amalgamating the two. It will now be seen that this illegal amalgamation of the two kinds of order, again, had at least the *effect*, even if not the *aim*, of restricting as far as possible the Turkish nationals' opportunities to exercise their right to appeal those orders.

For each type of order, two questions may be posed:

(1) Is it executed immediately?

(2) Is it possible for an appeal to suspend the execution of the order?

Both questions are important regarding the opportunity of a party effectively to exercise his legal remedies. First, if the order is executed immediately, then the party has very little time—that is, only the period in which the order is in the process of being executed—to exercise his right to appeal. And second, if an appeal does not suspend the execution of the order, then even if the party files an appeal before the requisite administrative or judicial authority, he risks being removed from the country before a decision is taken on that appeal.

A detailed analysis of the Law on Foreigners shows that each type of order provided for by law is in one respect *favorable* to the exercise of the right to appeal, and in another respect *unfavorable* to the exercise of that right.

TRANSLATION

Regarding the *order for forced removal* ("urdhër për largim me forcë"), the Law on Foreigners provides: "The appeal against the decision on the removal by force, does not suspend the execution of the warrant removal by force."[193] This is *unfavorable* to the exercise of the right to appeal, because during the time that the appeal is being reviewed by the requisite authority, there is a risk that the party will in the meantime be forcibly removed from the country. But on the other hand, the law does not specify that the forced removal order is to be executed immediately.[194] This aspect is *favorable* to the exercise of the right to appeal, because the party has more time at his disposition to exercise that right.

Regarding the *removal order* ("urdhër i dëbimit"), the situation is exactly the opposite in both respects. On the one hand, the law makes possible the immediate execution of the removal order in specific cases: "The removal order shall be enforced immediately, in case the presence of the foreigner constitutes a threat to public order and state security."[195] This is *unfavorable* to the exercise of the right to appeal, because that right can be exercised only during the short time during which the expulsion is in the process of being carried out. But on the other hand, the law leaves open the possibility that an appeal could suspend the execution of the order. An appeal against a removal order is submitted to the Basic Court, and as we have already established, that court has the power to suspend the execution of administrative acts until it takes a final decision. This is *favorable* to the exercise of the right to appeal: if, during the expulsion process, the party manages to contact legal counsel, then he can submit an urgent request to the court to stay the execution of the expulsion.

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[193] Law on Foreigners, Article 98, para. 1.

[194] On this point, the Report of the Police Inspectorate contains a misquotation. According to that Report, Article 99, para. 2 of the Law on Foreigners provides that "'the removal order [urdhër për *largim*] shall be enforced immediately, in case the presence of the foreigner constitutes a threat to public order and state security'" (Report of the Police Inspectorate, p. 14), whereas in fact, this provision refers not to the *forced removal* order ("urdhër për *largim me forcë*") but to the *removal* order ("urdhër i *dëbimit*"). The exact words of the relevant provision are: "The *removal* order [urdhër i dëbimit] shall be enforced immediately, in case the presence of the foreigner constitutes a threat to public order and state security" (emphasis added).

[195] Law on Foreigners, Article 99, para. 2.

TRANSLATION

But on the basis of the evidence made available to this Committee, it turns out that the DMF, in issuing an amalgamated forced removal-removal order ("urdhër për largim-dëbim me forcë"), *combined into a single order both of the aspects that are unfavorable to the exercise of the right to appeal*. That is, the amalgamated orders (1) were immediately executed, thereby following the model of the removal order ("urdhër i dëbimit"),[196] and (2) stipulated that an appeal would not suspend their execution, thereby following the model of the forced removal order ("urdhër për largim me forcë").[197] The following table facilitates comparison of the various kinds of order:

	Removal order ("Urdhër i dëbimit")	*Forced removal order ("Urdhër për largim me forcë")*	***Amalgamated forced removal-removal order ("Urdhër për largim-dëbim me forcë")***
Immediate execution?	Yes	No	**Yes**
Possibility of suspending execution during exercise of the right to appeal?	Yes	No	**No**

As seen in this table, the DMF, in issuing the amalgamated forced removal-removal orders ("urdhra për largim-dëbim me forcë"), restricted in both

[196] *See* Report of the Police Inspectorate, p. 14 ("This Directorate [the DMF], in light of the established danger, concluded that the variant of *immediate* forced removal of the Turkish nationals had to be considered. This conclusion was based on Article 99, paragraph 2 of the Law on Foreigners"; emphasis added).

[197] On the first page of each forced removal-removal order ("urdhër për largim-dëbim me forcë"), it is written: "An appeal does not prohibit the execution of this decision."

possible ways the six Turkish nationals' right to appeal those orders. Insofar as such an amalgamated order is not provided for anywhere in the Law on Foreigners, these restrictions on the right to appeal constituted a violation of law.[198]

§ 4

Up to now, we have found that the responsible authorities, specifically the DCAM and the DMF, as a result of their actions and omissions, limited the Turkish nationals' right to exercise their legal remedies. And we have also found that these limitations on their right to appeal were unlawful.

We can now move on to assess whether the Turkish nationals' lack of opportunity to exercise their legal remedies before being expelled constituted a violation not only of the *law* but also of *constitutional and international human rights standards*.

In this respect, Article 1, para. 1 of Protocol No. 7 to the ECHR provides that: "An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

> (a) to submit reasons against his expulsion,
>
> (b) to have his case reviewed, and
>
> (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority."

Insofar as the six Turkish nationals were expelled before exercising their right to appeal, none of the three aforementioned rights was respected in their case.

But here, the second paragraph of Protocol No. 7, Article 1 must also be considered and carefully analyzed. That paragraph states: "An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, *when such expulsion is necessary in the interests of public order or is grounded on reasons of national security*."

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[198] As we saw in the Statement of Facts, these restrictions also had a negative effect on the conduct of the police officers: at least two police officers testified that they had not informed the Turkish nationals of their rights precisely because, in their opinion, an attorney would not have been able to help them in the case at hand, given that an appeal would not have suspended the orders' execution.

Thus, the key question in the case of the six Turkish nationals is: insofar as they had been considered a threat to national security, was it permissible, on the basis of the provision just cited, for them to be expelled before exercising the three rights provided for in paragraph 1.(a), (b) and (c)?

The answer to this question is *negative*, for two reasons.

First, Protocol No. 7, Article 1 is not the only provision of the Convention that guarantees the right to appeal in the expulsion process. To the contrary, Article 13 of the Convention also offers this guarantee in specific cases. Article 13 states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority[.]"Along the same lines, the Constitution of the Republic of Kosovo, Article 32, provides: "Every person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests[.]"

As we have noted above, in the constitutional system of the Republic of Kosovo, "Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."[199]

In the case at hand, ECtHR decisions specify exactly in what circumstances Article 13 guarantees the right to appeal in the expulsion process. In the case of *Al-Nashif v. Bulgaria*, Application No. 50963/99 (Grand Chamber) (2002), para. 133, the Court held that: "*Quite apart from the general procedural guarantees which Article 1 of Protocol No. 7 to the Convention . . . provides in all cases of expulsion of aliens*, where there is an arguable claim that such an expulsion *may infringe the foreigner's right to respect for family life*," then Article 13 in conjunction with Article 8 of the Convention ("Everyone has the right to respect for his . . . family life"), "requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality" (emphasis added).

It should also be emphasized that, according to the ECtHR, the applicant in *Al-Nashif* should have enjoyed the right to appeal before being expelled, *even*

[199] Constitution of the Republic of Kosovo, Article 53.

though state authorities had concluded that he posed a threat to national security.[200]

Furthermore, in the case of *Lupsa v. Romania*, the ECtHR explained that "the removal of a person from a country *where close members of his family are living* may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention[.]"[201]

From these two ECtHR precedents, we can extract the following two principles, respectively:

(1) If a foreigner lives in a country with close members of his family, then there exists a possibility that his expulsion would violate his right to respect for family life (*Lupsa*).

(2) If there exists a possibility that a foreigner's expulsion would violate his right to respect for family life, then Article 13, together with Article 8, of the ECHR guarantees him the right to appeal before being expelled (*Al-Nashif*).

From these two principles a third principle follows as a matter of logical consequence:

(3) If a foreigner lives in a country with close members of his family, then Article 13, together with Article 8, of the ECHR guarantees him the right to appeal before being expelled.

According to evidence in this Committee's possession,[202] all of the Turkish nationals who were subjected to forced removal-removal orders ("urdhra për largim-dëbim me forcë"), as well as Mr. Hasan Huseyin Gunakan, who was mistakenly expelled, had lived in the Republic of Kosovo with close members of their families. It follows that, according to the principles above, on the basis of Article 13, together with Article 8, of the ECHR, they should have enjoyed the right to appeal before being expelled. Therefore, their expulsion before exercising that right constituted a violation of these Articles—quite apart from Article 1 of Protocol No. 7 to the ECHR.

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[200] *See Al-Nashif, op. cit.*, para. 22. On this point, *see also C.G. and Others v. Bulgaria*, Application No. 1365/07 (2008), para. 56.

[201] *Lupsa v. Romania*, Application No. 10337/04 (2006), para. 25; emphasis added.

[202] The attorney of the family members of the expelled persons, Mr. Vokshi, has submitted to this Committee copies of the family members' residence permits.

§ 5

There is also another reason why the expulsion of the six Turkish nationals before exercising the right to appeal was impermissible. According to constitutional and international human rights standards, in the case of an expulsion for reasons of national security, the right to appeal before being expelled can be restricted *only if those reasons make it impossible for that right to be respected*. What is *not* permitted is for the right of appeal to be denied *automatically* whenever there is a case of expulsion for reasons of national security. Rather, those reasons would have to rise to such a level of seriousness that the expulsion would have to be carried out before the person expelled is able to challenge his expulsion.

Thus, the International Covenant for Civil and Political Rights stipulates that a foreigner can be expelled before exercising his right to appeal only "*where compelling reasons of national security . . . require*[.]"[203] Along the same lines, the Constitution of the Republic of Kosovo states: "Fundamental rights and freedoms guaranteed by this Constitution may [only] be limited *to the extent necessary*[.]"[204]

In the case of the six Turkish nationals, the Committee does not possess any evidence showing that there were "compelling reasons of national security" that would have justified their expulsion *before exercising their right to appeal*. Likewise, the Committee does not possess any evidence showing that such a measure was "necessary" for any other reason.

To the contrary, as was established in the Statement of Facts, this Committee has three pieces of evidence showing that whatever threat the nationals in question might have posed was not of a terrorist or violent nature. And furthermore, it should also be mentioned that the Law on Foreigners makes it possible "to keep the foreigner in a detention center . . . until the removal order is enforced."[205] Thus, even if the Turkish nationals had genuinely been dangerous in a terrorist or violent manner, they could have been detained and isolated in the Detention Center during the entire time that they were exercising their right to appeal. In light of these facts, it

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[203] Article 13; emphasis added.

[204] Constitution of the Republic of Kosovo, Article 55, para. 2; emphasis added. The word "only" ("vetëm") has mistakenly been omitted from the English translation of the Constitution.

[205] Law on Foreigners, Article 99, para. 1, subpara. 1.

cannot be claimed that expelling them *without even giving them the chance to appeal*, was a "necessary" measure, or that there were "compelling reasons of national security" for such a measure.[206]

For these reasons, the expulsion of the six Turkish nationals before they had a chance to exercise their legal remedies constituted a violation of the International Covenant on Civil and Political Rights, Article 13, and the Constitution of the Republic of Kosovo, Article 55, para. 2—again, quite apart from Article 1 of Protocol No. 7 to the ECHR.

§ 6

As was established in the Statement of Facts, the Turkish nationals, through their attorney, exercised their right to appeal *after* being expelled, even though they did not have the opportunity to exercise it *before* their expulsion. But even during the appeals process in the months following the expulsion, some of their other human rights were violated, based on constitutional and international standards.

These violations were the direct result of the Law on Foreigners, Article 6, para. 2, which states: "In case of rejection or revocation of a residence permit to a foreigner for the reasons related to national security, a decision shall be issued *without justification* with regard to the circumstances for which such a decision has been issued."[207]

In line with this provision, the decisions revoking the Turkish nationals' residence permits do not have accompanying justifications, stating only that they have been issued "[o]n the basis of Article 6 of Law No. 04/L-219 on Foreigners, based on evidence in the possession of the competent security institutions."[208]

This complete absence of justification violates two relevant human rights standards, a point that has also been raised by the judgments of the Basic

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[206] This assessment is in line with that of the Prime Minister of the Republic of Kosovo, Mr. Ramush Haradinaj, who has deemed a legal violation the fact that the operation for the expulsion of the Turkish nationals was carried out in an excessively hasty manner. *See* his testimony before this Committee, *Transcript of the Meeting of the Parliamentary Investigative Committee of the Assembly of the Republic of Kosovo, held on 30 November 2018*, p. 30.

[207] Law on Foreigners, Article 6, para. 2.

[208] *See* each of the decisions revoking the residence permits, p. 1.

Court of Prishtina. As indicated in the Statement of Facts, that court has, up until now, vacated three decisions on the revocation of the Turkish nationals' residence permits. The relevant human rights standards are the following.

First, Article 1, paragraph 1, subparagraph (a) of Protocol No. 7 to the ECHR guarantees each individual the right "to submit reasons against his expulsion." But in order to exercise that right, an individual must be provided sufficient factual information relating to the reasons for his expulsion, in order to then be in a position to contest those reasons effectively. Moreover, the court or independent authority assessing the individual's appeal must also have sufficient information to undertake a genuine review of the reasons offered by the state, with the aim of assessing the expulsion's lawfulness.

Second, Article 13 of the ECHR, cited previously, also specifies that legal remedies must be "*effective*." But, once again, these legal remedies cannot be effective if the individual is not provided the opportunity effectively to contest the claims against him. And in order effectively to contest those claims, the individual must have sufficient information regarding the factual grounds of those claims. And just as with Article 1 of Protocol No. 7, legal remedies cannot be effective unless the court or independent authority handling the case has sufficient information to assess the claims against the individual in question.

These principles find clear support in ECtHR jurisprudence. For example, in the case of *Lupsa v. Romania*, cited previously, the Court noted that "the authorities failed to provide the applicant with the slightest indication of the [national security] offence of which he was suspected,"[209] and that this failure on the part of the authorities violated the principle that "any provision of the Convention or its Protocols must be interpreted in such a way as to guarantee rights which are *practical and effective as opposed to theoretical and illusory*."[210] On this basis, the Court found that the failure of the authorities

[209] *Lupsa, op. cit.*, para. 59.

[210] *Id.*, para. 60; emphasis added. *See also Nolan and K. v. Russia*, Application No. 2512/04 (2009), para. 71 (finding that, in line with Article 1 of Protocol No. 7, "[t]he individual must be able to challenge the executive's assertion that national security is at stake").

to provide the applicant sufficient information relating to the claims against him constituted a violation of Article 1 of Protocol No. 7 to the ECHR.[211]

The situation of the Turkish nationals is fully analogous in the relevant respect. In their case as well, the authorities failed to give them "the slightest indication of the [national security] offence of which he was suspected." The fact that the Turkish nationals did not receive any information related to their offense against national security deprived them of the right to submit reasons against their expulsion. As a result, Article 6, para. 2 of the Law on Foreigners, which expressly requires such lack of information in cases having to do with national security, is incompatible with Article 1 of Protocol No. 7 to the ECHR.

The Court followed the same line of reasoning in the context of Article 13 of the Convention, concerning the right to effective remedies. In the case of *C.G. and Others v. Bulgaria*, the ECtHR noted, in connection with one of the applicants in that case, that "the decision to expel the . . . applicant made no mention of the factual grounds on which it was made. It simply cited the applicable legal provisions and stated that he 'present[ed] a serious threat to national security'; this conclusion was based on unspecified information contained in a secret internal document."[212]

In these circumstances, "[l]acking even outline knowledge of the facts which had served as a basis for this assessment, the . . . applicant was not able to present his case adequately in the ensuing appeal to the Minister of Internal Affairs and in the judicial review proceedings."[213] For these reasons, the Court found that the applicant "did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities" and was thereby denied his right to effective remedies, guaranteed by Article 13, together with Article 8, of the ECHR.[214]

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[211] *Lupsa, op. cit.*, para. 61. *See also Ljatifi v. the Former Yugoslav Republic of Macedonia*, Application No. 19017/16 (2018), para. 39 (finding a violation of Article 1 of Protocol No. 7 for the reason that: "Lacking even an outline of the facts which had served as a basis for that assessment [that she posed a threat to national security], the applicant was not able to present her case adequately in the ensuing judicial review proceedings").

[212] *C.G. and Others, op. cit.*, para. 46.

[213] *Id.*, para. 49.

[214] *Id.*, para. 50.

Once again, the situation of the Turkish nationals is analogous in all relevant respects. Just as in *C.G. and Others*, in the Turkish nationals' case as well, the decisions revoking their residence permits did not mention the factual grounds on which they had been issued. Those decisions simply cited the applicable legal provisions and asserted that the Turkish nationals posed a threat to national security. Likewise, just as in the ECtHR's case, this conclusion was based on unspecified information contained in a secret internal document.

In these circumstances, "lacking even outline knowledge of the facts which had served as a basis" for the assessment that they constituted a threat to national security, the Turkish nationals did not have the opportunity to "present [their] case adequately . . . in the judicial review proceedings." In the absence of this factual information, then, they did not enjoy even "the minimum degree of protection against arbitrariness on the part of the authorities." Therefore, the authorities' failure to provide them with the relevant information deprived them of their right to effective legal remedies, guaranteed by Article 13 of the ECHR.

Regarding this provision of the ECHR, as well as Article 1 of Protocol No. 7 to the ECHR, the ECtHR's jurisprudence also emphasizes the importance not only that the *individual* but also that the *court or independent authority assessing the individual's case* have sufficient information to evaluate the claim that he poses a threat to national security. The Court's judgments in the cases of *C.G. and Others* (relating to Article 13 of the ECHR) and *Ljatifi* (relating to Article 1 of Protocol No. 7) both hold that "the independent authority or court must be able to react in cases where the invocation of this concept [the concept of national security] has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary."[215]

In the case of the six Turkish nationals, the complete absence of justification in the decisions revoking their residence permits made it impossible for the court—specifically, the Basic Court of Prishtina—to assess whether the DCAM's invocation of the concept of national security "has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary." Furthermore, a rigorous judicial review of the lawfulness of the invocation of the concept of

[215] *Ljatifi, op. cit.*, para. 35; *C.G. and Others, op. cit.*, para. 40.

"national security" is even more necessary in the current case, considering that the DCAM itself admitted that it implemented the KIA's request *automatically*, without analyzing at all whether the information offered in that request was consistent with the legal definition of the concept of "a threat to national security." As the Basic Court of Prishtina found, in the absence of sufficient information, "an assessment of the lawfulness of the contested order cannot be conducted."[216]

For the foregoing reasons, the Law on Foreigners, Article 6, para. 2, by depriving the Turkish nationals of their right to be informed about the factual grounds of the KIA's assessment that they posed a threat to national security, is incompatible with Article 13 of the ECHR, and Article 1, para. 1 of Protocol No. 7 to the ECHR.

D. Regarding the notification or failure to notify the requisite officials about the expulsion

§ 1

As noted in the Statement of Facts, the Prime Minister of the Republic of Kosovo, Mr. Haradinaj, demanded that the then-Minister of the MIA, Mr. Sefaj, and the then-KIA Director, Mr. Gashi, resign immediately from their positions, due to the fact that they had not informed him in advance of the six Turkish nationals' detention and expulsion. According to the "Timeline of the event of the detention and expulsion of the six Turkish citizens," submitted by the Prime Minister to this Committee: "On the basis of legislation, it was an obligation of the Minister of Internal Affairs and the KIA Director to inform me in advance of the operation. That did not happen."[217]

But this document does not cite any law or other normative act that could serve as a basis for the claim that Messrs. Sefaj and Gashi violated the law by not informing the Prime Minister of the operation in question.

Regarding Mr. Sefaj, the only normative act that could be relevant in this respect is Regulation No. 09/2011 of Rules and Procedure of the Government of the Republic of Kosovo. According to this Regulation: "The Prime Minister may require any individual Minister to report to him in writing on his work

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[216] Judgments of the Basic Court of Prishtina, A.no. 1033/2018, *op. cit.*, p. 8; and A.no. 1030/2018, *op. cit.*, p. 7.

[217] The Prime Minister, Mr. Haradinaj, "Timeline of the event of the detention and expulsion of the six Turkish citizens," p. 2.

and on the work of the ministry which he heads, and provide him with information and reports on his area of work and other information important for the running of the Government."[218]

But this provision is not sufficiently specific to establish definitively a violation on the part of Mr. Sefaj. Two different views are possible in this regard.

On the one hand, even though the Minister is obligated to "provide [the Prime Minister] with information and reports on his area of work and other information important for the running of the Government," surely not *all* information can be provided, nor should it be: ministers must take care to select what information they provide to the Prime Minister, and specifically, to provide him only with that information which rises to a sufficient level of importance that it would justify the time spent in transmitting, analyzing, and discussing that information, whether verbally or in writing. What is relevant here is not only the minister's time, but especially the Prime Minister's time. And at this point, the following question may be posed: how can it be determined whether a piece of information is so important that it gives rise to an obligation, in accordance with the provision cited above, to notify the Prime Minister regarding that piece of information? This question does not have a definitive answer, and the Committee has not received any evidence showing that it had been the usual practice to inform the Prime Minister of every revocation or refusal of a residence permit for reasons of national security.

But on the other hand, it could at least be argued, not without reason, that threats to national security are sufficiently important that the Prime Minister should, in principle, be informed every time a minister is made aware of such a threat.

As can be seen, the lack of clarity in the provision in question demonstrates the need for a more specific definition of precisely what kinds of information give rise to an obligation to report to the Prime Minister.

Mr. Gashi's situation is analogous. Both the Constitution and the Law on the KIA specify that the KIA Director is obligated to keep not only the Prime Minister but also the President informed. According to the Constitution,

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[218] Regulation No. 09/2011 of Rules and Procedure of the Government of the Republic of Kosovo, Article 25, para. 1.

Article 129, para. 4: "The President of the Republic of Kosovo and the Prime Minister shall receive the same intelligence information." Likewise, the Law on the KIA, Article 5, para. 7, provides: "The KIA Director shall: (i) be used as adviser to the President and Prime Minister of the Republic of Kosovo for intelligence matters related to the security of Kosovo; (ii) brief the President and the Prime Minister of the Republic of Kosovo on the activities of the KIA; (iii) provide intelligence related to security to the President and the Prime Minister of the Republic of Kosovo[.]"

But just as in Mr. Sefaj's case, two different views are possible here as well.

On the one hand, it should be emphasized that, despite the legal obligations cited above, the KIA Director must take care in selecting only that information which is sufficiently important that it must be provided to the Prime Minister and the President. The law does not impose an obligation to provide the Prime Minister and the President with *all* information in the KIA's possession, however unimportant it might be. And again, just as in Mr. Sefaj's case, an obligation to provide information without limit would be a burden not only on the KIA Director but also on the Prime Minister and the President themselves, considering the large volume of information gathered by the KIA. Similarly, considering the large number of activities in which the KIA is involved, it would be unreasonable for the Prime Minister and the President to be informed regarding *all* of these activities, however quotidian they may be. And as Mr. Gashi has testified, "it has not been a practice in the case of forced removals to go to the Prime Minister's Office or the President's Office and inform them that today or tomorrow, or at some hour this or that person will be forcibly removed from Kosovo."[219]

But on the other hand, as with Mr. Sefaj, it could be argued, not without reason, that the case of the six Turkish nationals, given the KIA's finding that they constituted a threat to national security, was more important than the typical forced removal case. And thus, in this specific case, it might be urged that Mr. Gashi should have made the Prime Minister aware of the operation in question.

The problem, once again, is how to define specifically what information and activities of the KIA are so important that the KIA Director is obligated to inform the President and Prime Minister about them. Here as well, then,

[219] Testimony of Mr. Gashi, *op. cit.*, p. 5.

there is a demonstrable need for a more specific definition of the legal obligation to inform the heads of state about activities the KIA conducts, and about the information it gathers.

Regarding the constitutional requirement, that "[t]he President of the Republic of Kosovo and the Prime Minister shall receive the same intelligence information," the Committee does not have evidence that could serve as a basis for establishing whether this provision has been violated in the case of the expulsion of the six Turkish nationals. As we saw above, the Prime Minister has officially stated that he had not been informed in advance. But the Committee was not given the opportunity to interview the President, Mr. Hashim Thaçi, and it has not been provided with any other piece of evidence either *confirming* or *denying* that the President had advance knowledge of the operation in question.

§ 2

There is another legal provision that more clearly specifies the obligation to inform in cases such as that of the six Turkish nationals—but it does not concern notification of the heads of state. Rather, Article 25, para. 2 of the Law on the KIA provides: "If in the performance of its functions, the KIA establishes that grounds exist for suspicion that a certain person or entity has committed or is committing a criminal offense, or is preparing or organizing a criminal offense subject to public prosecution, *it is bound to notify the General Director of the Kosovo Police and the competent public prosecutor*" (emphasis added).[220]

According to evidence in this Committee's possession, the State Prosecution had not been informed about the six Turkish nationals, nor about the threat that they could have posed to national security, until after they were

[220] In specific cases, the KIA Director can submit a request to the Prosecution that the Police temporarily refrain from taking pre-criminal investigative measures (*see* Article 25, para. 3 of the Law on the KIA), but this does not change the fact that, according to Article 25, para. 2, the KIA is obligated in the first place to inform the Police Director and the competent prosecutor whenever there exists a reasonable suspicion that a criminal offense has been committed.

expelled.[221] This means that the then-KIA Director, Mr. Gashi, did not fully respect the legal requirements specified in the provision cited above.

The question of whether Mr. Gashi gave advance notice to the then-Police Director, Mr. Shpend Maxhuni, regarding the six Turkish nationals is more complicated, because the Committee has received two contradictory pieces of evidence on this point. On the one hand, Mr. Gashi testified that Mr. Maxhuni was one of the persons who had been informed in advance of the operation for expelling the six Turkish nationals,[222] whereas Mr. Maxhuni claimed during his own testimony that he had not been made aware of the case until after the operation was completed on 29 March.[223]

Due to this contradictory testimony, we cannot definitively establish whether Mr. Gashi acted in compliance with his obligation to inform the Director of the Kosovo Police regarding the case.

IV. Recommendations

On the basis of the foregoing legal assessment, I recommend that the Assembly of the Republic of Kosovo exercise its legislative authority:

(1) To amend and supplement Law No. 04/L-219 on Foreigners, in order to prohibit the expulsion or extradition of foreigners to countries where they may be subjected to torture or to inhuman or degrading treatment or punishment, in compliance with the international law principle of *non-refoulement*.

(2) To establish an institutional mechanism, or to charge an existing institution, with the responsibility of assessing whether foreigners, if expelled or extradited to a given country, would be subjected to torture or to inhuman or degrading treatment or punishment in that country.

(3) To amend and supplement Law No. 04/L-219 on Foreigners, in order to obligate the Department of Citizenship, Asylum and Migration of the Ministry of Internal Affairs to inform foreigners of the factual

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[221] *See* e-mail of 4 December 2018, from Chief Prosecutor Aleksandër Lumezi's Executive Assistant, in the name of the Chief Prosecutor, addressed to this Committee; and Report of the Police Inspectorate, p. 12.

[222] *See* testimony of Mr. Gashi, *op. cit.*, pp. 14–15.

[223] *See* testimony of Mr. Maxhuni, *op. cit.*, pp. 6 and 37.

grounds for decisions for the revocation or refusal of residence permits, without exception.

(4) To amend and supplement Law No. 04/L-219 on Foreigners, in order to prohibit the expulsion of foreigners before they exercise their right to challenge their expulsion before an independent authority.

(5) To assign police officers the exclusive authority and responsibility to verify the identity of persons detained during joint operations between the Kosovo Police and the Kosovo Intelligence Agency.

(6) To clarify, through new legislation, the circumstances under which security institutions are obligated to notify the heads of state, specifically the Prime Minister and the President of the Republic of Kosovo, regarding activities they undertake and important information in their possession.

Respectfully submitted.

TIENMU MA

Prishtina, 17 December 2018