

Justice Suspended: Access to Justice and the State of Emergency in Turkey

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This publication has been co-funded by the Ministry for Foreign Affairs of Finland and the European Union. The views portrayed in this document do not necessarily reflect their opinion.



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Introduction

Since 16 July 2016, Turkey has been living under state of emergency. President Recep Tayyip Erdoğan has announced that he will not seek a renewal of the state of emergency that will otherwise lapse on 19 July.

Two years under a state of emergency have nonetheless had a devastating impact on the human rights of vast numbers of persons in the country. Hundreds of thousands of civil servants, judges, military personnel, and academics have been dismissed from their jobs; thousands of people have been arrested, investigated, tried and convicted; hundreds of associations have been closed and key State institutions, under legislative, executive and judicial authority, have been radically overhauled. Many of these changes are there to stay and, even now that the state of emergency is over, the question remains of what remedies can people access for human rights violated in this last two years.

Human rights are illusory if there is no effective remedy to access to protect them, or to provide redress where they have been violated. It is through its justice and accountability mechanisms, in particular the judicial systems, that corrective action takes place to bring the State in compliance with the rule of law. This is even more the case in times of public emergency. Indeed, "[t]he role of the judiciary and legal profession is paramount in safeguarding human rights and the Rule of Law in times of crisis, including declared states of emergency."¹ It is essential that these mechanisms of protection be independent and effective at all times.

This report will provide an overall assessment of the impact that the state of emergency and the reforms undertaken have had on the capacity of people in Turkey to access effective legal remedies for human rights violations.

¹ *ICJ Geneva Declaration on Upholding the Rule of Law of Judges and Lawyers in Times of Crisis* of 2008, Principle 1 (hereinafter "ICJ Geneva Declaration"). See, ICJ Legal Commentary to the *ICJ Geneva Declaration on Upholding the Rule of Law of Judges and Lawyers in Times of Crisis*, ICJ Human Rights and Rule of Law Series No. 3, Geneva, 2011, available at <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf> , pp. 1-15.

1. General context²

On the night of 15 July 2016, elements of the Turkish army attempted to overthrow the democratically elected Government. They blocked the bridges on the Bosphorus in Istanbul, bombed the Grand National Assembly of Turkey, seized control of several media outlets and reportedly attempted to kill President Erdoğan.³

The attempted military coup was ultimately unsuccessful, partly due to the mobilization of civilians including police officials that blocked the advance of army movements. By the morning of 16 July 2016, the attempted coup was over. That night ended with 246 persons dead and more than 2,500 wounded.⁴

The "Gülen movement", a religious-based organization led by US-based cleric Fethullah Gülen, and designated as a terrorist organization by the Turkish authorities, the Organisation of the Islamic Conference, the Gulf Cooperation Council,⁵ and the Asian Parliamentary Assembly⁶, under the name of Fetullahist Terrorist Organisation (FETÖ/PDY),⁷ was accused by the Government to be behind the attempted coup.⁸

In reaction to the attempted coup, the Council of Ministers, under the chairmanship of President Erdoğan, declared, on 16 July, a nation-wide state of emergency that was ratified by the Grand National Assembly of Turkey.⁹

Shortly afterwards, a series of decree laws were issued by President Erdoğan. To date, more than 30 emergency Decree Laws have been issued modifying legislation ranging from the Criminal Procedure Code to the Law on International Protection and media laws. All of these Decrees were eventually enacted into law by the Grand National Assembly of Turkey.

The Human Rights Joint Platform estimates that over 160,000 people have been held in police custody since the declaration of the state of emergency and that, from 17 October 2016 to 20 March 2018, 79,301 were held in police custody for terrorism-related offences.¹⁰ Between 16 July 2016 and 20 March 2018 at least

² The description of the context for the purpose of this report is necessarily cursory and incomplete. An official account by the Government of Turkey of the events of 15 July may be found in annex 1. Authoritative accounts and assessment of the situation in Turkey under the State of Emergency are available at: Human Rights Joint Platform (IHOP), *Updated Situation Report - State of Emergency in Turkey (21 July 2016 - 20 March 2018)*, published on 17 April 2018 (hereinafter "IHOP Report"), available at <http://www.ihop.org.tr/2018/04/25/updated-situation-report-state-of-emergency-in-turkey-21-july-2016-20-march-2018/> [accessed on 16 July 2018]; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey*, UN Doc. A/HRC/37/50/Add.1, 18 December 2017 (hereinafter "Report of the UN Special Rapporteur on torture"); Office of the United Nations High Commissioner for Human Rights (OHCHR), *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 (hereinafter "Second Report on Turkey"); European Commission, *Turkey 2018 Report*, Doc. No. SWD(2018) 153 final, 17 April 2018 (hereinafter "European Commission 2018 Report"). The ICJ has carried out a visit to Turkey from 7 to 11 May 2018.

³ See account by the Turkish Government in Annex 1.

⁴ MFA Turkey, Information on the terrorist attempt on 15 July 2016 and the investigations conducted against the judges and public prosecutors, in Notification of State of Emergency under article 15 ECHR, Doc. JJ8190C, Tr./005-192, p. 9, p. 10.

⁵ Hürriyet Daily News, "OIC lists Gülen network as 'terrorist group'", 19 October 2016, available at <http://www.hurriyetdailynews.com/oic-lists-gulen-network-as-terror-group--105128> [accessed on 16 July 2018]

⁶ Sputnik News, "APA Branding FETO Terrorist Organization 'Important Step' - Turkish Official", 8 December 2016, available at <https://sputniknews.com/world/201612081048302019-apa-feto-terrorist-organization-important-step/> [accessed on 16 July 2018]

⁷ Reuters, "Turkey officially designates Gülen religious group as terrorist", 31 May 2016, available at <https://www.reuters.com/article/us-turkey-gulen/turkey-officially-designates-gulen-religious-group-as-terrorists-idUSKCN0YM167> [accessed on 16 July 2018].

⁸ See, articles 2, 3, 4, Decree Law no. 667. The ICJ will adopt the terminology used by the United Nations to refer to this group or movement. Turkey refers to them, based on decisions of their domestic courts as a terrorist organisation called the "Fetullahist Terrorist Organisation" or "FETÖ".

⁹ Declaration, State of emergency declared in Turkey following the Coup Attempt of 15 July 2016, para. 4.

¹⁰ IHOP report, *op. cit.*, p. 10.

228,137 persons were held in pre-trial detention.¹¹ The profiles of those arrested include members of the army, judges and prosecutors, public servants, Members of Parliament, journalists, human rights defenders, students and lawyers.¹²

As of 20 March 2018, 112,679 public servants were dismissed for life from public office.¹³ In the same timespan, 7,037 academic staff and 4,662 judges and prosecutors were dismissed.¹⁴ During the state of emergency, authorities ordered, via emergency decrees, the closure of 1,064 private education institutions (kindergartens, elementary schools, junior high schools and high schools), 360 private training courses and study centres, 847 student dormitories, 47 private healthcare centres, 15 private foundation universities, 29 trade unions affiliated to two Confederation, 1,419 associations, 145 foundations and 174 media and broadcasting organizations.¹⁵

A new emergency decree, issued on 8 July 2018 has led to the further dismissal of 18,632 public servants, including 6,153 military personnel and 9,647 members of the police and of the gendarmerie, several civil servants and 199 academicians. 12 associations, three newspapers and one TV station have been closed.¹⁶

2. A brief introduction to Turkey's judicial system

Turkey is a civil law system governed under a Constitution. International treaties, once ratified by the Grand National Assembly of Turkey, have force of domestic law and "[i]n the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."¹⁷

The principle of the rule of law is enshrined in article 2 of the Turkish Constitution which describes the State as "a democratic, secular and social state governed by the rule of law". In the Turkish legal system, the Constitution is the supreme law of the land, laws cannot be contrary to the Constitution and all executive, legislative and judicial organs, administrative authorities, institutions and individuals are bound by its provisions and must comply with them.¹⁸

Under article 9 of the Constitution, the judicial power is exercised by "independent and impartial courts on behalf of the Turkish nation." Within the civil judicial system, there are separate ordinary and administrative jurisdictions. The Constitutional Court has the power to review the constitutionality of laws; the High Court of Appeals which has power to review the judgments of first instance civil and criminal courts; the Council of State has the power to review the decisions and judgments of all administrative courts; and Court of Jurisdictional Disputes, has the power to resolve disputes of jurisdiction among high courts.

The independence of the Turkish courts is guaranteed in article 138 of the Constitution as follows:

¹¹ *Ibid.*, p. 11.

¹² See, *ibid.*, p. 13.

¹³ See, *ibid.*, p. 24.

¹⁴ See, *ibid.*, p. 37.

¹⁵ *Ibid.*, p. 43

¹⁶ See, Emergency Decree No. 701 of 8 July 2018, available (in Turkish) at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2018/07/20180708.htm&ain=http://www.resmigazete.gov.tr/eskiler/2018/07/20180708.htm> [accessed on 16 July 2018].

¹⁷ Article 90, Constitution of Turkey (hereinafter the "Constitution"). Official translation by the Grand National Assembly of Turkey.

¹⁸ Article 11, *ibid.*

Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming with the law.

No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions. ...

Article 139 establishes the security of tenure of judges and public prosecutors. It stipulates:

Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post. Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of ill health, or those determined as unsuitable to remain in the profession, are reserved.

Turkish prosecutors form part of the judicial system, although they have powers and functions distinct from those of judges.¹⁹ The role of public prosecutors is particularly important in Turkey during the pre-trial phase of criminal proceedings. They have the duty to investigate the facts promptly after being informed about suspicions of a crime²⁰ and must gather and secure evidence both in favour of and against any suspects. Throughout the investigation, the judicial police are under the command of public prosecutors.²¹ If the public prosecutors believe that there is a reasonable basis for suspicion of a crime, they are obliged by law to file indictments.²²

Under Turkish law, the work of lawyers is described as an independent public service.²³ In order to practice law, a lawyer must be registered with the bar association of the city where he or she resides. The bar associations, including the Union of Turkish Bar Associations at national level and the regional bar associations, are responsible for the admission of candidates to the profession, the regulation and the conduct of their internship and disciplinary investigations. The Ministry of Justice retains a significant role in the admission of lawyers to the profession and in their disciplinary system. The admission decisions of the Union of Turkish Bar Associations are subject to the approval of the Ministry, which is also needed to launch criminal investigations and impose disciplinary measures against lawyers.²⁴

3. The declaration of the State of Emergency

3.1. International law

Turkey is party to two treaties that regulate human rights obligations in states of emergency, the International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR). Article 4 of the ICCPR affirms that:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the

¹⁹ Article 139 and 140, *ibid.*

²⁰ Article 160 of the Law on Criminal Procedure

²¹ Article 161, *ibid.*

²² Article 170, *ibid.*

²³ Article 1/1 of the Law on Practice of Law.

²⁴ Articles 8, 58 and 71, *ibid.*

present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 15 ECHR declares that:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Under international human rights law, a state of emergency may be invoked only in time of war or of "public emergency which threatens the life of the nation and the existence of which is officially proclaimed".²⁵ Under both instruments, States "may take measures derogating from their obligations ... to the extent strictly required by the exigencies of the situation."²⁶ States must communicate the derogation, the measures undertaken and the extent to which they derogate from their obligations under the relevant human rights treaty to the treaty's depository, i.e. the UN Secretary General for the ICCPR and the Council of Europe's Secretary General for the ECHR.²⁷

Under both treaties, certain rights can never be derogated from even under a state of emergency, including freedom from torture and other cruel, inhuman or degrading treatment or punishment, most elements of the right to life, freedom from slavery and servitude; and freedom from retroactive criminal liability (*nullum crimen sine lege*).²⁸ The ICCPR, in addition, makes non-derogable freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation, the right to recognition of as a person before the law,²⁹ and freedom of thought, conscience and religion.³⁰ The right not be subjected to the death penalty is non-derogable in respect of States, such as Turkey, that are parties to the respective protocols on the death penalty.³¹ No derogating measure

²⁵ Article 4.1 of the International Covenant on Civil and Political Rights (ICCPR), article 15.1 of the European Convention on Human Rights (ECHR). (The ECHR also contains the ground of "times of war").

²⁶ Article 4.1 ICCPR, article 15.1 ECHR.

²⁷ Article 4.3 ICCPR, article 15.3 ECHR.

²⁸ see, articles 4.2 ICCPR, 15.2 ECHR.

²⁹ Article 4 ICCPR.

³⁰ Article 4 ICCPR.

³¹ Protocol 6 ECHR, Protocol 2 ICCPR.

may breach the prohibition on discrimination and no measure may be inconsistent with other obligations under international law.³²

In addition to the rights that are made expressly non-derogable under the treaties, the jurisprudence of the supervisory organs has made clear that other rights are effectively non-derogable. These include the right to an effective remedy for a violation of rights and the fundamental requirements of the rights to a fair trial and to liberty.³³

Furthermore, in regard to the ICCPR, States "may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."³⁴ Other rights and prohibitions that are held as non-derogable include the right to humane treatment in detention;³⁵ the prohibitions against taking of hostages, abductions or unacknowledged detention; the international protection of the rights of persons belonging to minorities; deportation or forcible transfer of population without grounds permitted under international law and the prohibition of propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.³⁶

Critically, derogating measures must comply with the principles of necessity and proportionality, since they are limited "to the extent strictly required by the exigencies of the situation."³⁷ This means that "derogation" from rights is not equivalent to "suspension of rights" and, as the Human Rights Committee has affirmed that "no provision of the [ICCPR], however validly derogated from will be entirely inapplicable to the behaviour of a State party."³⁸ The proportionality and necessity requirements "relate to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency."³⁹

The Human Rights Committee has held that the "restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."⁴⁰ The Office of the UN High Commissioner for Human Rights has stressed that "[e]mergency legislation cannot therefore remain in force for so long that it becomes institutionalized so that it is the rule rather than the exception."⁴¹

The European Court of Human Rights has held that, "even in a state of emergency – which is ... a legal regime whose aim is to restore the normal regime by guaranteeing fundamental rights ... – ... States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness."⁴²

³² Article 4.1 ICCPR, Article 15.1 ECHR.

³³ Human Rights Committee (CCPR), *General Comment no. 29*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14-16.

³⁴ *Ibid.*, para. 11.

³⁵ Article 10 ICCPR.

³⁶ Human Rights Committee, *General Comment no. 29, op. cit.*, para. 13.

³⁷ Article 4.1. ICCPR, article 15.1 ECHR.

³⁸ Human Rights Committee, *General Comment no. 29, op. cit.*, para 4.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, para. 1.

⁴¹ OHCHR Manual, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 16 - The Administration of Justice During States of Emergency, available at <https://www.un.org/ruleoflaw/blog/document/manual-on-human-rights-for-judges-prosecutors-and-lawyers-chapter-16/> [accessed on 16 July 2018] (hereinafter "OHCHR Manual"), p. 824.

⁴² *Mehmet Hasan Altan v. Turkey*, ECtHR, Application no. 13237/17, 20 March 2018, para. 210.

The Parliamentary Assembly of the Council of Europe (PACE) has stressed that the "[f]undamental safeguard of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained even during a state of emergency. Due democratic process, including separation of powers, as well as political pluralism and the independence of civil society and the media must also continue to be respected and protected."⁴³ A state of emergency "must be limited in duration, circumstances and scope. Emergency powers may be exercised only for the purposes for which they were granted. The duration of emergency measures and their effect may not exceed that of the state of emergency."⁴⁴

3.2. Turkish law

According to the Turkish Constitution in force in July 2016, a state of emergency can be declared by the Council of Ministers, meeting under the chairmanship of the President of the Republic, after consultation with the National Security Council, for a period not exceeding six months in the "event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or serious deterioration of public order because of acts of violence."⁴⁵ Such a decision must be published in the Official Gazette and must be approved by the Grand National Assembly of Turkey that "may alter the duration of the state of emergency, may extend the period for a maximum of four months each time at the request of the Council of Ministers, or may lift the state of emergency".⁴⁶

Furthermore:

The financial, material and labour obligations which are to be imposed on citizens in the event of the declaration of state of emergency under Article 119 and the manner how fundamental rights and freedoms shall be restricted or suspended in line with the principles of Article 15, how and by what means the measures necessitated by the situation shall be taken, ... shall be regulated by the Act on State of Emergency.

During the state of emergency, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency. These decrees shall be published in the Official Gazette, and shall be submitted to the Grand National Assembly of Turkey on the same day for approval; the time limit and procedure for their approval by the Assembly shall be indicated in the Rules of Procedure.⁴⁷

As regards the human rights enshrined in the Constitution, the general principle is that

In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in

⁴³ *State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights*, PACE Resolution 2209(2018), para. 3.

⁴⁴ *Ibid.*, para. 4.

⁴⁵ Article 120, Constitution of 2016.

⁴⁶ Article 121.1, *ibid.*

⁴⁷ Article 121.2-3, *ibid.*

*conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.*⁴⁸

Box 1: State of emergency in the new Constitution

Under the new Constitution, as revised after the referendum of 16 April 2017, the derogation of constitutional rights cannot take place in cases of "martial law" as the possibility of resort to martial law has been abolished (new article 15.1).

A new regime of state of emergency has been enshrined in article 119 that previously allowed for declaring state of emergency only for "natural disaster, dangerous epidemic diseases or a serious economic crisis".

The new article 119 gives the President of the Republic, without the involvement of the Council of Ministers or of the National Security Council, the power to declare a state of emergency also in the event of "war, the emergence of a situation necessitating war, mobilization, uprising, strong and actual attempt against homeland and Republic, widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence which are aimed at the destruction of the constitutional order or the fundamental rights and freedoms, severe destruction of public order due to acts of violence," in addition to the previous grounds contemplated by the provision.

However, the new article 119 establishes the same procedure of ratification by the Grand National Assembly of Turkey provided for by article 120. The Grand National Assembly can reject the declaration, modify it or approve it and extend it of terms of four months.

During the state of emergency, the President of the Republic can legislate directly by presidential decree, that must be later approved by the Assembly, in all matters, without limitation of competence on fundamental rights or other issues ordinarily reserved to Parliament.

3.3. The declaration of the state of emergency in Turkey

In its first ratification of the state of emergency, the Grand National Assembly of Turkey affirmed that:

*purpose of the state of emergency is to take required measures in the most speedy and effective manner in the fight against FETÖ terrorist organisation in order to save the nation from this ferocious terror network and return to normalcy as soon as possible. Meanwhile, utmost care will will (sic) be maintained with a view of upholding democracy standards as well as respecting the fundamental rights of citizens.*⁴⁹

Notifications of the state of emergency were filed to the Secretary General of the Council of Europe, with regard to article 15 of the ECHR on 21 July 2016, and, on 2 August 2016, with the UN Secretary General with regard to article 4 of the ICCPR.

⁴⁸ Article 15, *ibid.*

⁴⁹ Declaration, State of emergency, declared in Turkey following the Coup Attempt of 15 July 2016, para. 4.

The notification to the UN Secretary General with regard to the ICCPR refers to derogation from article 2.3 (right to an effective remedy), article 9 (right to liberty and security), article 10 (right to humane treatment in detention), article 12 (freedom of movement), article 13 (procedural guarantees in expulsion proceedings), article 14 (right to a fair trial), article 17 (right to privacy), article 19 (right to freedom of expression), article 21 (right of peaceful assembly), article 22 (freedom of association), article 25 (political rights), article 26 (equality before the law) and article 27 (protection of minorities). The declaration of derogation from the ECHR refers to no specific articles to be derogated from. Neither of the two declarations states the extent of the derogation requested while, at least for the ECHR, the Turkish Government sent periodically to the Secretary General of the Council of Europe translations and summaries of part of the adopted Emergency Decree-Laws.⁵⁰

3.4. Assessment of the state of emergency

The European Court of Human Rights has recently noted that "the notice of derogation by Turkey ... does not explicitly mention which Articles of the Convention are to form the subject of a derogation. Instead, it simply announces that "measures taken may involve derogation from the obligations under the Convention".⁵¹ The European Court has accepted that "the attempted military coup disclosed the existence of a 'public emergency threatening the life of the nation' within the meaning of the Convention."⁵²

The PACE has declared that "Turkey's response to the unquestionably serious situation described in the derogation is disproportionate on numerous grounds,"⁵³ in particular because the powers granted went beyond what was strictly necessary by the exigencies of the situation, the duration of the state of emergency was excessive, emergency measures were converted into permanent changes to the legal framework, the overall impact of the measures was excessive and indiscriminate and there were "delays in implementing a timely effective remedy."⁵⁴ The PACE Rapporteur noted that:

*The resulting practice of government by emergency decree, often in apparently unrelated areas, has bypassed effective scrutiny by Parliament and the Constitutional Court. This seems to have occurred with an apparent unwillingness to exercise independent control of State authorities that should, in a democracy, act as checks and balances on the government.*⁵⁵

The Office of the UN High Commissioner for Human Rights has noted that "the sheer number, frequency and the lack of connection of several decrees to any national threat, seems to indicate the arbitrary nature of some measures, and point to the use of emergency powers to stifle any form of criticism or dissent vis-à-vis the Government."⁵⁶

The European Commission has affirmed that "the broad scale and collective nature, and the disproportionality of measures taken since the attempted coup

⁵⁰ The declarations and annexes sent to the Secretary General of the Council of Europe are available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=7j0iic.

⁵¹ *Mehmet Hasan Altan v. Turkey*, ECtHR, Application no. 13237/17, 20 March 2018, para. 89; *Sahin Alpay v Turkey*, ECtHR, Application no. 16538/17, 20 March 2018, para. 73. The Court has not ruled on the validity of the notice of derogation; it accepted it for the purpose of this case, because the parties to the case did not raise the issue.

⁵² *Mehmet Hasan Altan v. Turkey*, *op. cit.*, para. 93; *Sahin Alpay v Turkey*, *op. cit.*, para. 77.

⁵³ *State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights*, PACE Resolution 2209(2018), para. 16. The states of emergency of France and Ukraine were also criticised in the resolution.

⁵⁴ *Ibid.*

⁵⁵ *State of emergency: proportionality issues concerning derogations under article 15 of the European Convention on Human Rights*, PACE report, Doc. No. 14506, 27 February 2018 (hereinafter "PACE Report"), para. 91

⁵⁶ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 42.

under the state of emergency, such as widespread dismissals, arrests, and detentions, continue to raise serious concerns. Turkey should lift the state of emergency without delay."⁵⁷

Furthermore, the European Commission has found that "[s]erious shortcomings affect the 31 decrees taken to date under the state of emergency. They have not been subject to a diligent and effective scrutiny by parliament. Consequently, the decrees have long not been open to judicial review and none of them has yet been subject to a decision by the Constitutional Court. These emergency decrees have notably curtailed certain civil and political rights, including freedom of expression, freedom of assembly and procedural rights. They also amended key pieces of legislation which will continue to have an effect when the state of emergency is lifted."⁵⁸

During the days in which the coup attempt was underway and the period immediately thereafter, there was likely a public emergency that was of sufficient gravity to constitute a threat the life of the nation. For purposes of conducting its analysis, therefore, the ICJ will take as a given that the one element required for lawful derogation has been satisfied in the initial period, that of the existence of a public emergency threatening the life of the nation.

Measures of derogation can range from the adoption of legislation, executive or administrative decrees or regulations, to *ad hoc* practices. This briefing paper does not make an assessment of each and every derogating measure under the state of emergency or its compliance with Turkey's obligations under international law. Nonetheless, Turkey is under an obligation to ensure both that a public emergency that threatens the life of the nation continues and that all emergency measures derogating from rights are strictly necessary and proportionate to address a threat to the life of the nation, and to continuously review whether these requirements are met.

The ICJ stresses that, at present, urgent review of the necessity and proportionality of the extensive measures taken under the state of emergency is needed.

The ICJ's own assessment is that more than one year and a half after the events that gave rise to the state of emergency, it is now time to lift it and revoke such measures that risk giving emergency measures permanent effect.

Furthermore, the ICJ stresses that, under international law, a declaration of state of emergency must identify the particular human rights provisions from which it has derogated. Turkey has failed to do this in respect of the ECHR. It also must describe in detail and with precision each derogating measure and the extent of the derogation in relation to specific provisions, parts of provisions, and to the exceptional measure(s) undertaken under the state of emergency. The ICJ notes that even in the case of the ECHR, where Turkey provided partial translation of the Decree-Laws with some introductory explanation, this requirement has not been satisfied.

As highlighted in the section on international law, the ICJ considers that the derogations by Turkey to the right to an effective remedy (article 2.3 ICCPR), the right to humane treatment in detention (article 10 ICCPR), and the protection of minorities (article 27 ICCPR) are *prima facie* invalid, as they refer to non-derogable rights. They should therefore be withdrawn.⁵⁹ In addition, a number of

⁵⁷ European Commission 2018 Report, *op. cit.*, p. 3.

⁵⁸ *Ibid.*

⁵⁹ See, Human Rights Committee, *General Comment no. 29, op.cit.*, paras. 13-14.

derogations undertaken in respect of rights notionally subject to derogation, will be invalid as not complying with the requirements of necessity and proportionality.

4. The right to an effective remedy under international law

Under general international law, and including in times of crisis,⁶⁰ the obligation to respect and ensure respect for international human rights law and international humanitarian law includes the duty to provide effective remedies to victims, including reparation.⁶¹ This obligation has been recognized and accepted by all members of the UN, through General Assembly resolution 60/47 of 16 December 2005. In respect of the right at issue here, it is guaranteed under article 2.3 of the ICCPR and articles 13 and 41 of the ECHR.

To be effective, remedies must be prompt, accessible, impartial and independent, must be enforceable, and lead to cessation of violations and reparation for the human rights violation concerned.⁶² The right to reparation includes the right to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶³

An effective remedy should be provided by a judicial body, and must be in respect of gross human rights violations. For certain other violations, provided there is the availability of judicial review, there may be the possibility, in limited circumstance, of non-judicial remedies. However, these must fulfil the requirements set out above, of effectiveness - i.e. the power to bring about cessation of the violation and appropriate reparation - of impartiality and independence.⁶⁴ The remedy must be prompt and effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.⁶⁵

⁶⁰ ICJ Geneva Declaration, principle 2. See, *ICJ Legal Commentary, op. cit.*, pp. 17-28.

⁶¹ Article 8 of the *Universal Declaration of Human Rights*; article 2(3) of the *International Covenant on Civil and Political Rights*; articles 13 and 14 of the *Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*; article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*; article 39 of the *Convention on the Rights of the Child*; articles 25 and 63(1) of the *American Convention on Human Rights*; article 7(1)(a) of the *African Charter on Human and Peoples' Rights*; articles 12 and 23 of the *Arab Charter on Human Rights*; articles 5 (5), 13 and 41 of the *European Convention on Human Rights*; article 47 of the *Charter of Fundamental Rights of the EU*; article 27 of the *Vienna Declaration and Program of Action*; *UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, Article 3. See also *UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity* (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005, Principle 31: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator." See also: *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; *UN Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of international humanitarian law*; Article 19 of the *UN Declaration on the Protection of all Persons from Enforced Disappearance*; Principle 20 of the *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; *UN Declaration on the Elimination of Violence against Women*; Council of Europe Committee of Ministers Recommendation No. R (85) 11 to member states on the position of the victim in the framework of criminal law and procedure (28 June 1985); *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe (2005); *Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa*; and Council of European Union Council Framework Decision on the standing of victims in criminal proceedings, 2001/220/JHA.

⁶² See, generally, ICJ, *Practitioners' Guide No. 2, The Right to a Remedy and Reparation for Gross Human Rights Violations*, December 2006, pp. 46-54.

⁶³ Articles 2 and 3, 18-23 of the *UN Basic Principles and Guidelines on the right to a remedy and reparation*; UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity. Principle 34; Human Rights Committee (CCPR), *General Comment no. 31*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 16.

⁶⁴ See, ICJ, *Practitioners' Guide No.2, op. cit.*, pp. 49-54.

⁶⁵ *Muminov v. Russia*, ECtHR, Application no 42502/06, 11 December 2008, para. 100; *Isakov v. Russia*, ECtHR, Application no. 20745/04, 19 June 2008, para. 136; *Yuldashev v. Russia*, ECtHR, Application no. 1248/09, 8 July 2010, paras. 110-111; *Garayev v. Azerbaijan*, ECtHR, Application no. 53688/08, 10 June 2010, paras. 82 and 84.

The remedy's purpose is to "enforce the substance of the [human rights treaty] rights and freedoms in whatever form they might happen to be secured in the domestic legal order".⁶⁶

Furthermore, the right to an effective remedy effectively is not subject to derogation during a state of emergency. As the UN Human Rights Committee has pointed out:

*... Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation ... to provide a remedy that is effective.*⁶⁷ ...

*As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.*⁶⁸

An effective remedy at a national level is simultaneously a substantive right States must guarantee to all persons under their jurisdiction and a crucial aspect of establishing the admissibility of a complaint before an international human rights mechanism. In this regard, aside from the possibility to bring complaints to the European Court of Human Rights, Turkey has accepted the competency to complain through the communication procedures of the Committee against Torture (CAT) pursuant to a declaration under article 22 CAT; the Human Rights Committee, pursuant ratification of the first Optional Protocol; the Committee on the Elimination of Discrimination against Women (CEDAW), pursuant to the ratification of the Optional Protocol to CEDAW; and Committee on the Rights of Persons with Disabilities (CRPD), pursuant to its accession to the optional protocol to the CRPD.

Generally, an applicant to an international court or tribunal or a quasi-judicial mechanism, such as a treaty body communication procedure, must exhaust all effective domestic remedies before submitting his or her case at the international level. For this reason, much of the case-law on how to assess the effectiveness of a remedy and, hence, the respect of this international obligation relies on both substantive and procedural findings of international courts and bodies.

The assessment of the effectiveness of a remedy depends on the individual case and must be assessed both in law and in practice.⁶⁹ Nonetheless, a set of requirements may be construed, in particular from the jurisprudence of the European Court of Human Rights. This jurisprudence is generally consonant with that of international authorities, including the UN treaty bodies and other regional mechanisms. Notwithstanding whether it has a preventive or compensatory nature, remedy must respect the following requirements:

- i. **Independence and impartiality.**⁷⁰ The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR

⁶⁶ *Al-Nashif v. Bulgaria*, ECtHR, Application No. 50963/99, Judgment of 20 June 2002, para. 132.

⁶⁷ Human Rights Committee, *General Comment no. 29, op. cit.*, para. 14.

⁶⁸ *Ibid.*, para. 16.

⁶⁹ *Neshkov and others v. Bulgaria*, ECtHR, Applications nos. 36925/10 21487/12 72893/12, 27 January 2015, para. 178, 179-181; *Akdivar and others v. Turkey*, ECtHR, Application no. 21893/93, 1 April 1998, paras. 66-73.

⁷⁰ *Atanasov and Apostolov v. Bulgaria*, ECtHR, Applications nos. 65540/16 22368/17, para 49, 59; *Neshkov and others v. Bulgaria, op. cit.*, para. 183; *Demopoulos and others v. Turkey*, Applications nos. 46113/99 3843/02 13751/02, para. 120.

article 6, has held that “[i]n determining whether a body can be considered to be ‘independent’—notably of the executive and of the parties to the case—the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”⁷¹ International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the European Charter on the Statute for Judges and the Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities also provide authoritative standards against which recent developments in the Turkish judicial system should be measured.

- ii. **Accessibility and respect of the principle of fairness under the right to a fair trial:**⁷² procedural guarantees of a remedy against human rights violations (in particular when it is dealing with systemic or a great number of allegations of violations) must “make it simple to use,”⁷³ not impair access to remedy, for example with excessive legal costs,⁷⁴ and must “not place an undue evidential burden”⁷⁵ on the applicant. It must provide the possibility of a public hearing in its presence and with his or her “effective presence”⁷⁶ in adversarial proceedings.⁷⁷ The European Court of Human Rights has held that the principle “that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective ... is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under Article 6.”⁷⁸
- iii. **Timeliness:** the remedy must not be excessively long in providing with redress.⁷⁹ Indeed, the European Court of Human Rights has stressed “the importance of administering justice without delays which might jeopardise its effectiveness and credibility”.⁸⁰
- iv. **Scope of the assessment:** the remedy must be able to consider the substance of the complaint including in light of the relevant State’s

⁷¹ See, *Campbell and Fell v. the United Kingdom*, ECtHR, Application No. 7819/77, 28 June 1984, para. 78. See also, UN Human Rights Committee, *General Comment No. 32, article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007), para. 19.

⁷² *Neshkov and others v. Bulgaria*, *op. cit.*, para.184; *Valada Matos das Neves v. Portugal*, Application no. 73798/13, para. 73(c).

⁷³ *Atanasov and Apostolov v. Bulgaria*, *op. cit.*, paras. 50, 61.

⁷⁴ *Scordino v. Italy (No. 1)*, Application no. 36813/97, para. 201 (“unreasonable restriction on the right to lodge such an application”); *Valada Matos das Neves v. Portugal*, *op. cit.*, para. 73(d)

⁷⁵ *Atanasov and Apostolov v. Bulgaria*, *op. cit.*, para 50, 61; *Neshkov and others v. Bulgaria*, *op. cit.*, para. 184; *Valada Matos das Neves v. Portugal*, *op. cit.*

⁷⁶ *Ibid.*, para 51, *Neshkov and others v. Bulgaria*, *op. cit.*, paras. 183, 212, 283

⁷⁷ *Ibid.*, paras. 49, 59.

⁷⁸ *Scordino v. Italy (No. 1)*, *op. cit.*, para. 192.

⁷⁹ *Atanasov and Apostolov v. Bulgaria*, *op. cit.*, paras. 52, 63; *Neshkov and others v. Bulgaria*, *op. cit.*, para. 183-184, 281 (“swift redress” for preventive remedies), 283. *Scordino v. Italy (No. 1)*, *op. cit.*, para. 195: “it cannot be ruled out that excessive delays in an action for compensation will render the remedy inadequate ...”. In the case *Scordino v. Italy (No. 1)* the ECtHR found that four months to reach the judicial decision on the violation of reasonable length of judicial proceedings was reasonable, but held that more than six months to execute the decision and provide compensation was excessively long (para. 198, 208-209). Indeed the Court regretted “to observe that, where a deficiency that has given rise to a violation has been put right, another one related to the first one appears: in the present case the delay in executing decisions. It cannot overemphasise the fact that States must equip themselves with the means necessary and adequate to ensure that all the conditions for providing effective justice are guaranteed.” (para. 238). In *Parizov v. “the former Yugoslav Republic of Macedonia”*, ECtHR, Application no. 14258/03, the Court found the newly introduced remedy ineffective because “the fact remains that no court decision has been taken although more than twelve months have elapsed after the introduction of the remedy” (para. 44). See in 2015, *Valada Matos das Neves v. Portugal*, *op. cit.*, paras. 73 (a) and (b) and 93.

⁸⁰ *Scordino v. Italy (No. 1)*, *op. cit.*, para. 224.

obligations under international human rights law⁸¹ and be able to acknowledge such violation, if ascertained.⁸²

- v. **Capacity to provide redress:** redress "can be considered as appropriate and sufficient"⁸³ if the violation is ascertained by a binding and enforceable decision.⁸⁴ Remedies with mere declaratory effect, even before constitutional courts, cannot be considered effective.⁸⁵

5. The situation in the Turkish judiciary

*In times of crisis the stability and continuity of the judiciary is essential. Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches.*⁸⁶

A competent, independent and impartial judiciary is fundamental to the rule of law, particularly in respect of the fair administration of justice and for the protection of human rights. It is therefore essential that a judicial system is able to guarantee the independence and effectiveness of its courts and judges.

Developments in the judiciary, prosecution and legal profession in Turkey must therefore be assessed in the framework of its obligations under international human rights law. The ECHR the ICCPR both provide for the right to a fair hearing before a competent, independent and impartial tribunal established by law, and the right to an effective remedy for violations of human rights.

The European Court of Human Rights, in interpreting and applying the right to a fair hearing under ECHR article 6, has held that "... [i]n determining whether a body can be considered to be 'independent' – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."⁸⁷ The Human Rights Committee affirms that

*The requirement of competence, independence and impartiality of a tribunal ... is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.*⁸⁸

International standards on the independence and accountability of the judiciary, prosecutors and lawyers, including the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors, also provide authoritative standards against which recent developments in the Turkish judicial system should be measured.

Furthermore, measures undertaken under the state of emergency may infringe upon the enjoyment of the right to a professional life under article 8 ECHR and 17

⁸¹ *Neshkov and others v. Bulgaria*, *op. cit.*, paras. 185, 203.

⁸² *Scordino v. Italy (No. 1)*, *op. cit.*, para. 193.

⁸³ *Ibid.*, para. 193.

⁸⁴ *Neshkov and others v. Bulgaria*, *op. cit.*, paras. 183, 212, 283.

⁸⁵ *Puchstein v. Austria*, ECtHR, Application no. 20089/06, para. 31.

⁸⁶ ICJ Geneva Declaration, principle 5. See, *ICJ Legal Commentary*, *op. cit.*, pp. 77-87.

⁸⁷ See *Campbell and Fell v. the United Kingdom*, ECtHR, *op. cit.*, para. 78.

⁸⁸ UN Human Rights Committee, General Comment No. 32, *op. cit.*, para. 19.

ICCPR, or the right to a fair hearing in case it is applicable to the dismissal procedures, which is undoubtedly the case in regard to the dismissal of academics, judges and prosecutors.⁸⁹

The independence of the judiciary in Turkey was already subject to significant strains before the attempted coup of 15 July 2016 and the beginning of the state of emergency, as already described by the ICJ, in its briefing paper *Turkey: the Judicial System in Peril*.⁹⁰

Nonetheless, the measures undertaken under the current state of emergency, in particular the mass dismissal of judges and prosecutors, as well as the constitutional reforms that have further modified the judicial structure of self-governance, have considerably undermined the capacity of the Turkish judiciary to administer justice generally and to provide an effective remedy for human rights violations.

5.1. Mass dismissals

*Judges should not be subject to arbitrary removal, individually or collectively, by the executive, legislative or judicial branches. Judges may only be removed, by means of fair and transparent proceedings, for serious misconduct incompatible with judicial office, criminal offence or incapacity that renders them unable to discharge their functions.*⁹¹

Measures undertaken under the state of emergency, the summary and mass dismissals of around 30 percent of active judges and prosecutors following the attempted coup,⁹² and the mass arrests of judges, prosecutors and lawyers, have significantly weakened the justice system and its capacity to protect against, and effectively remedy violations of, human rights.⁹³

The mass dismissal of judges and prosecutors has been adjudicated by judicial bodies of varying competences, based on unclear or vague grounds of association with terrorism. As outlined below, judges of the Constitutional Court have been dismissed where such links have been found to exist by an absolute majority of the Constitutional Court; judges of the Court of Cassation and the Council of State by an absolute majority of the Boards of the Presidency of the Court of Cassation, respectively. Judges of the Court of Accounts have been dismissed by a commission set up by the President and Vice-President of that Court. Decisions on the dismissal of all other judges and prosecutors have been made by the Plenary Session of the High Council of Judges and Prosecutors.⁹⁴

On 4 August 2016, the Constitutional Court dismissed two of its members, Alparslan Altan and Erdal Tercan, after they had been taken into custody, under orders of the Ankara Chief's Public Prosecutor's Office of 16 July 2016 purportedly to prevent their fleeing the country or absconding.⁹⁵ The arrest warrant was confirmed by the Ankara Magistrate's Judge on 20 July 2016 that authorized their

⁸⁹ See, *Baka v. Hungary*, ECtHR, GC, Application no. 20261/12, 23 June 2016.

⁹⁰ ICJ, *Turkey: the Judicial System in Peril*, 2 June 2016, available at <https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/>.

⁹¹ ICJ Geneva Declaration, principle 5. See, *ICJ Legal Commentary*, *op. cit.*, pp. 77-87.

⁹² European Commission 2018 Report, *op. cit.*, p. 23.

⁹³ ICJ, 'Turkey: emergency measures have gravely damaged the rule of law', 6 December 2016, available at <https://www.icj.org/turkey-emergency-measures-have-gravely-damaged-the-rule-of-law/>.

⁹⁴ Article 3.1, Decree Law no. 667. Article 3.2 allowed the High Council of Judges and Prosecutors to appoint as judges and prosecutors candidates for these positions "regardless of the duration of their candidacies", upon proposal of the Ministry of Justice.

⁹⁵ Press Release of the Constitutional Court in English of 9 August 2016, available at <http://constitutionalcourt.gov.tr/inlinepages/press/PressReleases/detail/31.html>, para. 18.

detention on remand and charged them with "being a member of an armed terrorist organization".⁹⁶

Five members of the High Council of Judges and Prosecutors, Mustafa Kemal Özçelik, Kerim Tosun, Şaban Işık, Ahmet Berberoğlu and Mahmut Şen, were dismissed from their position by the Plenary of this institution on 16 July 2016 "by virtue of the report prepared by the assigned investigator."⁹⁷ They were dismissed from their membership of the High Council for lack of one of the entry requirements, i.e. not being investigated or prosecuted for an offences sanctioned with more than three months of imprisonment.⁹⁸

The then High Council of Judges and Prosecutors subsequently proceeded to dismiss 4,279 judges and prosecutors⁹⁹ as an "exceptional measure" because "retaining in office members of the judiciary, who are linked to the FETÖ/PDY, which is responsible for the coup attempt on 15/07/2016 conflicts first and foremost with the independence and impartiality of the judiciary."¹⁰⁰

Box 2: The dismissal ruling of the Constitutional Court

The Constitutional Court held that dismissal from the profession is an "extraordinary" "non-temporal" measure that "aims to terminate the existence of terrorist organizations and other structures, which are established as engaging in activities against the national security, in public institutions and organizations."¹⁰¹ When this kind of dismissal touches upon members of the judiciary, this is "of special importance for ensuring the reliability and honour of the judiciary which is one of the fundamental values of a democratic society."¹⁰²

The Constitutional Court interpreted the Emergency Law Decree no. 667¹⁰³ as requiring, in order to justify dismissal of a judge, a mere "cohesion" or "connection" with an unlawful structure, organisation or group that the National Security Council has deemed as engaging in activities against the national security of the State. It further held that "certainty" was not required as the standard of proof, since the decision had no bearing on criminal liability. Instead what was required was a conviction on the part of a simple majority of the Plenary of the Constitutional Court that there existed such "cohesion" or "connection".¹⁰⁴ The Constitutional Court unanimously upheld the dismissal of the two Constitutional Court judges for "having links" with FETÖ/PDY based on "information from the social circle that they are connected with the organization in question and the common conviction formed by the Members of the Constitutional Court over time."¹⁰⁵

The processes of dismissal conducted by the Constitutional Court and by the High Council of Judges and Prosecutors led the Council of Europe's European

⁹⁶ *Ibid.* para. 19

⁹⁷ MFA Turkey, *Information on the terrorist attempt on 15 July 2016 and the investigations conducted against the judges and public prosecutors*, in *Notification of State of Emergency under article 15 ECHR*, Doc. JJ8190C, Tr./005-192, p. 9, p. 10.

⁹⁸ See Article 18.1, Law on the High Council of Judges and Prosecutors no. 6087, read together with article 8.h of the Law on Judges and Prosecutors no. 2802; MFA Turkey, *Information on the terrorist attempt on 15 July 2016 and the investigations conducted against the judges and public prosecutors*, in *Notification of State of Emergency under article 15 ECHR*, Doc. JJ8190C, Tr./005-192, p. 9, p. 11.

⁹⁹ See, *IHOP Report*, *op. cit.*, p. 38.

¹⁰⁰ Press Release of the High Council of Judges and Prosecutors of 15 November 2016. in English, available at http://www.judiciaryof turkey.gov.tr/pdf/hsyk_karar440.PDF [accessed on 16 July 2018].

¹⁰¹ *Ibid.* para. 30.

¹⁰² *Ibid.* para. 32.

¹⁰³ Published on Official Gazette no. 29779 of 23 July 2016.

¹⁰⁴ Press Release of the Constitutional Court in English, available at http://www.judiciaryof turkey.gov.tr/pdf/anayasa_Alparlan%20ALTAN%20and%20Erdal%20TERCAN.PDF [accessed on 16 July 2018], paras. 35-38.

¹⁰⁵ *Ibid.*, paras. 48-49.

Commission for Democracy through Law (Venice Commission) to warn that "challenging the legitimacy of the process of mass dismissals of judges and prosecutors before those courts will have little chance of success. The judges and prosecutors may probably still seek review of their individual cases, or challenge other aspects of the decree laws ..., but the general legitimacy of the scheme of dismissals *de facto* cannot be put into question."¹⁰⁶

The Council of Europe's Commissioner for Human Rights found that this situation created "an atmosphere of fear among the remaining judges and prosecutors."¹⁰⁷ Furthermore, "[b]ased on credible reports from a variety of sources, OHCHR documented increased executive control over, and interference with the judiciary and prosecution service; the arrest, dismissal and arbitrary transfer of judges and prosecutors to other courts; and recurring instances of threats against lawyers."¹⁰⁸

The PACE noted that the "dismissal of so many judges and prosecutors has had a serious impact on the capacity of the courts and a chilling effect on the willingness of judges to act independently and impartially in proceedings involving the State."¹⁰⁹ The European Commission also stressed that "[t]hese dismissals had a chilling effect on the judiciary as a whole and risk widespread self-censorship among judges and prosecutors. No measures were taken to restore legal guarantees ensuring the independence of the judiciary."¹¹⁰

For judges and lawyers that were dismissed by decisions of the then High Council of Judges and Prosecutors (HCJP), administrative courts, namely the Council of State, are the only avenue of appeal. Indeed the HCJP has processed the objection and reconsideration requests of 3,953 dismissals in total by 20 March 2018. As a result, the dismissal decisions on 166 judges and prosecutors were revoked. The remaining 3,786 applicants' objections were rejected.¹¹¹ It is striking that, to date, the Council of State, whose competence to hear appeals against the Council's decision has been affirmed on 23 January 2017 by Decree Law no. 685, has issued no decision.

5.2. Effectiveness and competence

The mass dismissals of judges, the need to recruit large numbers of new judges and the relative inexperience of many such new recruits, as well as the additional caseload generated by state of emergency measures, has had a significantly adverse impact on the effectiveness, competence and fairness of the justice system. The ICJ's assessment in this respect is similar to those of various international authorities that have evaluated the system.

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment following his visit to Turkey from 27 November to 2 December 2016 found that "[t]he mass arrest, dismissal or suspension of civil servants, including judges, prosecutors and other representatives of the judiciary, has entailed a major setback and delays in the administration of justice."¹¹²

¹⁰⁶ Venice Commission, *Opinion on the Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016*, adopted at its 109th plenary session, 9-10 December 2016, Doc. CDL-AD(2016)037-e, para. 186.

¹⁰⁷ *Abdullah Zeydan others v. Turkey*, ECtHR, Application no. 25453/17 and others, Third party intervention by the Council of Europe Commissioner for Human Rights, Doc. CommDH(2017)33, 2 November 2017, Coe Commissioner third party intervention in journalist case, para. 35.

¹⁰⁸ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 48

¹⁰⁹ PACE Report, *op. cit.*, para. 97 that also says "[t]he President of the Union of Turkish Bar Associations, commenting on the climate of paranoia and fear amongst judges and prosecutors, has said that "[j]ustice is now vested in a judge's personal bravery". "

¹¹⁰ European Commission 2018 Report, *op. cit.*, p. 23.

¹¹¹ IHOP Report, *op. cit.*, pl. 39.

¹¹² Report of the UN Special Rapporteur on torture, *op. cit.*, para. 62.

The European Commission similarly determined in April 2018 that "[l]arge parts of the Turkish judiciary continue to be under severe pressure to handle cases in a timely manner. The ability of the judiciary to effectively perform its tasks has suffered in the aftermath of the attempted coup and the large-scale dismissals, indictments and other administrative measures that followed."¹¹³

It has been reported that, because of the sudden and unforeseen dismissal of around 30 percent of judges in Turkey and the immediate need to replace those position, recruitment of new judges has been hastily carried out. The result is that a significant number of newly appointed judges appear not to have the required experience for the job and with suspicion that selection of new judges has been carried out sometimes on the basis of political affiliations. The following testimony reported by the PACE rapporteur paints a particularly troubling picture:

*The President of the Union of Turkish Bar Associations, whom I met, mentioned the lack of a minimum score in the entrance exam and the preponderant weight given to performance in subsequent unrecorded oral interviews involving politically biased questions: as a result, candidates with the "right" political profile who performed badly in the written tests were nevertheless recruited. Judges are also being appointed directly from the justice academy, without completing their training. 5 000 of 15 000 first instance judges have less than one year's experience, and another 5 000 have less than five years. ...*¹¹⁴

The ICJ, during its mission to Turkey in May 2018, has also heard from some judges and prosecutors that the newly recruited judges and prosecutors were young and lacked sufficient training, which would explain certain "disfunctions" within the judiciary.

5.3. Structural changes

The independence of the judiciary has been further imperilled following the constitutional amendments approved by referendum on 16 April 2017. One of the constitutional reforms introduced as a result of this referendum modified the composition and appointment of the institution responsible for the self-government of judges and prosecutors, now called the Council of Judges and Prosecutors (previously preceded by a "High").

Based on the new constitutional provision, the Council of Judges and Prosecutors has been reappointed. Of the thirteen members, six are now effectively appointed by the President of the Republic, including four ordinary members as well as the Minister of Justice (who acts as President of the Council) and the Under-Secretary of the Ministry of Justice. The remaining seven members are appointed by the National Assembly. None of the members of the Council is appointed by judges or public prosecutors. Finally, under the new constitutional regime, the President of the Republic no longer has a neutral role but may maintain political party affiliations.

The Turkish Ministry of Justice has declared that the *purpose of the change envisaged in the structure and electoral procedure of the Council is primarily to prevent the judiciary from being politicized, prevent another attempt to seize this institution which can be launched by organizations with secret goals such as FETÖ and to increase the effectiveness of the parliament that is a reflection of the national*

¹¹³ European Commission 2018 Report, *op. cit.*, p. 26

¹¹⁴ PACE Report, *op. cit.*, para. 98.

sovereignty, in the elections to the Council of Judges and Prosecutors (CJP)
...¹¹⁵

The Council of Europe's Commissioner for Human Rights found that this new composition "did not offer adequate safeguards for the independence of the judiciary and considerably increased the risk of it being subjected to political influence."¹¹⁶ The Venice Commission echoed these concerns, noting that this "composition of the CJP is extremely problematic. [This] would place the independence of the judiciary in serious jeopardy Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice."¹¹⁷

The UN Special Rapporteur on freedom of expression raised concern "about structural changes to the judicial system which undermine the independence of the judiciary, even those that predate the emergency declared in 2016."¹¹⁸ In this connection, the Office of the UN High Commissioner for Human Rights concluded that "the new appointment system for the members of the Council of Judges and Prosecutors ... does not abide by international standards, such as the Basic Principles on the Independence of the Judiciary. [Because] of the Council's key role of overseeing the appointment, promotion and dismissal of judges and public prosecutors, the President's control over it effectively extends to the whole judiciary branch."¹¹⁹

The European Commission, in its 2018 Progress Report found that:

*There has been further serious backsliding in the past year, in particular with regard to the independence of the judiciary. The Constitutional amendments governing the Council of Judges and Prosecutors (CJP) entered into force and further undermined its independence from the executive. The CJP continued to engage in large-scale suspensions and transfers of judges and prosecutors. No efforts were made to address concerns regarding the lack of objective, merit-based, uniform and pre-established criteria in the recruitment and promotion of judges and prosecutors.*¹²⁰

Previously in the report of June 2016, the ICJ had expressed concern that transfers of judges between judicial positions in different regions of Turkey were being applied as a hidden form of disciplinary sanction and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives.¹²¹ As the European Commission stated in April 2018 and as the ICJ heard from direct testimony, this practice has not ended in the last two years. Therefore, "there is a need for legal and constitutional guarantees to prevent

¹¹⁵ Ministry of Justice of Turkey, Directorate General for EU Affairs, *Information Note on the issues to be handled in the visit of the Venice Commission regarding the constitutional Amendments*, Doc. CDL-REF(2017)015-e, p. 39

¹¹⁶ Council of Europe Commissioner for Human Rights, *Third Party Intervention*, *op. cit.*, para. 37 and statement of 7 June 2017 available at https://www.coe.int/en/web/commissioner/country-monitoring/turkey/-/asset_publisher/IK6iqfNE1t0Z/content/turkey-new-council-of-judges-and-prosecutors-does-not-offer-adequate-safeguards-for-the-independence-of-the-judiciary?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fcommissioner%2Fcountry-monitoring%2Fturkey%3Fp_p_id%3D101_INSTANCE_IK6iqfNE1t0Z%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D1%26p_p_col_count%3D2 [accessed on 16 July 2018].

¹¹⁷ Venice Commission, *Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017*, adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e, para. 119.

¹¹⁸ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his visit to Turkey*, UN Doc. A/HRC/35/22Add.3, 21 June 2017, 2017, para. 68.

¹¹⁹ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 34

¹²⁰ European Commission 2018 Report, *op. cit.*, p. 6.

¹²¹ ICJ, *Turkey: the Judicial System in Peril*, *op. cit.*, p. 18.

judges and prosecutors from being transferred against their will, except where courts are being reorganised."¹²²

5.4. Independence and effectiveness of the Turkish judiciary: conclusions

The situation of individual judges and the role of judiciary as a whole and of its structural independence, does not accord with rule of law principles. The situation continues to deteriorate rapidly due to the measures undertaken under the state of emergency legislation and the constitutional amendments approved by the referendum of 16 April 2017.

Under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered fully structurally independent due to the excessive degree of political control of appoints. In particular, it does not comply with the Recommendation of the *Council of Europe on judges: independence, efficiency and responsibility* that "[n]ot less than half the members of [councils for the judiciary] should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary."¹²³

Without an independent institution of self-governance and, therefore, without strong structural independence, it is difficult to see how judges and prosecutors can carry out their duties independently in politically sensitive cases such as those arising under the state of emergency.

The credible reports indicating that many of the judges and prosecutors appointed to replace those dismissed are not fully qualified for the positions are of particular concern, as this deficiency will, no doubt, carry an adverse impact on the quality and effectiveness of courts' decisions and decision-making process.

The ICJ notes that in the seminal *Greek Case*, the European Commission on Human Rights, even if the applicants had not exhausted domestic remedies, "having regard to the measures taken by the respondent Government with respect to the status and functioning of courts of law, did not find that in the particular situation prevailing in Greece, the domestic remedies indicated by the respondent Government could be considered as effective and sufficient."¹²⁴ The Commission reached this conclusion "having particular regard to the dismissal of thirty judicial officers in May 1968".¹²⁵ It attached particular importance to the independence of courts, both ordinary and special.¹²⁶

The dismissals of around 30 percent of the entire judiciary shortly after the declaration of the state of emergency gives rise to significant concerns for the independence of judges who remain in office, as the situation of mass dismissal of their colleagues must exert a considerable chilling effect on their own decision-making. This effect must be heightened by concerns with regard to the lack of due process in the dismissal proceedings below (see further, section 7). The ICJ is particularly concerned that 18 months after being tasked with the competence to hear appeals on dismissals of judges and prosecutors, the Council of State has yet to issue a single decision. This fog of uncertainty with regard to the legitimacy of the whole dismissal process raises serious doubts about the capacity of single judges and prosecutors to withstand attacks on their independence.

¹²² European Commission 2018 Report, *op. cit.*, p. 24.

¹²³ Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 27.

¹²⁴ The Greek Case, ECommHR, Applications nos.3321/67 - 3322/67 - 3323/67 - 3344/67, Admissibility Decision of 31 May 1968, p. 8, para. 11.

¹²⁵ *Ibid.*, p. 121, para. 231.

¹²⁶ *Ibid.*, p. 122, para. 322.

The lack of institutional independence of the judiciary, the chilling effect of the mass dismissals and the diminished quality and experience of the members of the judiciary that resulted from it are serious threats to the rule of law. These factors clearly undermine the capacity of the judiciary as a whole to provide an effective remedy for human rights violations, both in regard to measures taken under the state of emergency, and in general.

6. Effectiveness of the Constitutional Court

*To safeguard the Rule of Law and the indivisibility of all human rights, all measures adopted to address the crisis, including those taken pursuant to a declared state of emergency or to prevent social dissent in times of economic crisis, must be subject to judicial oversight and review. Affected persons must have the right to fair and effective judicial proceedings to challenge the legality of these measures and/or their conformity with national or international law.*¹²⁷

The Constitutional Court has the responsibility to examine "the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications."¹²⁸

The Court has the power to annul laws on grounds of unconstitutionality when so requested by the President of the Republic, parliamentary groups of the ruling party or of the main opposition party, or one-fifth of the members of the Grand National Assembly of Turkey, within 60 days from the publication of the law.¹²⁹ Additionally, any Turkish courts may request the Constitutional Court to rule on the constitutionality of a legal provision at stake in the case before it.¹³⁰

In 2010, the Constitution was amended by popular vote to introduce a system of individual applications before the Constitutional Court for human rights violations under the ECHR.¹³¹ Judgments of the Constitutional Court are final and "binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies".¹³² If the Constitutional Court, in an individual application case, finds that a violation of human rights arises from the decision of a court, it must refer the case back to the lower court that must rule again in accordance with the ruling of the Constitutional Court.¹³³ This system was introduced to meet Turkey's obligations to implement the European Convention on Human Rights, in particular to ensure the effective resolution of human rights disputes domestically, before they were brought before the European Court of Human Rights.¹³⁴

6.1. The functioning of the individual application procedure

The individual application procedure began to function in 2012. The European Court of Human Rights has considered that, at least as formally designed, it fulfills the procedural requirements of an effective remedy for human rights violations. The European Court of Human Rights has dismissed a considerable number of applications for reasons of failure to exhaust domestic remedies,

¹²⁷ ICJ Geneva Declaration, principle 4. See, *ICJ Legal Commentary, op. cit.*, pp. 57-72.

¹²⁸ Article 148.1, Constitution.

¹²⁹ Articles 150-151, *ibid.*

¹³⁰ Article 152, *ibid.*

¹³¹ Article 148, *ibid.*

¹³² Article 153, *ibid.*

¹³³ See, article 50 of the Law on the Constitutional Court.

¹³⁴ Venice Commission, *Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey*, adopted at its 88th plenary session, 14-15 October 2011, Doc. CDL-AD(2011)040-e.

considering this remedy offered by the Constitutional Court must be resorted to before an application can be made internationally.¹³⁵

To date, the Constitutional Court has decided only three cases regarding dismissals under the state of emergency.¹³⁶ It stressed the complementarity of its role to that of the State of Emergency Commission and decided to dismiss applications that could have been dealt with by the Commission, even in cases which were filed before the Constitutional Court before the Commission had been established.¹³⁷

The Court has however ruled on the lawfulness of certain pre-trial detentions for persons arrested in the wake of the state of emergency.

In a judgment of 30 June 2017, the Constitutional Court upheld the lawfulness of the detention on remand of two electronic and computer engineers accused of terrorism offences and of "overthrowing the constitutional order". In this judgment, it held that it had competence to assess individual applications on the respect of human rights under state of emergency measures.¹³⁸

On 26 July 2017, the Court upheld the detention on remand of a dismissed judge under charges of being member of an armed terrorist organization, FETÖ/PDY, based on the understanding that having used the communication app Bylock could be regarded as a "strong indications regarding criminal suspicion" of this offence,¹³⁹ since, in this case, it was corroborated by precise testimony of former judicial colleagues about the defendant's membership of FETÖ/PDY. Furthermore, the Court accepted that there was there was a risk of fleeing if granted bail.¹⁴⁰

A more recent development has raised serious concerns regarding the capacity of the remedy before the Constitutional Court to be effective. On 11 January 2018, four criminal courts in Istanbul¹⁴¹ refused to implement the orders of the Constitutional Court prescribing a remedy for breaches of the right to liberty and freedom of expression of two journalists, Mehmet Altan and Şahin Alpay, detained on remand while under trial for terrorism offences and alleged links to the attempted coup of 15 July 2016.

The lack of respect of the binding force of the Constitutional Court's ruling by lower courts was strongly criticized by the European Court of Human Rights and the Constitutional Court itself. The Strasbourg Court held that

*For another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty.*¹⁴²

The Court found, in this case, that the detentions of both Mehmet Altan and Şahin Alpay were unlawful and in breach of the right to liberty under article 5 ECHR as well as the right to freedom of expression under article 10 ECHR.¹⁴³ While the European Court fell short of ruling that the remedies before the Constitutional Court were ineffective, it held that the applicants' "continued pre-trial detention,

¹³⁵ See, among others, *Uzun v. Turkey*, ECtHR, Application no. 48544/99, 20 April 2006.

¹³⁶ Constitutional Court, *Sait Orçan*, B. No: 2016/29085, 19/7/2017; *Ramazan Korkmaz*, B. No: 2016/36550, 19/7/2017; *Remziye Duman*, B. No: 2016/25923, 20/7/2017. See, IHOP Report, *op. cit.*, p. 60.

¹³⁷ See, Constitutional Court, *Remziye Duman*, *op. cit.*

¹³⁸ See, Constitutional Court Press release on individual application no. 15/17, 30 June 2017.

¹³⁹ Constitutional Court Press release on individual application, available at <http://www.constitutionalcourt.gov.tr/inlinepages/press/PressReleasesofJudgments/detail/78.html> [accessed on 16 July 2018].

¹⁴⁰ *Ibid.*

¹⁴¹ The 26th and 27th Assize Courts for Mehmet Hasan Altan, the 13th and 14th Assize Courts for Şahin Alpay.

¹⁴² *Mehmet Hasan Altan v. Turkey*, *op. cit.*, para. 139; *Şahin Alpay v. Turkey*, *op. cit.*, para. 118.

¹⁴³ *Ibid.*, para. 214; *Şahin Alpay v. Turkey*, *op. cit.*, para. 184.

even after the Constitutional Court's judgment, as a result of the decisions delivered by the [first instance courts], raises serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention."¹⁴⁴

On 15 March, the Constitutional Court itself issued a further judgment in the case of Şahin Alpay strongly asserting its competence and the binding nature of its judgments:

*In this respect, there is no hesitation in respect of the binding nature of the Constitutional Court's decisions including those rendered through individual applications mechanism. Indeed, regard being had to the judgments rendered by the Court of Cassation and the Council of State that emphasize the binding nature of the individual application judgments of the Constitutional Court, it also appears that, in this respect, there is no practical problem in the Turkish legal system.*¹⁴⁵

The ICJ notes that, despite this welcome clarification within the Turkish legal system concerning the binding force of constitutional court's judgments, it appears that no disciplinary action of any kind has been activated by the Council of Judges and Prosecutors for what appears to be a deliberate misapplication of the law by four different Assize Courts.

6.2. Structural changes

Regarding the structural independence of the Constitutional Court, the constitutional amendments of April 2017 have led to an effective increase the influence of the Executive on the Court itself. As the Venice Commission pointed out,

*[t]he changes regarding the manner of appointment of the members of the CJP will have repercussions on the Constitutional Court. The CJP is responsible for the elections of the members of the Court of Cassation and the Council of State. Both courts are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. The influence of the Executive over the Constitutional Court is therefore increased.*¹⁴⁶

Finally, the workload of the Court due to the cases arising from the state of emergency is also a source of concern. According to the official statistics of the Constitutional Court, at the end of 2016, 72,226 applications were pending before it, compared to 10,570 in 2015, 2,551 in 2014 and 14 in 2013 when it began to receive individual applications.¹⁴⁷

The UN Special Rapporteur on torture, after his mission in the country, reported that, "[s]ince the failed coup, the number of complaints had increased significantly, amounting to 69,752 individual petitions in 2016 alone."¹⁴⁸

6.3. Preliminary assessment

Recent developments have cast doubt on the capacity of the Court to provide an effective remedy for violations of human rights due to its backlog and to the worrying signals that, in sensitive cases, its rulings may not be executed by lower

¹⁴⁴ *Ibid.*, para. 142; *Sahin Alpay v. Turkey*, *op. cit.*, para. 121.

¹⁴⁵ Constitutional Court, *Sahin Alpay (2)*, Application 2018/3007, para. 63.

¹⁴⁶ Venice Commission, *Report on Constitutional Amendments*, *op. cit.*, para. 121.

¹⁴⁷ See, statistics of the Constitutional Court on its own website at <http://anayasa.gov.tr/icsayfalar/istatistikler/bireyselistatistik.html>. This exponential increase has been stressed by the UN Special Rapporteur on freedom of opinion and expression, *Report 2017*, *op. cit.*, para. 71.

¹⁴⁸ Report of the UN Special Rapporteur on torture, *op. cit.*, para. 73.

courts. These concerns are strengthened by the 2017 constitutional changes that undermine the structural independence of the Court.

With regard to sensitive cases arising from state of emergency measures, the ICJ notes that most favourable rulings, from a human rights perspective, by the Constitutional Court appear to take place in cases that have already been submitted to, and are under examination by, the European Court of Human Rights.

Despite assurances from several authorities that the failure of lower courts to implement the Constitutional Court's judgment was an isolated incident not to be repeated, the ICJ is concerned at the inaction of the Council of Judges and Prosecutors on such a blatant defiance of the Constitutional Court by not one judge but four different Assize Courts. Failure to take disciplinary action against the judges in these cases suggests a risk that incident may be repeated should the sensitivity of the case demand it.

7. Are there effective remedies for dismissed public servants?

Immediately after the declaration of a state of emergency, President Erdoğan issued Decree Law no. 667 of 22 July 2016 that enacted the procedures of dismissal of public servants, judges and prosecutors and closure of legal entities considered as belonging to, connected to or having contacts with the Gülenist movement. Following this and other decrees, public servants were dismissed and legal entities were closed through insertion of their names in Annexes to Decree Laws or by commissions established in the relevant Ministries.¹⁴⁹ Moreover, Decree Law no. 667 gave power to Ministries and independent agencies to dismiss their own personnel on the same grounds.

As of 20 March 2018, 112,679 public servants have been dismissed for life from public office.¹⁵⁰ In the same timespan, 7,037 academic staff and 4,662 judges and prosecutors were dismissed.¹⁵¹ During the state of emergency, authorities ordered, via emergency decrees, the closure of 1,064 private education institutions (kindergartens, elementary schools, junior high schools and high schools), 360 private training courses and study centres, 847 student dormitories, 47 private healthcare centres, 15 private foundation universities, 29 trade unions affiliated to two Confederation, 1,419 associations, 145 foundations and 174 media and broadcasting enterprises.¹⁵²

A new emergency decree, issued on 8 July 2018 has led to the further dismissal of 18,632 public servants, including 6,153 military personnel and 9,647 members of the police and of the gendarmerie, several civil servants and 199 academicians. 12 associations, three newspapers and one TV station have been closed.¹⁵³

The ICJ has previously stressed that

The executive, legislative and judicial branches should under no circumstance invoke a situation of crisis to deprive victims of human rights violations and/or their relatives of their rights to effective access to justice, effective judicial remedies and full reparation. The adoption of measures to remove jurisdiction

¹⁴⁹ Articles 2.3 and 4, Decree Law no. 667. They were banned not only from taking any position or task in the public sector, but also from working as private security or establishing a private security company.

¹⁵⁰ See, IHOP report, *op. cit.*, p. 24.

¹⁵¹ See, *ibid.*, p. 37.

¹⁵² *Ibid.*, p. 43.

¹⁵³ See, Emergency Decree No. 701 of 8 July 2018, available (in Turkish) at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2018/07/20180708.htm&ain=http://www.resmigazete.gov.tr/eskiler/2018/07/20180708.htm> [accessed on 16 July 2018].

*or the judicial remedies for human rights violations from the ordinary courts constitutes a serious attack against the independence of the judiciary and basic principles of the Rule of Law. State secrecy and similar restrictions must not impede the right to an effective remedy for human rights violations.*¹⁵⁴

These decisions and procedures of dismissal of public servants and closure of institutions were highly criticized by the Venice Commission, which found them "deficient in the sense that the dismissals were not based on individualised reasoning, which made any meaningful *ex post* judicial review of such decisions virtually impossible".¹⁵⁵

The UN Committee on the Elimination of Discrimination Against Women, in the immediate aftermath of the attempted coup expressed its concerns regarding "the numerous measures taken by the Government, including removal of large numbers of members of the judiciary, academic institutions and civil servants, including teachers."¹⁵⁶ The Committee urged Turkey "to uphold its commitment to human rights, the rule of law, the independence of the judiciary and the preservation of the freedom of expression."¹⁵⁷

Drawing on the testimony of individuals as well as analysis of the Decree-Laws, the ICJ is concerned that the mass dismissal of public servants, including judges and prosecutors, have been undertaken without a pre-determined or clear definition of what "belong to, be connected to or having contacts with" a terrorist organization means in law. The ICJ understands that these categories did not exist in Turkish criminal or administrative law before Decree Law 667, which did not establish any clear definition of their scope. Since the Gülen movement/FETÖ has been identified as a "terrorist armed group" under Turkey's anti-terrorism law no. 3713, the long-standing concerns with regard to the excessively wide definition of "terrorism" in this legislation¹⁵⁸ further fuel the lack of foreseeability with regard to the punishable conduct and, therefore, the disregard of the principle of legality in criminal law.

In addition, it is clear that these restrictions may be incompatible with, and constitute an unnecessary and/or disproportionate restriction of the right to freedom of expression and the right to information, freedom and association. For instance, it may put insurmountable obstacles in the performance of standard academic research and inquiry.

Several experts interviewed by the ICJ referred to criteria developed in the practice of public administrations as well as from indications enshrined in criminal judgments in relation to FETÖ by criminal courts, including the Court of Cassation. Grounds for considering a person as belonging to, connected to or having contacts with FETÖ have been reported to include using the messaging application ByLock, having closed accounts after a certain date in Bank Asya, past experience of social contacts, etc. The list is not public and it is not even certain that it is exhaustive. Rather it appears to act as general, non-exhaustive and open-ended guidance for authorities applying emergency measures.

The ICJ is concerned at the impact of these dismissals for the enjoyment of the affected persons' human rights, including the rights to freedom of expression, association and at the human rights implications for those charged with criminal

¹⁵⁴ ICJ Geneva Declaration, principle 11.

¹⁵⁵ Venice Commission, Report on State of Emergency Decrees, *op. cit.*, para. 140 and 148.

¹⁵⁶ Committee on the Elimination of Discrimination against Women (CEDAW), *Concluding Observations on Turkey*, UN Doc. CEDAW/C/TUR/CO/7, 25 July 2016, para. 7.

¹⁵⁷ *Ibid.*, para. 8.

¹⁵⁸ ICJ, *Assessing Damage, Urging Action - Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, p. 37.

offences. The measures are contrary to principles of legal certainty and, specifically, to the obligation that interferences with human rights must be adequately prescribed by law, serve a legitimate purpose and be necessary and proportionate to that purpose. This element alone taints the entirety of the dismissal proceedings with arbitrariness.

7.1. Seeking a remedy for complaints against dismissals

A problem that immediately arose for those dismissed under the state of emergency was how they could challenge these decisions. It transpired not to be an easy task. Some persons affected sought to challenge the dismissal decisions made by administrative bodies, including by the High Council of Judges and Prosecutors, before administrative courts. However, on 4 November 2016, the Council of State, the highest administrative court, declared that it was not competent to assess the merits of an annulment action brought by a judge against the decision of the High Council of Judges and Prosecutors on his dismissal, and sent the case back to the first instance administrative courts.¹⁵⁹ Since then, in addition, several first instance administrative courts have also declared their lack of competence to examine cases challenging dismissals by insertion on lists annexed to Decree-Laws.¹⁶⁰

Meanwhile, in four judgments issued on 12 October and 2 November 2016, the Constitutional Court, reversing its established jurisprudence, dismissed a challenge to the constitutionality of decree-laws issued during the state of emergency, submitted by a group of MPs. Taking a literal interpretation of then article 121 of the Constitution, the Court held that it did not have competence to review the decree-laws' constitutionality but did not foreclose the possibility to do so by means of individual application.¹⁶¹ According to the media statement made by the Constitutional Court on 4 August 2017, a total of 70,771 applications lodged to the Court have been transferred to the Commission.¹⁶²

This development notwithstanding, the European Court of Human Rights found that these domestic remedies, including before the Constitutional Court, must be resorted to before bringing a case before it. On 8 November 2016, the European Court rejected the case of the dismissed Judge Zeynep Mercan, at the time in detention for alleged links with the attempted coup, in which she claimed violations of her right to liberty. The European Court held that there was no element to establish that the individual application before the Constitutional Court could not provide an effective remedy for violations of their human rights.¹⁶³ It added that the fear of lack of impartiality of the Constitutional Court adduced by the applicant, based on the dismissal by the same Court of two of its members, could not exempt her from resorting to the remedy, although it could later be the ground for a complaint of a violation of the right to a fair trial under article 6 ECHR.¹⁶⁴ On 26 November 2016, in the case of dismissal of a teacher, the Court upheld its previous position and held that it was also too early to know whether administrative courts were ineffective in providing remedies for violations of the Convention rights.¹⁶⁵

¹⁵⁹ See, *Köksal v. Turkey*, ECtHR, Admissibility Decision, Application no. 70478/16, para. 14.

¹⁶⁰ See, *ibid.*, para. 15.

¹⁶¹ See judgments nos. 668 and 669 of 12 October 2016 and nos. 670-671 of 2 November 2016.

¹⁶² See, IHOP Report, *op. cit.*, p. 60.

¹⁶³ *Mercan v. Turkey*, ECtHR, Admissibility Decision, Application no. 56511/16, 8 November 2016, para. 25.

¹⁶⁴ *Ibid.*, para. 26.

¹⁶⁵ *Akif Zihni v. Turkey*, ECtHR, Admissibility Decision, Application no. 59061/16, 29 November 2016, paras. 28-29

7.2. The Commission on State of Emergency Measure

Given the pressure of the massive number cases alleging human rights violations due to measures under the Emergency Decree Laws, in particular in relation to dismissal of civil servants, judges and lawyers, the Secretary General of the Council of Europe suggested the introduction of a commission for state of emergency complaints.¹⁶⁶

The suggestion was endorsed in principle by the Venice Commission, which recommended the establishment of a "special *ad hoc* body, which would be tasked with the examination of individual cases related to dismissals of public servants and other associated measures."¹⁶⁷ It further stressed that such body should

*"give individualised treatment to all cases[;] have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions[;] be independent, impartial and be given sufficient powers to restore the status quo ante, and/or, where appropriate, to provide adequate compensation. The law should enable for subsequent judicial review of decisions of this ad hoc body. Limits and forms of any compensation may be set by Parliament in a special post-emergency legislation, with due regard to the Constitution of Turkey and its international human-rights obligations."*¹⁶⁸

7.2.1. The Commission's rules

On 23 January 2017, the Turkish Council of Ministers issued Decree Law no. 685 establishing a "Commission to Review the Actions Taken under the Scope of the State of Emergency" that will be in place for a maximum of two years. This maximum term may however be extended by the Council of Ministers at its discretion for additional terms of one year.¹⁶⁹

The Council of Ministers called the establishment of the Commission a "tangible example of Turkey's commitment to the Council of Europe's standards"¹⁷⁰ and declared that the Commission was "established with the aim to creating an effective domestic remedy for those who were affected by the measures under the decree laws."¹⁷¹

The Commission has the competence "to carry out an assessment of, and render a decision on, applications related to acts established directly through the decree-laws, without any other administrative acts being carried out, within the scope of the state of emergency ... on the ground of membership of, or have relation, connection or contact with terrorist organizations, or structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State."¹⁷²

The Commission is composed of seven members that hold office for two years:

- Three are appointed by the Prime Minister from among public servants;
- One appointed by the Ministry of Justice from among judges and prosecutors working within the Ministry;

¹⁶⁶ See, Speech by the Secretary General of the Council of Europe Thorbjørn Jagland of 24 January 2017, available https://www.coe.int/en/web/secretary-general/speeches/-/asset_publisher/gFMV10SKOUrv/content/understanding-populism-and-defending-europe-s-democracies-the-council-of-europe-in-2017 [accessed on 16 July 2018].

¹⁶⁷ Venice Commission, Report on State of Emergency Decrees, *op. cit.*, para. 221.

¹⁶⁸ *Ibid.*, para. 222.

¹⁶⁹ Article 3.1, Decree Law no. 685, Published in the Official Gazette no. 29957, dated 23 January 2017 (Translation provided by the Turkish authorities to the Venice Commission).

¹⁷⁰ Information Note Concerning the Inquiry Commission on the State of Emergency Measures Established by the Decree Law no. 685 dated 23 January 2017 and amended by the Decree law no. 690 dated 29 April 2017.

¹⁷¹ *Ibid.*

¹⁷² Article 1.1 Decree Law no. 685, Published in the Official Gazette no. 29957, dated 23 January 2017 (Translation provided by the Turkish authorities to the Venice Commission).

- One appointed by the Minister of Interior from among public servants;
- Two appointed by the High Council of Judges and Prosecutors from among "rapporteur judges who hold office in the Court of Cassation or in the Council of State."¹⁷³

After the expiry of the first two-year term, the Commission may be granted one more year of mandate, subsequently renewable for one year terms. In this event, new members must be appointed in accordance with this rule. If existing members want to stay in the Commission, they may be reassigned in accordance with the same procedure.¹⁷⁴ The secretariat of the Commission is provided by the Prime Minister's Office that also sets its procedural rules,¹⁷⁵ published on 12 July 2017, and its officers remain under the authority of the Prime Minister's Office. The ICJ was informed that the staff of the Commission are also assisted by investigative judges as rapporteurs, and that at least four rapporteurs assist each Commission's member.

The members of the Commission are not subject to dismissal unless:

- "a) the member has failed to attend a total of five Commission meetings within one calendar year, without any reason that could be accepted by the Commission,
- b) it is documented by a medical board report that the member is unfit to work due to a serious disease or disability,
- c) a conviction pronounced in respect of the member due to offences he/she has committed related to his/her duties becomes final,
- ç) the total duration of the member's temporary unfitness for work lasts more than three months,
- d) an investigation or prosecution is initiated against the member for offences listed in Articles 302, 309, 310, 311, 312, 313, 314 and 315 of the Turkish Criminal Code (Law no. 5237, dated 26 September 2004),
- e) an administrative investigation against the member is initiated by the Prime Ministry or a permit for prosecution against the member is issued on the ground that the member concerned is a member of, or has relations, connection or contact with terrorist organizations, or terrorist structures/entities, or groups established by the National Security Council as engaging in activities against the national security of the State."¹⁷⁶

Any investigation against the members of the Commission must be authorized by the Prime Minister.¹⁷⁷

The Commission has competence to review dismissals, closure of associations, annulment of ranks of retired personnel ordered through decree-laws, however not for those decided by administrative act in accordance with rules contained in these decrees, including dismissals of judges and prosecutors.¹⁷⁸ The applications must be filed with the relevant governorate or the institution where the applicant worked within sixty days from the entry into function of the Commission or of the entry into force of the Decree Law if later.¹⁷⁹

The Commission decides on admissibility, examining the respect of procedural deadlines, legal interest of the applicant, material jurisdiction, and respect for other procedural requirements. It is also the Commission that establishes the rules of procedure for the admissibility assessment.¹⁸⁰ Further inadmissibility

¹⁷³ Article 1.2, Decree Law no. 685.

¹⁷⁴ Article 3.2, *ibid.*

¹⁷⁵ Articles 12 and 13, *ibid.*

¹⁷⁶ Article 4.1, *ibid.*

¹⁷⁷ Article 3.3. *ibid.*. Included for the offences referred to in point (d) article 4, Article 197 in Decree Law no. 694.

¹⁷⁸ Article 2, *ibid.*

¹⁷⁹ Article 7.3, *ibid.*

¹⁸⁰ Article 8, *ibid.*

grounds (or more specific grounds) have been added by internal regulations. These include applications not duly made, lack of capacity to represent the applicant, application not made in writing, another legal remedy is available, and other unspecified requirements.¹⁸¹

In the merits phase, the Commission examines the case "on the basis of the documents in the file. The Commission may, following the examination, dismiss or accept the application."¹⁸² No hearing is possible.¹⁸³

Decisions are taken by absolute majority (four members) and abstentions are forbidden.¹⁸⁴

If the decision is positive, the State Personnel Administration must propose to the applicant solutions for reinstatement to an equivalent position to the one he or she previously occupied, excluding the administration where he or she used to work previously.¹⁸⁵ If the case concerns a legal entity, the decision of its closure and all its effect and consequences must be considered null and void.¹⁸⁶

The first seven members of the Commission were appointed on 16 May 2017¹⁸⁷ and include "judges from the Court of Cassation and the Council of State as well as senior government officials."¹⁸⁸ It reportedly commenced functioning on 22 May 2017.¹⁸⁹ It started receiving applications on 17 July 2017 and finished receiving them on 14 September 2017.¹⁹⁰ It made its first decision on 22 December 2017.¹⁹¹

Decisions of the Commission may be challenged within sixty days, before the Ankara administrative courts nos. 19 and 20.¹⁹² Individuals that were dismissed through an administrative decision based on a decree-law may challenge it before an administrative court and appeal before the Council of State. Those whose names were inserted in annexes to decree-laws must use the remedy of the Commission.¹⁹³ Judges and prosecutors may file an action before the Council of State as first instance court.¹⁹⁴

7.2.2. The functioning of the Commission in practice

As of 17 May 2018, there had been 108,905 cases filed with the Commission. Of these, 17,000 had been decided.¹⁹⁵ Some 1,990 of the applicants concerned had already been reinstated by emergency decree so are not examined in substance

¹⁸¹ Article 10.3, Procedures and Principles Regarding the Functioning of the Commission on Examination of the State of Emergency Procedures.

¹⁸² Article 9, Decree Law no. 685

¹⁸³ Article 14.3, Procedures and Principles Regarding the Functioning of the Commission on Examination of the State of Emergency Procedures.

¹⁸⁴ Article 1.3, Decree Law no. 685.

¹⁸⁵ Article 10.1, *ibid.*

¹⁸⁶ Article 10.2, *ibid.*

¹⁸⁷ Information Note Concerning the Inquiry Commission on the State of Emergency Measures Established by the Decree Law no. 685 dated 23 January 2017 and amended by the Decree law no. 690 dated 29 April 2017.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ Hürriyet Daily News, "Turkey's state of emergency commission to start receiving applications on July 17", 12 July 2017, available at <http://www.hurriyetdailynews.com/turkeys-state-of-emergency-commission-to-start-receiving-applications-on-july-17-115437> [accessed on 16 July 2018]; Comments of the Turkish Government to the report of the UN Special Rapporteur on torture, UN Doc. A/HRC/37/50/Add.2, para. 87

¹⁹¹ Hürriyet Daily News, "Turkey's state of emergency commission makes first decisions on dismissed public sector staff", 22 December 2017, available at <http://www.hurriyetdailynews.com/turkeys-state-of-emergency-commission-makes-first-decisions-on-dismissed-public-sector-staff-124583> [accessed on 16 July 2018].

¹⁹² Article 11.1, Decree Law no. 685, and article 16, Procedures and Principles Regarding the Functioning of the Commission on Examination of the State of Emergency Procedures.

¹⁹³ As clearly explained by PACE Report, *op. cit.*, para. 53.

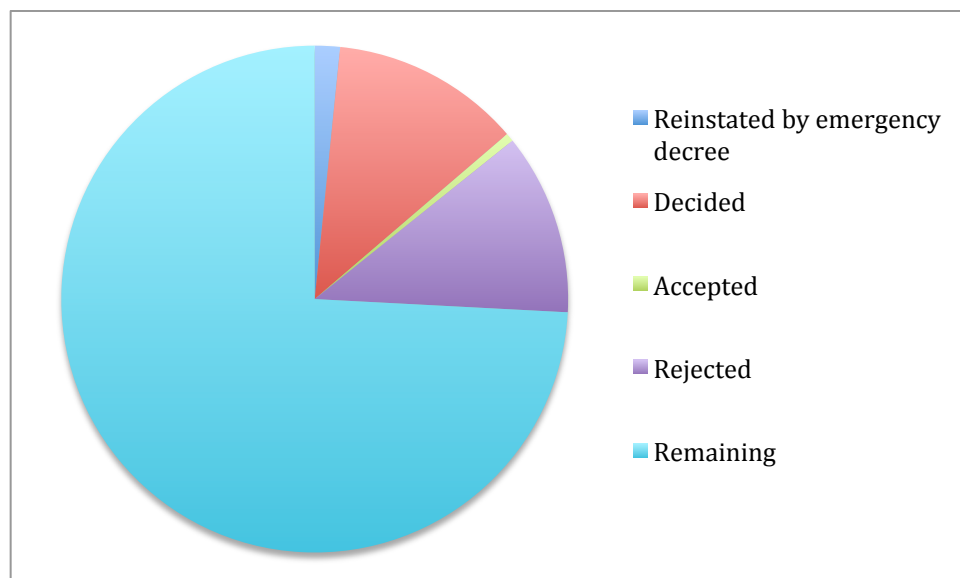
¹⁹⁴ Article 11.2, Decree Law no. 685. See, Information Note Concerning the Inquiry Commission on the State of Emergency Measures Established by the Decree Law no. 685 dated 23 January 2017 and amended by the Decree law no. 690 dated 29 April 2017.

¹⁹⁵ Information on <https://ohalkomisyonu.basbakanlik.gov.tr/> [visited on 11 June 2018].

by the Commission. Of the remaining 15,010 cases, 660 resulted in a positive decision for the applicant, while 14,350 were rejected.

The rejection rate is 95.60 percent.

The current caseload of the Commission is represented here:



The ICJ was told that the Commission is currently processing around 800-1,000 cases per week and was informed that the aim is to speed up the work of the Commission that should finish its work in two to three years maximum. The ICJ is however concerned that the speed of examination of cases by the Commission at a rate of 1,000 cases per week may seriously jeopardize the quality of the assessment with serious repercussions on the later appeal stages.

Finally, the extremely low admission rate raises concerns about the capacity of the Commission to conduct a thorough individual assessment in every case. This rate should be clarified by the Commission in case it is related to prioritization of more clear-cut cases or other factors.

7.2.3. International reactions to the establishment of the Commission

The introduction of the Commission was initially welcomed by the Venice Commission¹⁹⁶ and the PACE.¹⁹⁷ The Commission drew particular attention to the fact that its decisions "are subject to judicial review by the competent administrative courts, whose decisions may be further challenged before the Constitutional Court and, as a last resort, before the Strasbourg Court, which will then decide whether a remedy is effective or not."¹⁹⁸

Nonetheless, in March 2017, the Venice Commission identified some points of concern:

- the lack of requirement for the Commission's decisions to "be supported with evidence, reasoned and/or published" which makes difficult in practice to challenge them before the designated administrative court(s) in Ankara. The Venice Commission pointed out that, "if the commission is not

¹⁹⁶ Venice Commission, *Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media*, adopted at its 110th plenary session, 10-11 March 2017, para. 84.

¹⁹⁷ *Ibid.*, para 17.

¹⁹⁸ *Ibid.*

capable of issuing reasoned and individualized decisions, it is unclear what would be the role of the administrative courts and of the Constitutional Court in this scheme."¹⁹⁹

- Lack of clarity in the remedies the Commission has the power to provide: restitution, restoration of *status quo ante*, returning of assets, compensation.

The UN Special Rapporteur on freedom of expression, the first UN independent human rights expert to visit Turkey after the establishment of the Commission, expressed concern "about the narrow scope of the Commission's mandate and its lack of independence and impartiality."²⁰⁰

The UN Special Rapporteur on torture expressed the view that "the composition of the Commission may raise legitimate questions regarding its independence and impartiality, given that the majority of its members will be appointed by the Government. ... Concerns have also been raised that the Commission may be considered as an additional domestic remedy that has to be exhausted before individuals or institutions can have their cases reviewed by the Constitutional Court (and possibly later by the European Court of Human Rights)."²⁰¹

On 7 March 2017, the European Court of Human Rights dismissed the case of another judge complaining about the fairness of her dismissal. This case came after the issuance of Decree Law no. 685 establishing the State of Emergency Commission. The Court held that a remedy should be sought before the State of Emergency Commission before applying to the European Court of Human Rights, taking into consideration the fact that its decisions are subject to the judicial review of the administrative courts and, in the end, the individual application mechanism of the Constitutional Court. The Court held that the Commission was *a priori* an effective and accessible remedy, but that this did not preclude the Court upon later review from a later finding that it was non-compliant as a remedy.²⁰² On 12 June 2017, the Court, in a decision rejecting the case of a dismissed teacher, upheld this approach. It further stressed that the Commission is not a judicial remedy but found it positive that its decisions were subject to judicial review.²⁰³ In the latest judgment of the Court affirming this approach, it found inadmissible the case of a former judge challenging the conditions of his detention.²⁰⁴

The Parliamentary Assembly of the Council of Europe²⁰⁵ and the Office of the UN High Commissioner for Human Rights²⁰⁶ have recently expressed concern at the

¹⁹⁹ *Op Ibid.*, para. 88, other reasons listed here are in paras. 86-87.

²⁰⁰ Report of the UN Special Rapporteur on freedom of expression, *op. cit.*, 2017, para. 30.

²⁰¹ Report of the UN Special Rapporteur on torture, *op. cit.*, para. 84.

²⁰² *Catal v. Turkey*, ECtHR, Admissibility Decision, Application no. 2873/17, 7 March 2017, paras. 29-32.

²⁰³ *Köksal v. Turkey*, ECtHR, Admissibility Decision, Application no. 70478/16, paras. 28-29.

²⁰⁴ *Ayhan Bora v. Turkey*, ECtHR, Admissibility Decision, 28 November 2017. The complaint on the alleged inhuman or degrading treatment for the detention conditions was dismissed as manifestly unfounded.

²⁰⁵ PACE Report, *op. cit.*, para. 92: "[The Commission's] members come from the same authorities which dismissed the officials in question, putting in doubt their independence and impartiality; its members are automatically dismissed should a terrorism-related investigation be opened concerning them – given the very broad scope of anti-terrorism law in Turkey and the potential for its arbitrary abuse, this places the members' positions on the Commission at the mercy of the authorities; the secretariat of the Commission, responsible for administrative and preparatory work, is appointed by the Prime Minister, putting its independence in question; the basis of contested decisions is unclear, making them difficult to contest; there is no possibility of adversarial proceedings and there are no hearings, making it difficult for applicants to articulate their cases; the workload, working methods (each decision requires the participation of four of the Commission's seven members) and time-frame available would seem to make it almost impossible "to give individualised treatment to all cases", as intended by the Venice Commission."

²⁰⁶ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 106: "there is no requirement for the decisions of the Commission to be supported with evidence, reasoned and/or published. As pointed out by the Venice Commission, it is of great concern that the Commission will conduct its examinations on the sole basis of documents in the case-file, seemingly without participation of the person concerned. It is estimated that the Commission would receive around 100,000 applications in a period of two years. With only seven members, it would be difficult for it to issue reasoned and individualized decisions in each case." And, "the Commission of Inquiry for State Emergency Practices cannot be considered as an independent body that will guarantee full respect of due process. It regrets the lack of appropriate

lack of independence and impartiality of the Commission as well as at the fact that the very basis of the Commission's decisions are not clear, at the lack of hearings and adversarial proceedings and the lack of conditions that would allow the Commission to give genuinely individualized decisions.

The European Commission, in its 2018 Progress Report on Turkey, determined that the Commission "still needs to develop into an effective and transparent remedy for those unjustly affected by measures under the state of emergency."²⁰⁷

7.2.4. An interim assessment on the OHAL Commission as an effective remedy

The State of Emergency Commission has clear shortcomings related to its independence from the executive that disqualify it as a judicial remedy. The duration of its members' mandate is neither open-ended nor clearly defined, as the Council of Ministers, i.e. the Executive, can extend them yearly at discretion.

Furthermore, its appointment system clearly reveals executive influence since the executive appoints directly five of its members and the other two are nominated by the Council of Judges and Prosecutors that is also appointed by the executive and legislature. Even more, the membership of the Commission is modified or renewed by these bodies any time the Council of Minister renews the term of the Commission's mandate. This means that, from the beginning of 2019, the professional tenure of the Commission's members is at the discretion of the political powers, the executive and legislature. In light of this appointment system, it counts for little that some of the members of the Commission are members of the judiciary.

An additional obstacle to the body's independence is the fact that members can be dismissed when the Prime Minister initiates administrative investigations against them or authorises the carrying out of criminal investigations.

It is therefore clear, on these grounds alone, that the Commission is not independent and does not in itself provide an effective remedy. However, many authorities have stressed that "this commission is an administrative, not a judicial body."²⁰⁸ Rather its function is seen as being to protect the judicial system from excessive workload, including in sudden increases in workload related to emergency decrees.

The establishment of the State of Emergency Commission recalls several past experiences of Turkey that have sought to provide effective remedies for extensive violations of a Convention right. The most recent was the establishment of a compensation commission for excessive length of judicial proceedings that was tasked with providing compensation in cases for excessive length of judicial proceedings, under article 6.3 ECHR, that took place before the remedy of individual application to the Constitutional Court entered into force.²⁰⁹ However, this remedy was limited to one kind of human rights violation that by its nature does not allow for *restitutio in integrum* but only for compensation. Furthermore, its competence was limited in time as it could consider cases that would have

remedies to address thousands of dismissals of employees, liquidation of thousands of private entities, including health and education institutions, as well as trade unions" (para 108).

²⁰⁷ European Commission 2018 Report, *op. cit.*, p. 3.

²⁰⁸ PACE Report, *op. cit.*, para. 57.

²⁰⁹ See, *Turgut and others v. Turkey*, ECtHR, Admissibility Decision, Application no. 4860/09, 26 March 2013. The remedy was set up after the pilot judgment *Ümmühan Kaplan v. Turkey*, ECtHR, Application no. 24240/07, Judgment of 20 March 2012.

taken place only before the date of entry into force of the individual complaint mechanism before the Constitutional Court.

There are several other important reasons why the remedy before the State of Emergency Commission is not effective.

First, the Commission cannot hold any public or non-public hearing and must decide on the merits based on the written submitted files. However, it appears that generally people dismissed by virtue of being listed in an Annex to a Decree-law - and several of those dismissed by administrative decision - are not shown the individual grounds for their dismissal. This makes challenging their dismissal via documentary virtually impossible.

It is still unclear whether the decisions and the reasoning on which they are based on these cases will be published or not. To date no decision has been published by the authorities.

Finally, it is difficult to see how it is possible for the Commission under the current structure to finish its work in the next few years while giving a proper individualized assessment of each case. This is likely to make cases subject to significant delays, which in itself would put at risk the effectiveness of the remedy before the Commission.

The current rejection rate of more than 95 percent already casts doubt on the effectiveness of the remedy, particularly given the lack of certain procedural guarantees such as a hearing, difficulties for applicants in presenting evidence, or the availability of a reasoned decision. Because of this, it is highly likely that the workload of the appeal remedies will also become excessive.

The State of Emergency Complaints Commission cannot therefore be considered *per se* either an independent or an effective remedy. The key question then becomes whether appeals of the Commission's decisions through the Turkish judicial system can remedy the limitations of the Commission itself, and thereby ensure that the national system as a whole provides an effective remedy for persons dismissed under the state of emergency. Indeed, administrative courts are appeal bodies against the decisions of dismissal by Ministries and Agencies under emergency Decree Law 667, as well as against decisions of the State of Emergency Complaints Commission.

However, the alarming situation of the judiciary in Turkey, described above, casts serious doubts as to the capacity of the judicial system to provide an effective appeal against decisions of the Commission or of ministries or agencies that have dismissed employees.

The effectiveness of administrative courts in Turkey with regard to cases of dismissals has yet to be tested by the likely wave of cases that will come from the State of Emergency Complaints Commission. Nonetheless, it is of particular concern that the Ankara administrative courts nos. 19 and 20 were designated as the courts competent to hear appeals from the Commission's decisions by the Council of Judges and Prosecutors, in its formation following the constitutional reform.²¹⁰ This situation has tainted the very administrative courts that are entrusted with providing an appeal against decisions of the State of Emergency Complaints Commission of suspicions of lack of independence. It is further symptomatic that the Council of State, the supreme administrative court of Turkey, has not issued a single ruling on the appeals of judges and prosecutors

²¹⁰ See article 11 Emergency Decree No. 685 (Article 11) dated 23 January 2017.

against their dismissal. This negligence has deprived administrative courts, the State of Emergency Complaints Commission, and all public administration institutions of the necessary guidance and precedent for due process compliant decisions on dismissals and their appeals.

8. Obstacles in access to a lawyer

The state of emergency Decree Laws have introduced a set of measures that have considerably restricted the capacity of lawyers, in accordance with their professional responsibilities, to effectively represent clients involved in investigations for terrorism and/or linked to the attempted coup of 15 July 2016

The Decree Laws introduced the following restrictions:²¹¹

1. Public prosecutors have been granted the authority to deny access to a lawyer to detainees for up to five days under Emergency Decree no. 668 of 28 July 2016. Later, this period was reduced to 24 hours under Emergency Decree no. 684 of 23 January 2017.
2. Limitations on the confidentiality, frequency and duration of interviews between the detainee and his/her lawyer, "where there is a risk that public security and the security of the penitentiary institution is endangered, that the terrorist organization or other criminal organizations are directed, that orders and instructions are given to them or secret, clear or crypto messages are transmitted to them through the remarks during the interviews between the detainees and their lawyer".²¹² These include:
 - a. Auditory or audio-visual recordings of the interviews can be made via technical devices;
 - b. Officers may be present during interviews between the detainee and his/her lawyer with a view to monitoring the interview;
 - c. The documents or document templates and files given by the detainee to his/her lawyer or vice versa and the records kept by them concerning the interview between them may be seized;
 - d. The days and hours of the interviews may be limited upon the public prosecutor's order;
 - e. In the event that the interview of the detainee is understood to be made for the aim set out above, the interview shall be immediately ended;
 - f. In the event that such minutes are drawn up in respect of a detainee, the Office of the Magistrates' Judge can ban the detainee from meeting with his or her lawyer(s), upon the public prosecutor's request. The decision on banning shall be immediately served on the detainee and the relevant Bar Presidency with a view to assigning a new lawyer.²¹³

The Office of the UN High Commissioner for Human Rights has reported that the "risks faced by criminal defence lawyers is reportedly so high that it is extremely difficult for suspects arrested during the state of emergency to find a lawyer. Some lawyers still willing to defend suspects of terrorism demand fees that are unaffordable for the majority of suspects. This constitutes an obstacle to the enjoyment of the right to fair trial and access to justice."²¹⁴

²¹¹ See, Article 6 of the Decree Law No. 667 reads that: "**Investigation and prosecution procedures**
ARTICLE 6 - (1) During the period of state of emergency, with regard to the offences enumerated under Fourth, Fifth, Sixth and Seventh Sections of Fourth Chapter of Second Volume of the Turkish Criminal Code no. 5237 dated 26 September 2004, the offences falling under the Anti-Terror Law no. 3713 dated 12 April 1991 and the collective offences;"

²¹² Article 6(d) of the Decree Law No. 667.

²¹³ See, *ibid.*

²¹⁴ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 57.

The ICJ has received numerous reports indicating that, while currently detainees charged with offences linked to the attempted coup can have access to a lawyer of their choice and lawyers are defending them, the fees requested to take up their defence are considerably higher than normal by Turkish standards.

The ICJ has previously stressed that

*In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients, including to those deprived of their liberty, and to relevant documentation and evidence, at all stages of proceedings. All branches of government must take necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including substantial and timely access to all relevant case files.*²¹⁵

In this connection, the UN Basic Principles on the role of lawyers require governments to ensure that lawyers: "(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics".²¹⁶ These protection measures are crucial to providing effective legal assistance to clients.²¹⁷

The State has a duty to safeguard lawyers where their security is threatened, and to ensure that lawyers are never identified with their clients or their clients' causes as a result of discharging their professional functions.²¹⁸ The UN Special Rapporteur on the independence of judges and lawyers emphasized that "even during a state of emergency, the rule of law must be respected, there should be no prolonged detentions without trial, all detainees shall have access to a legal representative and shall have the right to have the lawfulness of their detention reviewed by an independent court".²¹⁹

Recommendation R (2000) 21 of the Council of Europe Committee of Ministers identifies the obligations of States take all necessary measures "to respect, protect and promote the freedom of exercise of profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights".²²⁰ Under international human rights law, including the European Convention on Human Rights, States must take measures to protect persons who the authorities know or ought to know are at risk of physical attack.²²¹ States must also ensure that a prompt and thorough investigation is undertaken, by an independent and impartial authority, into attacks that endanger lives or physical integrity of those within their jurisdiction, including lawyers.²²²

²¹⁵ ICJ Geneva Declaration, principle 8. See *ICJ Legal Commentary*, *op. cit.*, pp. 125-137.

²¹⁶ *UN Basic Principles on the Role of Lawyers*, principle 16.

²¹⁷ *Ibid.*, principles 16 (b), 22.

²¹⁸ *Ibid.*, principle 18; Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1998/39, para. 179.

²¹⁹ Commission on Human Rights, *Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy*, submitted in accordance with Commission on Human Rights resolution 2001/39, UN Doc. E/CN.4/2002/72, para. 28.

²²⁰ Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, principle I.1.

²²¹ UN HRC, *General Comment No. 31, the Nature of the General Obligations Imposed on State Parties to the Covenant*, CCPR/C/21/Rev. 1/Add. 13, 26 May 2004, para. 8; ECtHR, *Osman v UK*, Application No. 23452/94, Judgment of 28 October 1998.

²²² Convention Against Torture, article 12; Human Rights Committee, *General Comment No. 20 on article 7*, HRI/GEN/1/Rev. 7, para. 14; See generally, ICJ, *Practitioners Guide no. 2*, *op. cit.*, Chapter IV.

The obstruction of the work of lawyers will typically impermissibly impede the lawyer in providing an effective defence, contrary to the right to a fair trial;²²³ or prevent the lawyer from challenging arbitrary detention,²²⁴ or torture or other ill-treatment.²²⁵ In addition to violating the rights of the lawyer, attacks on lawyers, or threats or harassment of lawyers, are likely to violate the rights of the clients they represent.

Under international law, an accused person must be granted prompt access to counsel in accordance with the right to communicate with counsel²²⁶ and as part of the right to a fair trial.²²⁷ Such access may serve as a preventive measure against ill-treatment, coerced self-incrimination and "confessions" or other violations of the rights of the suspect.²²⁸ Moreover, the European Court of Human Rights has held that "a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial".²²⁹ The Human Rights Committee has affirmed that there is a violation of the right to a fair trial if a "court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively."²³⁰ Therefore, not only do practices of impeding access of lawyers to clients run contrary to the international law and standards, but they also lead to violations of human rights, which may not necessarily be remedied at future stages in the proceedings.²³¹

Under international law, States have an obligation to ensure full confidentiality of communication between a lawyer and a client.²³²

In a memorandum published in October 2016, the Council of Europe's Commissioner for Human Rights condemned the drastic restrictions to access to lawyers, as well as limitations on the confidentiality of the client-lawyer relationship. In particular, the Commissioner urged the Turkish authorities to revert to the situation before the state of emergency as a matter of urgency.²³³

The Parliamentary Assembly of the Council of Europe also urged Turkey to "redress the procedural shortcomings under the state of emergency, in particular with respect to the duration of detention and effective access to lawyers".²³⁴

The ICJ considers that, in the current conditions, lawyers face significant obstacles to providing effective representation and defense to clients that have been subject to criminal prosecution and/or dismissals following the state of emergency. The five-day delay before the visit of a lawyer and the restrictions to the possibility to hold confidential interviews between lawyers and their clients strike at the core of the legal profession's guarantees and of the fair trial rights of the defendants.

²²³ Guaranteed, *inter alia*, under article 6 ECHR and article 14 ICCPR.

²²⁴ Guaranteed, *inter alia*, under article 5 ECHR and article 9 ICCPR

²²⁵ Guaranteed, *inter alia*, under the UN Convention against Torture; article 3 ECHR and article 9 ICCPR

²²⁶ Human Rights Committee, *General Comment no. 32, op. cit.*, para. 34; *UN Basic Principles on the Role of Lawyers*, principle 1 .

²²⁷ *Salduz v Turkey*, ECtHR, GC, Application no. 3639/02, paras. 54–55.

²²⁸ Human Rights Committee, *General Comment no. 20, op. cit.*, para. 11; *Salduz v Turkey*, *op cit* , para. 54.

²²⁹ *Al-Moayad v Germany*, Application No.35865/03, (inadmissibility) Decision of the European Court (2007), para. 101.

²³⁰ Human Rights Committee, *General Comment no. 32, op cit* , para. 38.

²³¹ ECtHR, *Salduz v Turkey*, *op cit* , para. 62.

²³² Human Rights Committee, *General Comment no.32, op cit* , para. 34; *UN Basic Principles on the Role of Lawyers*, principle 8, 22.

²³³ Commissioner for Human Rights of the CoE, *Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey*, CommDH(2016)35, 7 October 2016, para. 16.

²³⁴ PACE, *The functioning of democratic institutions in Turkey*, report by Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), 2017, para 21.4.

9. Obstacles to the action of civil society

Since the declaration of the State of Emergency and to the time of publication of this report, some 1,619 associations have been closed by Emergency Decrees No: 667, 677, 679, 689, 693, 695 and 701. While 188 of these decisions were later revoked, as of 20 March 2018, the number of closed associations was 1,419. 12 associations have been closed by Emergency Decree no. 701 of 8 July 2018.²³⁵

The majority of these organizations have been closed down permanently and their assets were seized under Emergency Decree no. 677. Among these civil society organizations, there were tens of local human rights, woman's rights, child rights, cultural heritage protection, poverty alleviation and legal rights organizations. Lawyers' organizations such as Çağdaş Hukukçular Derneği (Contemporary Lawyers Association) and Özgürlükçü Hukukçular Derneği (Association of Lawyers for Freedom) comprising lawyers representing the victims of torture and other ill-treatment and Mezopotamya Hukukçular Derneği (Mesopotamia Lawyers Association) representing the people effected from the curfews in the southeast Anatolia; women's domestic violence and the child rights organisation Gündem Çocuk Derneği (Agenda Child) are among the organizations that have been closed down.

Two associations, Çağdaş Hukukçular Derneği (Contemporary Lawyers Association) and Mesopotamia Lawyers Association (composed mainly of lawyers of Kurdish origin) were closed down on 22 November 2016 by Emergency Decree No 677. Established by lawyers, these associations were working on cases involving torture and ill-treatment, enforced disappearance and other serious human rights violations. The head of the Contemporary Lawyers Association, Selçuk Kozağaçlı was arrested on 13 November 2017.

According to the recent Report entitled "Lawyers under the Judicial Pressure" published by the Human Rights Association, 76 cases concerning investigations and trials had been launched against lawyers.²³⁶

Since the declaration of the state of emergency, a number of human rights defenders and other civil society actors have been arrested, and are currently standing (or have already stood) trial under charges of membership of a terrorist armed group. The following individuals are among them:

Taner Kılıç, Chair of Amnesty International Turkey, was detained on 6 June 2017 in Izmir. He was charged three days later with "membership of the Fethullah Gülen Terrorist Organization" (FETÖ) and remanded in pre-trial detention. Since then he has been held at the Şakran prison in Izmir. He has been charged based on the allegation that he downloaded and used the ByLock messaging application, claimed to have been used by the Gülen movement to communicate. However, two independent forensic analyses of his phone commissioned by Amnesty International found that there was no trace of ByLock having been on his phone. On 31 January 2018, the İstanbul Heavy Penal Court No. 35 ordered Taner Kılıç's conditional release; however, it reversed its decision on 1 February 2018 after the prosecutor appealed the release order. The fifth hearing is scheduled to take place on 7 November 2018.

Osman Kavala: Osman Kavala, the founder and Head of Board of Anadolu Kültür, a non-profit company founded in 2002, was taken into custody on 18 October 2017. Following 14 days in police custody, the Istanbul Chief Public

²³⁵ See complete data in IHOP Report, *op. cit.*

²³⁶ Human Rights Association, *Yargı Baskısı Altındaki Avukatlar Raporu Yayınlandı*, 1 May 2018, available at <http://www.ihd.org.tr/yargi-baskisi-altindaki-avukatlar-raporu-yayinlandi/> [accessed on 16 July 2018].

Prosecutor's Office referred him to court for arrest without taking his testimony. The Istanbul 1st Criminal Court of Peace ruled that Osman Kavala should remain in detention awaiting trial on charges under articles 309 (attempt to attack the constitutional order) and 312 (attempt to abolish the government of Turkey or preventing it from fulfilling its duties) of the Turkish Penal Code. At the time of this report, there had been no indictment yet issued.

Eren Keskin, Co-Chair of the Human Rights Association: A total of 143 court cases were launched against Eren Keskin, the editor in chief of newspaper Özgür Gündem Daily in 2014 and 2015. She was subject to an administrative fine of 355,920 TL, later reduced to 105,920 TL. Eren Keskin was sentenced to seven and a half years' imprisonment, following her conviction on charges under Articles 299 (insulting the President of the Republic) and 301 (publicly degrading the Turkish Nation) of the Turkish penal Code by the İstanbul Second First Instance Criminal Court on 29 March 2018.

The European Commission, in its Progress Report 2018, found that
*Civil society came under increasing pressure, notably in the face of a large number of arrests of activists, including human rights defenders, and the recurrent use of bans of demonstrations and other types of gatherings, leading to a rapid shrinking space for fundamental rights and freedoms. Many rights-based organisations remained closed as part of the measures under the state of emergency and an effective legal remedy has not been available with respect to confiscations.*²³⁷

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders) affirms that "everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms."²³⁸

The UN Declaration on Human Rights Defenders stresses that "[i]ndividuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, *inter alia*, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities."²³⁹

The prosecution of a number of human rights defenders in the country as well as the closure of several human rights non-governmental organizations has had a chilling effect on the work of civil society as a whole. While human rights work has not stopped it completely thanks to the courageous dedication of civil society actors, the threat of proscription and prosecution for derivative offences such as "collaboration" or "support" and on the basis of general and arbitrary criteria is a sword of damocles hanging over every human rights defender's head.

²³⁷ European Commission 2018 Report, *op. cit.*, p. 4.

²³⁸ UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, article 12.3.

²³⁹ *Ibid.*, article 16.

10. Conclusions

On 15 July 2016, Turkey experienced a condemnable attempt of a coup d'Etat that led to the completely destabilization of its already shaky institutions, particularly as concerns the administration of justice and the rule of law. The ICJ condemns that attack.

The declaration of state of emergency has led to systematic unlawful derogations from, and restrictions and limitations on, human rights protections. Many of the measure are unnecessary and disproportionate and have seriously impaired human rights enjoyment and due process guarantees. This constitutes an abuse of state of emergency legislation apparently for extrinsic policy objectives. The result has been a mass dismissal of public servants, judges and prosecutors without ensuring due process guarantees and the degradation of the justice system, depriving the judiciary of essential guarantees to ensure its independence from the political authorities. Taken together, these measures have seriously crippled the capacity of the Turkish legal system to provide an effective remedy for human rights violations.

The particular measures to reform the Council of Judges and Prosecutors as well as the diffuse chilling effect caused by the mass dismissal of judges and prosecutors at all levels cannot currently guarantee the requirements of independence necessary in domestic courts for a remedy to be effective.

Furthermore, the dramatic fall in the competence of judges and prosecutors following the replacements of the mass dismissals, as well as the increasing workload that will face administrative courts and the Constitutional Court once decisions of the Commission are appealed, are worrying signals for the capacity of the justice system to withstand the workload arising from cases challenging human rights violations committed by State institutions, whether linked to the state of emergency or not.

At the constitutional level, concerns arise from the capacity of the Constitutional Court to withstand the heavy backlog that inevitably follows from appeals against the Commission's decisions and/or administrative courts' decisions, considering its already important workload. At the very best, this situation exposes the Court to an incalculable number of cases for lack of respect of procedural guarantees in a fair trial as well as virtually countless violations of the right to a fair trial within a reasonable time, under article 6.1 ECHR.

It is true, as many interlocutors the ICJ have engaged with have indicated, that "ordinary" cases - e.g. neighbours disputes, contract lawsuits, theft trials - are generally unaffected by this constitutional crisis. Only so-called "sensitive" "political" cases are said be affected. The problem with this observation is that it misses the point that any case may, under certain conditions, become "sensitive", such as a civil dispute with a politically connected neighbour. In addition, human rights protection must never be seen as something that is extraordinary or "political".

It is for this reason that it is important for civil society to be alert to the effectiveness of remedies for human rights violations also for "sensitive" cases, in particular when they amount to hundreds of thousands. In this regard, the mass disestablishment of NGOs in the country under emergency legislation, the arrests and trials of some of its human rights defenders, coupled with the lack of procedural guarantees to access a lawyer under state of emergency legislation and the high fees some lawyers demand, have seriously curtailed that capacity of

civil society and the legal profession to assist and represent victims of human rights violations in accessing remedies.

After an assessment of the legal framework of the Commission, of its extremely high rejection rate, as well as the rapid work-pace, it is apparent that this administrative mechanism does not provide an independent – nor it appears an effective - remedy for human rights violations under its competence. It is instead highly likely that it will operate as a factor of further excessive delay in accessing effective remedies for human rights violations.

It is highly symptomatic of the incapacity of the judicial system to provide an effective remedy in sensitive cases under the state of emergency that administrative courts, and in particular the Council of State that has first appeal instance on dismissal decisions of judges and prosecutors since 23 January 2017, have not decided a single case. For 18 months, appeals have been pending before the supreme administrative court that has not taken up this chance to give essential guidance through case-law for both the Commission and first-instance administrative courts. This negligent attitude necessarily engenders ineffectiveness and a poor quality of justice in the court system in these cases.

To these concerns one must add the recent cases of disregard of decisions of the Constitutional Court in spite of clear legal and constitutional obligations and the further erosion of its institutional independence following the constitutional amendments of 2017. It is a symptom of the lack of independence within the judiciary that the Council of Judges and Prosecutors, that dismissed more than 4,000 judges and prosecutors immediately after the attempted coup of 15 July 2016 for alleged links with the Gülenist movement/FETÖ, has not begun any disciplinary proceedings of any sort against any of the judges of the four Assizes Courts. Those courts deliberately failed to execute the rulings of the Constitutional Court despite what appears, in the very words of the same Constitutional Court, a clear violation of constitutional law.

At the international level, based on the principle of subsidiarity, the European Court of Human Rights has so far not determined there to be an absence of effective remedies for human rights violations arising from measures adopted under the state of emergency in Turkey. However, the Court did not foreclose a possible re-assessment of the question of effectiveness and existence of a remedy, both in theory and in practice, in light of the decisions issued by the Commission and by national courts, as well as of the effective execution of these decisions.²⁴⁰

The reality on the ground, from this assessment of laws and practice, leads to the conclusion that the current system of remedies in Turkey has had the effect of merely slowing down the referral of cases to the country's highest courts and, ultimately, the European Court of Human Rights. The ICJ has gathered several testimonies of the growing frustration in Turkey with the inaction of the European Court of Human Rights, with some underlining that pilot judgments or guidance through case-law from the Court would assist national courts, including the Constitutional Court, to produce ECHR complaint decisions.

Unless there are significant changes in the Turkish legal system such as to provide access to effective and independent judicial remedies for human rights violations at first instance level, high courts in Turkey, especially the Constitutional Court, and international human rights mechanisms, risk being flooded with cases in the years of come.

²⁴⁰ *Köksal v. Turkey*, *op. cit.*, para. 29.

Meanwhile, victims of human rights violations will remain without an effective remedy, adding another human rights violation to their complaints.

11. Recommendations

The Turkish authorities should dial back the hastily conceived, and in many instances arbitrary, measures implemented in the wake of the 2016 failed coup attempt. These include the derogations from human rights guarantees and the mass purges of persons from a wide range of professions and institutions, including the judiciary. Reversal of these measures will be necessary to address the central concern of this report, which is the failure by Turkey to provide access to effective remedies and reparation to everyone in the country in implementation of their obligations under international law and the Turkish Constitution.

It is an encouraging signal that the government **has vowed to shortly lift/ has lifted the state of emergency.**

In this spirit, the ICJ provides the Turkish authorities with the following recommendations to ensure an effective remedy and access to justice:

A. To the President, the Council of Ministers and the Parliament:

- 1. Repeal the accompanying Law Decrees to the state of emergency.**
- 2. Withdraw all derogations to the European Convention on Human Rights and the International Covenant on Civil and Political Rights. To the extent that any derogations are not withdrawn, justify all specific measures, pursuant to an assessment that each are strictly necessary to address a specific threat to the life of the nation.**
- 3. Abolish the State of Emergency Complaints Commission and provide direct access to administrative courts in compliance with due process guarantees, full legal representation, access to all files and the opportunity to have a hearing with an adversarial procedure.**
- 4. In the event that the Commission is not abolished, revise its procedure to provide such guarantees and publicize, in anonymised format, its reasoned decisions.**
- 5. The constitutional amendments on the appointment of members of the Council of Judges and Prosecutors should be amended to ensure a majority presence of judges and prosecutors in the board and their sole presence in chambers dealing with appointment, career, transfer and dismissals of judges and prosecutors.**
- 6. The constitutional amendments on the appointment of members of the Constitutional Court should be amended in order to ensure that the political branches of government are not predominant in appointments.**
- 7. State authorities should desist from making comments on judicial proceedings**
- 8. Reform the Anti-Terrorism Law no. 3713 and related counter-terrorism legislation in order to:**
 - a. Provide a definition of terrorism that is clear and in line with principles of legality and international human rights and counter-terrorism standards;**
 - b. Ensure that no provision related to "terrorism" offences arbitrarily and disproportionately interferes with any**

person's fundamental freedoms, including the rights to freedom of expression, assembly and association. The right of all persons to discuss laws, policies and actions must be protected.

- 9. Ensure that legal aid is available to every person regardless of the criminal offence of which is accused and that legal fees do not constitute an obstacles in accessing a lawyer.**
- 10. Abrogate all amendments to criminal procedure under emergency legislation that curtail an effective access to a lawyer.**
- 11. Promote and protect the work of civil society and the legal profession for the respect, protection, fulfilment and advancement of human rights and the rule of law, including when critical of the State's laws, policies and actions.**

B. To the judiciary:

- 1. The Council of State should as soon as possible provide guidance with regard to the criteria and jurisprudence on dismissals in line with international law and standards on the independence of the judiciary, the right to a fair hearing and due process.**
- 2. The Constitutional Court should expeditiously issue judgments which will instruct lower courts on the proper and effective implementation of legislation linked to state of emergency in a manner compliant with human rights law.**
- 3. The Council of State should immediately hear and decide cases on dismissals of judges and prosecutors based on fair trial and due process guarantees, full legal representation, access to the file and the opportunity to have an open hearing with an adversarial procedure and a public judgment. Judges and prosecutors should be reinstated immediately by the Council of Judges and Prosecutors if cleared.**
- 4. The Council of Judges and Prosecutors should make it a priority to increase the quality of judges and prosecutors in the judicial system, especially with regard to the implementation of international human rights and constitutional law, by giving priority to the training in these fields of law.**
- 5. The system of transfer of judges, including laws and procedures, should be independently reviewed to ensure that transfers are not, in practice, used as a disguised disciplinary measure. Administrative decisions on the transfer of judges and prosecutors should be transparent and subject to effective due process safeguards. Judicial review of such decisions on the application of the affected judge or prosecutor should be introduced as a matter of priority. The system, including laws and procedures, should be independently reviewed to ensure that transfers are not, in practice, used as a disguised disciplinary measure.**
- 6. The Council of Judges and Prosecutors should set up a procedure for protection of judges and prosecutors from attacks and interferences from other State authorities and private persons and make this task a priority of the Council's mandate.**
- 7. The Council of Judges and Prosecutors should initiate fair disciplinary proceedings against judges and prosecutors that do not comply with the directives of the Constitutional Court.**
- 8. Release and discontinue the prosecution of all human rights defenders and lawyers that are not accused of participation in the attempted coup and/or are subject to prosecution solely for activities carried out as part of their legitimate professional**

functions or the exercise of internationally protected human rights and fundamental freedoms.

- 9. Reassess the prosecution of persons under anti-terrorism offences in light of the principle of legality under international law to ensure that they are charged only with a cognizable offences consistent with human rights and the rule of law.**

Annex 1 - Extracts from Turkey's reply to the follow up-questions of the UN Committee against Torture

The terrorist coup attempt of 15th July 2016

58. On the night of 15 July, upon the instruction of the founder and leader of the Fetullahist Terrorist Organization/the Parallel State Structure ("FETÖ/PDY"), Fetullah Gülen, and in line with the plan approved by him, "terrorists in uniforms" within the Turkish Armed Forces attempted an armed coup against the democracy for the purpose of overthrowing the democratically elected government together with the President and the constitutional order in Turkey.

59. The Presidential Compound, the hotel where the President of the Republic was staying at, the Turkish Grand National Assembly ("TGNA"), the Police Special Operations Centre and the security units, the premises of the National Intelligence Organization and various military units were attacked with bombs and arms. The President of the Republic survived the assassination attempt by leaving the lieu by 15 minutes before the raid on that hotel. The coup plotters also opened fire on the convoy of the Prime Minister. ...

60. The bomb attack by jet fighter aircraft (F-16) was made in the course of the extraordinary meeting of the Plenary Session against the coup attempt. During the attack, Parliament officials, some civilians and many police officers were injured, and extensive damage was caused to the Parliament building. ...

61. On the night of 15 July, tanks ran over the civilians and some of them died and were injured as a result of being trapped under the tanks. Fighter aircrafts made low altitude flights over the cities by breaking through the sound barrier and in a manner which would lead to fear and panic in the public. The TGNA and people were shot randomly by the coup plotters, snipers directly targeted people from strategic points, the crowd was bombed and shot from aircrafts and the civilians, who defended the democratic regime at the cost of their lives, were murdered. In the course of the coup attempt, 246 persons were killed and more than 2000 were injured....

62. The terrorists seized the state-run television ("TRT") and forced a newsreader to read a faux declaration stating that the democratic regime was taken over. Raids were also made to private media and press organizations, and the free media was tried to be silenced. The coup plotters also attacked satellite control centers in order to cut off TV broadcasting all around the country, except for the state-run TV channel. ...

63. The Turkish people from all walks of life and regardless of their political affiliations united on the streets on the night of 15th July. Putting all the political and ideological differences aside, they peacefully gathered and jointly defended common democratic values and bravely stood against tanks, helicopters and aircrafts with only national flags in their hands. ...

64. The unity and solidarity among the nation on the night of 15 July continued among the political parties as well. All political parties represented at the Parliament signed a joint statement against the coup attempt. Representatives of the media, academia, business circles and all other segments of Turkish society uniformly condemned the coup attempt. ...

65. Even after 15th July, Turkish citizens continued to gather regularly at the main squares in each and every city in Turkey to show their unity and support for the Turkish democracy, for approximately one month.

66. This spirit was crowned with the historic meeting in İstanbul on the 7th of August where 5 million people came together. They were joined by the President, the Prime Minister and the leaders of opposition parties.

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