



Joint Submission of the International Commission of Jurists and Human Rights Joint Platform in view of the UN Committee against Torture's adoption of a List of Issues to be transmitted to the Republic of Turkey prior to the submission of its Fifth Periodic Report under Article 19 of the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council in 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Human Rights Joint Platform (IHOP) is a network of 5 human rights NGOs in Turkey set up in 2005. IHOP promotes the human rights norms and standards and the principles of rule of law in Turkey through monitoring the implementation of the international and regional human rights conventions and recommendations of the specific human rights instruments, such as European Court of Human Rights and Universal periodical Review. IHOP also provides technical and logistic support to human rights organisations, organises capacity building programmes and conducts researches in specific human rights fields, including freedom of expression and impunity. Existing members: Human Rights Association, Human Rights Agenda Association, Citizens Association, Amnesty International Turkey Branch and Association of the Monitoring Equal Rights.

Submitted on 25 June 2018

Introduction

1. During its 65th Session, from 12 November to 7 December 2018, the UN Committee against Torture (the Committee) will prepare and adopt a List of Issues (known as list of issues prior to reporting – LOIPR) to be transmitted to the Republic of Turkey (Turkey), prior to the submission by the State party of its 5th Periodic Report under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) with a view to assisting Turkey in the preparation of the said report. Once submitted, that report, in turn, will form the basis of the Committee’s review of the country’s implementation of and compliance with provisions of the Convention.
2. In this context, the International Commission of Jurists (ICJ) and the Human Rights Joint Platform (IHOP) welcome the opportunity to contribute to the Committee’s preparation of its LOIPR on Turkey with the present submission.
3. In this document, the ICJ and IHOP focus on the following principal issues of concern arising in connection with Turkey’s compliance with and implementation of its obligations under Articles 2, 6, 11, 12, 13, 14 and 16 of the Convention:
 - 1) allegations of abduction;
 - 2) immunity from prosecution for torture and cruel, inhuman or degrading treatment or punishment;
 - 3) remedies and reparations for victims of torture;
 - 4) fundamental legal safeguards and access to a lawyer;
 - 5) conditions of detention;
 - 6) civil society organizations; and
 - 7) national human rights institution and national preventive mechanism.

1. Background: the state of emergency in Turkey

4. Purportedly in reaction to the attempted *coup* of 15 July 2016, the Council of Ministers, under the chairmanship of President Recep Tayyip Erdogan, declared, on 16 July, a nation-wide state of emergency, which was confirmed by the Grand National Assembly of Turkey (GNAT).¹ Once a state of emergency declared, "the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue decrees having the force of law".² The state of emergency has been repeatedly renewed, and was in place at the time of writing.
5. Shortly afterwards, a series of decree laws were issued by President Erdogan. To date, 31 emergency Decree Laws have been issued modifying legislation ranging from the Criminal Procedure Code to the Law on International Protection and media laws. Subsequently, the Grand National Assembly of Turkey converted each Decree into legislation.
6. Some of the measures introduced by emergency Decree Laws will cease to have effect at the end of the state of emergency, while others, such as dismissals of personnel, revocation of passports and closure of legal entities will have a permanent effect.³

¹ Declaration, State of emergency declared in Turkey following the Coup Attempt of 15 July 2016, para. 4.

² Article 121, Turkish Constitution. They must be later ratified by Parliament.

³ See, 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"), p. 6.

7. From 17 October 2016 to 20 March 2018, 79,301 people have been held in police custody for so-called terrorism-related offences.⁴ The profiles of those arrested for anti-terrorism offences include members of the army, judges and prosecutors, public servants, Members of Parliament, journalists, human rights defenders, students and lawyers.⁵

8. As of 20 March 2018, 112,679 public servants have been dismissed for life from public office, of which 21,153 are women (18,8% of the total dismissed). A total of 1,763 already retired police and soldiers were stripped of their pensions and other State benefits.⁶ In the same timespan, 7,037 academic staff, and 4,662 judges and prosecutors were dismissed.⁷

9. During the state of emergency, the authorities ordered, via emergency decrees, the closure of 1,064 private education institutions (i.e., 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 Confederations, 1,419 associations, 145 foundations and 174 media and broadcasting organisations.⁸

10. The UN Committee on the Elimination of Discrimination Against Women, in the immediate aftermath of the attempted coup expressed "its concerns regarding the current context of insecurity, including the recent attempted coup against the Government. They related to the numerous measures taken by the Government, including removal of large numbers of members of the judiciary, academic institutions and civil servants, including teachers."⁹ 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."¹⁰

11. While the declaration of a state of emergency has no legal consequences in terms of Turkey's obligations under the Convention, since none of its provisions is derogable, whether or not a state of emergency is extant, the ICJ and IHOP would like to point out that Turkey has made statements to the effect that it declared that it would be taking measures derogating, among other rights, from articles 2.3 (right to an effective remedy), article 9 (right to liberty and security), article 10 (right to humane treatment in detention), article 13 (procedural guarantees in expulsion proceedings), and article 14 (right to a fair trial) of the ICCPR. Turkey has provided no details as to the extent and measures of these derogations.

12. While these derogations do not pertain to the CAT, the ICJ and IHOP note that the measures undertaken under state of emergency legislation may lead to violations of Turkey's obligations under articles 2, 14 and 16 CAT, as will be outlined in the following sections.

⁴ *Ibid.*, p. 10. Of these cases, 60% (47.617 individuals) are related with "FETO/PDY", 30.4% (24.113 individuals) with "PKK/PYD", 8.2% (6.497 individuals) with "DEAS" [ISIS] and 1.4% (1.074 individuals) with other organisations.

⁵ See, *ibid.*, p. 13.

⁶ See, *ibid.*, p. 24.

⁷ See, *ibid.*, p. 37.

⁸ *Ibid.*, p. 43

⁹ 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.

¹⁰ *Ibid.*, para. 8.

13. There is no doubt that, in the days of the attempted coup of 15 July 2016, Turkey experienced a genuine public emergency that threatened the life of the nation. The ground to invoke a state of emergency therefore existed. Nonetheless, Turkey is under an obligation to ensure that all emergency measures derogating from rights are strictly necessary and proportionate, and to continuously review whether this is the case.

14. The ICJ and IHOP stress that urgent review of the necessity and proportionality of the extensive measures taken under the state of emergency is needed, nearly two years after the events that gave rise to the state of emergency.

2. Allegations of abduction

15. In its 2016 Concluding Observations, this Committee was "concerned at the "almost complete lack of accountability for cases of enforced disappearance" in the State party and its "palpable lack of interest [in] seriously investigating, prosecuting and adjudicating these cases".¹¹ This Committee recommended that Turkey "take appropriate measures to ensure effective and impartial investigations into all outstanding cases of alleged enforced disappearance, prosecute the perpetrators and, where appropriate, punish them and provide compensation to the families of the victims",¹² and that it ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

16. The ICJ and IHOP note that to date Turkey has not even signed, let alone ratified the International Convention for the Protection of All Persons from Enforced Disappearance. Furthermore, the two organizations draw this Committee's attention to a series of written questions submitted to Prime Minister Binali Yıldırım by Sezgin Tanrikulu, Member of Parliament of the Republican People's Party (CHP) concerning the allegation about the abduction of individuals who were allegedly linked with the Gülen movement/FETÖ.

17. According to these written questions, the following individuals were abducted: Önder Asan, Turgut Çapan, Mesut Geçer, Ayhan Oran, Hüseyin Kötüce, Mustafa Özgür Gültekin, Sunay Elmas,¹³ and Orçun Şenyücel¹⁴ So far, the Prime Minister has failed to reply the MP's questions on this matter.

18. A further case of abduction, that of Ümit Horzum, has reached the European Court of Human Rights, which has communicated it to the Turkish Government.¹⁵ Currently, the Court has requested Turkey to submit a copy of the investigation file and asked questions on the state of the investigations.¹⁶

¹¹ Committee against Torture (CAT), *Concluding Observations on Turkey*, UN Doc. CAT/C/TUR/CO/4, 2 June 2016, para. 21.

¹² *Ibid.*, para. 22.

¹³ The first written question was submitted on 26 April 2017 (No. 7/13495); the second written question was submitted on 4 July 2017 (No. 7/15204); the Third written question was submitted on 26 December 2017 (No. 7/22964)

¹⁴ Fourth written question submitted on 30 April 2018.

¹⁵ See, *Aynur Horzum and others v Turkey*, Application no. 4475/18 lodged on 18 January 2018, statement of facts available at <http://hudoc.echr.coe.int/eng?i=001-182899>

¹⁶ See *ibid.*: "2. In accordance with the procedural and positive obligations under Article 2 of the Convention, have the authorities carried out an effective investigation and taken the necessary measures available to them to find the applicants' relative in order to safeguard his life ... ?

In this connection:

2.1. Given the urgency of the issue in question, was the investigation instigated promptly?

2.2. Has the footage recorded by CCTVs and other security cameras around and en route to the private mall where the incident allegedly occurred been secured and analysed?

2.3. Has it been possible to identify the perpetrators' images from the footage? If your reply is in the affirmative, has there been any follow-up on those leads?

19. The European Union also drew attention to "alarming reports of alleged cases of abductions and enforced disappearances."¹⁷ Similar allegations of abductions have also been raised by Human Rights Watch.¹⁸

20. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee ask Turkey:

- **To provide any information on the investigations and, if available, any prosecution related to the above-mentioned allegations of abduction and enforced disappearances, or indeed any other reported case of the same.**
- **To provide information on the participation of family members of the alleged victims in the above-mentioned cases (or indeed any other reported cases) of abductions and enforced disappearances in the investigations.**
- **To provide examples of how the right to truth in connection with enforced disappearances has been implemented in Turkey in law and in practice.**

3. Immunity from prosecution for torture and cruel, inhuman or degrading treatment or punishment (articles 2, 6, 12, 13, 14, 16 CAT)

21. In its 2016 concluding observations, this Committee recommended that Turkey "[e]nsure that all instances and allegations of torture and ill-treatment are investigated promptly, effectively and impartially and that the perpetrators are prosecuted and convicted in accordance with the gravity of their acts."¹⁹

22. However, Decree Law no. 668 of 27 July 2017, now converted into permanent legislation, affirms in article 37 that:

"Legal, administrative, financial and criminal liabilities of the persons who have adopted decisions and executed decisions and measures with a view to suppressing the coup attempt and terrorist actions performed on 15/7/2016 and the ensuing actions, who have taken office within the scope of all kinds of judicial and administrative measures and who have adopted decisions and fulfilled relevant duties within the scope of the decree laws promulgated after the period of state of emergency shall not arise from such decisions taken, duties and acts performed."²⁰

23. As a result of its adoption, the Decree Law no. 668 has ultimately granted immunity with retroactive force from 15 July 2016 from any legal, administrative, financial and criminal liability, including with respect to the perpetration of acts of torture or other ill-treatment.²¹

24. The following paragraph featured in the Decree Law No. 696 dated 24 December 2017 has further compounded the gravity of the situation by adding:

2.4. What other steps are being taken to locate the car with the number plate no. 20 H 1931, which was allegedly used by Ümit Horzum on the date of the incident?

2.5. Has any inquiry been made into the GSM signals of the mobile phone used by Ümit Horzum? If your reply is in the affirmative, has there been any follow up on those leads?"

¹⁷ European Commission, *Turkey 2018 Report*, Doc. No. SWD(2018) 153 final, 17 April 2018, p.32.

¹⁸ Human Rights Watch, 'Turkey: Investigate Ankara Abductions, Disappearances', 3 August 2017.

¹⁹ CAT, *Concluding Observations on Turkey*, *op. cit.*, para 10.(a).

²⁰ Article 37, Decree Law No. 668, 27 July 2017, official translation from Turkey's notification to the Secretary General of the Council of Europe, CoE Doc. Ref JJ8201C - Tr./005-196.

²¹ Article 37. 2, Law No. 6755, as modified by Decree Law No.696 dated 24.12.2017. Decree Law No. 696 became a law on 1/2/2018.

"(2) Provisions of paragraph 1 shall also be applicable to those individuals who acted with the aim of suppressing the coup attempt and the terrorist activities that took place on July 15, 2016 and actions that can be deemed a continuation of these, without having regard to whether they held an official title or were performing an official duty or not."

25. The scope of these provisions contains no exceptions, regardless of the seriousness of the criminal offences perpetrated. These legal provisions, which have since been given permanent validity, give discretionary powers to the authorities to decide which actions "can be deemed a continuation" of actions aimed at suppressing the coup attempt and terrorist activities of 15 July 2016. For those actions and omissions deemed to constitute such a continuation, the same provisions grant, in turn, complete immunity from criminal and civil liability for absolutely any action or omission by any person. No exception appears to have been provided for acts of torture or other cruel, inhuman or degrading treatment or punishment in violation of articles 12, 13 and 14 of the Convention.

26. The UN Special Rapporteur on torture has also expressed particular concern that, under Law no. 6722 of 14 July 2016, "the executive authorities must give permission before any soldiers or civilians taking part in counter-terrorism operations can be prosecuted for any offences committed while carrying out their duties, thus rendering investigations into allegations of torture or ill-treatment by the security forces involved more difficult, if not impossible."²²

27. In its General Comment no. 3, this Committee has affirmed that:
[G]ranteeing immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims.²³

28. This position is also outlined in the jurisprudence of the UN Human Rights Committee,²⁴ the resolutions of the UN Commission on Human Rights,²⁵ as well as in other international human rights law instruments, such as the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,²⁶ and the UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity,²⁷ and clearly extends the prohibition on granting immunity to any person responsible for crimes under international law, beyond torture.

29. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee should ask Turkey:

²² 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, para. 69

²³ CAT, General Comment no. 3, UN Doc. CAT/C/GC/3, 13 December 2012, para. 42

²⁴ Human Rights Committee (CCPR), General Comment no. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 18.

²⁵ Resolutions 2004/72, para. 3; 2005/81, para. 3; 2004/72, para. 3; 2003/72, para. 2; 2002/79, para. 2.

²⁶ Article 19, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

²⁷ Principle 22, UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity.

- **To provide statistics of the number of cases, if any, of criminal prosecutions and civil lawsuits that have been barred by the entry into force of the above-mentioned provisions.**
- **To provide information on**
 - **the number of cases of torture or ill-treatment brought before the authorities, including judicial and executive authorities and the ombudsman, following the attempted coup of 15 July 2016;**
 - **the number of investigations, prosecution and trials carried out since 15 July 2016 pertaining to allegations of torture or other ill-treatment;**
 - **the number of civil or administrative proceedings for redress in connection with acts of torture or other ill-treatment since 15 July 2016.**
- **To provide information on the number of times that authorisation under law 6722 has been requested, denied or granted.**

4. Remedies and reparations for torture violations (article 14 CAT)

30. As this Committee has affirmed in its General Comment no. 3 on article 14 CAT, "[t]o satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims."²⁸

31. The independence of the judiciary in Turkey was already subject to significant strains before the attempted coup of 15 July 2016 and the imposition of the state of emergency.²⁹ Some of the measures undertaken by the executive pursuant to powers that it arrogated to itself under the state of emergency, including the mass arrests of judges, prosecutors and lawyers, as well as the summary and mass dismissals of judges, have significantly weakened the justice system, and dramatically deteriorated its capacity to protect against and effectively remedy violations of human rights, including violations of the Convention.³⁰

32. As reported above, 4,662 judges and prosecutors were dismissed at once by the then High Council of Judges and Prosecutors in the wake of the attempted coup. While the same body has revoked, after objection by the concerned persons, 166 of these dismissals, it has nonetheless rejected the objection of some 3,786 persons.³¹ Moreover, to date, the Council of State, whose competence to hear appeals against the Council of Judges and Prosecutors' decisions has been affirmed on 23 January 2017 by Decree Law no. 685, has issued no decision in these cases.

33. The Council of Europe's Commissioner for Human Rights found that these dismissals created "an atmosphere of fear among the remaining judges and prosecutors."³² The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment found that "[t]he mass arrest, dismissal or

²⁸ CAT, *General Comment no. 3*, op. cit., para. 5.

²⁹ 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/>.

³⁰ 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/>.

³¹ IHOP Report, op. cit., pp. 38-39.

³² *Third party intervention by the Council of Europe Commissioner for Human Rights*, CoE Doc. CommDH(2017)29, 10 October 2017, para. 35.

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."³³ Furthermore, "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."³⁴ The Parliamentary Assembly of the Council of Europe (PACE) has held 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."³⁵

34. There are also reports that the judges and prosecutors hired to replace those dismissed were not qualified to do so, and that this may in turn detrimentally affect the quality and effectiveness of courts' decisions and the decision-making processes themselves.

35. The independence of the judiciary has been further imperilled following the constitutional amendments approved by referendum on 16 April 2017. Based on a new constitutional provision, the Council of Judges and Prosecutors has been reappointed. Of the thirteen members, six are now 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.

36. The Council of Europe's Commissioner for Human Rights,³⁶ the Venice Commission,³⁷ the UN Special Rapporteur on freedom of expression,³⁸ and the Office of the UN High Commissioner for Human Rights³⁹ have all considered that a Council so composed could not be independent of the executive and the legislature, and would constitute a threat to the independence of the judiciary in Turkey.

37. Indeed, under the current constitutional framework, the Council of Judges and Prosecutors cannot be considered as structurally independent as it does not comply with the recommendation of the *Council of Europe on judges: independence, efficiency and responsibility* requiring that "[n]ot less than half the members of [councils for the judiciary] should be judges chosen by their peers

³³ UN Special Rapporteur on torture, *op. cit.*, para. 62.

³⁴ 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"), para. 48

³⁵ PACE, *State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights*, Doc. 14508, 27 February 2018, 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". "

³⁶ CoE Commissioner, *op. cit.*, para. 37; and Statement by the Coe Commissioner 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 .

³⁷ 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 by the Venice Commission at its 110th Plenary Session, Doc. CDL-AD(2017)005-e, 10-11 March 2017, para. 119.

³⁸ *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.

³⁹ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 34.

from all levels of the judiciary and with respect for pluralism inside the judiciary."⁴⁰

38. Without an independent institution of self-governance and, therefore, without structural independence from the executive and legislature, it is difficult to see how judges and prosecutors can carry out their decision-making role in politically sensitive cases such as those under the state of emergency.

39. It is further symptomatic of the subservience of the judiciary and, more broadly, of the undermining of the independence of the administration of justice in the country, that the Council of State, the supreme administrative court of Turkey, has not issued a single ruling on the appeals of judges and prosecutors against their dismissal by the then High Council of Judges and Prosecutors, since 23 January 2017, when Decree-Law no. 685 clarified its competence to hear direct appeals in such cases.

40. With regard to the decisions of the Constitutional Court, recent developments have called into question the capacity of this institution to provide effective remedies. On 11 January, four criminal courts in Istanbul⁴¹ refused to apply the rulings of the Constitutional Court ordering 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 so called terrorism offences and alleged links to the attempted coup of 15 July 2016.⁴²

41. While in the same cases 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, 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."⁴³ On 15 March, the Constitutional Court itself issued a further judgment in the case of Sahin Alpay re-asserting its competence and the binding nature of its judgments.⁴⁴

42. The ICJ and IHOP note that, despite the clarity in Turkish law⁴⁵ about the binding force of the 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.

43. In their report on the follow-up to the Committee's concluding observations of 2016, the Turkish Government has affirmed that, during the state of emergency "judicial remedies exist at the national level for those claims with respect to counter-terrorism operations. In addition to the right to individual application to the Constitutional Court ..., Turkey also recognizes [the] right to

⁴⁰ Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 27.

⁴¹ The 26th and 27th Assize Courts for Mehmet Hasan Altan, the 13th and 14th Assize Courts for Sahin Alpay.

⁴² See, Constitutional Court, Sahin Alpay (2), Application 2018/3007, and Başak Çalı, *Will Legalism be the End of Constitutionalism in Turkey*, [Verfassungsblog](#).

⁴³ *Mehmet Hasan Altan v Turkey*, Application no. 13237/17, 20 March 2018, para. 142; *Sahin Alpay v Turkey*, Application no. 16538/17, 20 March 2018, para. 121.

⁴⁴ Constitutional Court, Sahin Alpay (2), Application 2018/3007, para. 63.

⁴⁵ *Ibid.*, para. 63.

individual application to the European Court of Human Rights after exhausting domestic remedies."⁴⁶

44. In the same report, the Turkish Government stated the position of the then High Council of Judges and Prosecutors that "members of judiciary who were dismissed from the profession will be able to request reassessment before the General Assembly of the High Council of Judges and Prosecutors. Upon individual complaints, cases will be reconsidered by the HCJP. Reinstatements have also begun with respect to judges and prosecutors. Against such backdrop and contrary to what has been alleged by some NGOs, it is clear that decisions for dismissals of some members of the judiciary actually aims at ensuring the independence of the judiciary."⁴⁷

45. The state of emergency has exacerbated concerns predating it and arising from the criminal jurisdiction of the judges of the peace. This criminal jurisdiction, presided over by judges of peace, was established in June 2014, and replaced the previous criminal courts of peace without retaining all their prerogatives. Under the current structure, criminal trials are conducted before the criminal courts of general jurisdiction, but functions related to supervision of the investigation are transferred to the criminal jurisdiction of the judges of the peace. According to the Law on Criminal Procedure, these courts have the power to issue search, arrest and detention warrants. They are also entitled to judicially review the decisions of public prosecutors not to prosecute. In addition, however, under emergency laws, they have been granted the power to remove the right for a lawyer to "exercise advocacy".⁴⁸

46. Furthermore, avenues to appeal decisions of judges of the peace exercising their criminal jurisdiction are very limited. Except in the highly exceptional circumstances in which a case can be referred to the Constitutional Court, the only appeal is to another criminal judge of the peace of the same district. Effectively, therefore, there is a closed system of appeals within the criminal jurisdiction presided over by judges of the peace, with minimal recourse to the wider courts system. This situation is particularly worrying given the allegations of lack of independence of judges of these courts.

47. The Council of Europe's Venice Commission has concluded that the "system of horizontal appeals against decisions by the criminal peace judges does not offer sufficient prospects of an impartial, meaningful examination of the appeals."⁴⁹

48. The Office of the UN High Commissioner for Human Rights has found that "the jurisdiction and practice of the Peace Judgeship Courts, established by Law 6545 in June 2014, give rise to numerous concerns. These courts have been using the emergency decrees to issue detention orders, including decisions to detain journalists and human rights defenders, to impose media bans, to appoint trustees for the takeover of media companies, or to block internet."⁵⁰

⁴⁶ *Initial comments by Turkey on some of the Concluding Observations of the Committee against Torture*, UN Doc. CAT/C/TUR/CO/4/Add.1, 11 November 2016, para 33.

⁴⁷ *Ibid.*, 99-100.

⁴⁸ See, Venice Commission, *Turkey - Opinion on the duties, competencies and functioning of the criminal peace judgeship*, adopted by the Venice Commission at its 110th Plenary Session, 10-11 March 2017, Doc. CDL-AD(2017)004-e, para 21.

⁴⁹ *Ibid.*, para. 86.

⁵⁰ OHCHR, *Second Report on Turkey*, *op. cit.*, para. 52.

49. The extremely limited avenues of appeal from the decisions of the criminal judges of the peace call into question the effectiveness of the remedies available within the domestic system for violations of human rights (e.g., the rights to liberty and to respect for the home and privacy) in the investigative process, as well as the capacity of the legal system to ensure fundamental safeguards guaranteed by international human rights law and standards, including the Convention, to secure the protection of human rights, including the right not to be tortured or otherwise ill-treated.

50. In light of the above, the ICJ and IHOP recommend that the Committee should ask Turkey:

- **To provide the criteria on which decisions to dismiss judges and prosecutors have been based, and a clear explanation for their choice.**
- **To provide information on criteria required for the admission of new judges and prosecutors to replace those dismissed by the High Council of Judges and Prosecutors.**
- **To provide information on the procedures followed for the admission of new judges and prosecutors to replace those dismissed by the High Council of Judges and Prosecutors.**
- **In light of concerns expressed above, to explain how if at all the independence of the judiciary and that of the administration of justice in the country as a whole are guaranteed.**
- **To provide information on disciplinary proceedings, if any, taken against judges who make decisions made in clear disregard of the law, including by refusal to implement Constitutional Court judgments.**
- **To comment on the guarantees for impartiality and independence of criminal judges of the peace in law and in practice.**
- **To comment on how a parallel appeal system for judicial review among judges of the peace can ensure independence and effectiveness.**
- **To provide detailed statistics on the success rate of appeals before the judges of the peace both with regard to persons in detention under state of emergency Decree Laws and under ordinary legislation.**

5. Fundamental legal safeguards and access to a lawyer (articles 2, 11, 16 CAT)

51. In its 2016 Concluding Observations on Turkey, this Committee expressed concern at "amendments to the Code of Criminal Procedure, which give the police greater powers to detain individuals without judicial oversight during police custody."⁵¹

5.1. Measures affecting procedural rights

52. Currently, the state of emergency Decree Laws have introduced the following measures in relation to investigations for of terrorism offences and/or other acts linked to the attempted coup of 15 July 2016:⁵²

⁵¹ CAT, *Concluding observations on Turkey, op. cit.*, para. 19.

⁵² 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

- a. A pre-charge detention period (police custody) of maximum 14 days, i.e. seven days renewable once by order of a Justice of the Peace (see below).⁵³
- b. Under Emergency Decree no. 684 of 23 January 2017, public prosecutors have been granted the power to deny detainees access to a lawyer for up to 24 hours.
- c. Limitations on the confidentiality, frequency and duration of interviews between detainees and their lawyers may be imposed, on the stated grounds that, "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".⁵⁴ Such encroachments include:
 - i. Auditory or audio-visual recordings of the interviews can be made via technical devices;
 - ii. Officers may be made present during interviews between detainees and their lawyers with a view to monitor and listen to the interview;
 - iii. The documents or document templates and files exchanged between detainees and their lawyers and records of lawyer-client interviews may be seized;
 - iv. The duration and frequency of the interviews may be limited upon the public prosecutor's order;
 - v. At any point, the authorities can end the client/lawyer interview stating that the interview's purpose was one of those enumerated in Article 6(d) of the Emergency Decree no. 667,⁵⁵
 - vi. Upon request of the public prosecutor, the Office of the Magistrates' Judge may bar detainees from conferring with their lawyers. The decision on barring shall be immediately served on the detainee and the relevant Bar Presidency with a view to assigning a new lawyer.⁵⁶

53. With regard to communications between detainees and their relatives, including through visits:

- a. Detainees on remand may only be visited by their spouse, relatives of the first and second degrees and the first degree relatives-in-law and his/her guardian or trustee only where the relevant documents are submitted.
- b. Detainees on remand shall enjoy the right to telephone conversations once every fifteen days and for a period not exceeding ten minutes, with certain specified categories of persons only.⁵⁷

26 September 2004, the offences falling under the Anti-Terror Law no. 3713 dated 12 April 1991 and the collective offences;"

⁵³ Decree Law No. 684 dated 23 January 2017. From the entry into force of Decree Law no. 667 on 23 July 2016 to that of Emergency Decree No. 684 on 23 January 2017, the maximum duration of the pre-charge detention period (police custody) was 30 days.

⁵⁴ Article 6(d) of the Decree Law No. 667.

⁵⁵ i.e. when "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", article 6.d, Decree Law no. 667.

⁵⁶ See, Decree Law no. 667, Article 6(d).

⁵⁷ Article 6(e), Decree Law no. 667.

54. Decree Law No. 668 extended the period of consideration of a detainee's request for judicial review of detention by judges of the peace from three to ten days,⁵⁸ and established that the "decision shall be made on the basis of the case file", instead of on the basis also of "live testimony of the suspect or hearing from his/her attorney".⁵⁹ These derogations to the ordinary rules on judicial review of detention will apply only as long as the state of emergency is in place.

55. Finally, the Special Rapporteur "heard numerous allegations that a great number of [persons arrested in relation with the failed coup] have been held in prolonged solitary confinement."⁶⁰ Also, "both current and former detainees alleged that they had been held incommunicado, without access to lawyers or relatives, and without being formally charged, for extended periods lasting up to 30 days."⁶¹

5.2. Practical obstacles in access to a lawyer of one's choice

56. 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."⁶²

57. The ICJ and IHOP have received several reports 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.

58. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee should ask Turkey:

- **To provide detailed statistics on the use of the emergency pre-trial detention measures, including reasons and grounds for detention in individual cases.**
- **To provide detailed statistics on how many times prosecutors or other authorities have denied or limited access to a lawyer under the Decree Laws 668 and 684 and on what specific grounds these limitations have been ordered.**
- **To provide information on:**
 - **how many times interviews between lawyers and clients , or the confidentiality of lawyer-client interviews or communications, have been restricted, on what specific grounds and for how long.**
 - **which situations, facts, acts or omissions, in these cases, gave rise to the "risk to public security" or other risks featured in Decree Law 668 to justify the imposition of restrictions on interviews between lawyers and clients.**
 - **which techniques provided under article 6.d of Decree Law 668 have been used, how many times and on what grounds.**
- **To provide detailed statistics on how many suspects under the state of emergency have had access to a lawyer of their choice,**

⁵⁸ Article 3 of the Decree Law no. 668 modifying Criminal Procedure Law No. 5271, Article 268(2).

⁵⁹ Decree Law No. 668, Article 3(c) modifying Criminal Procedure Law no. 5271, Article 108.

⁶⁰ SR torture, para. 32.

⁶¹ SR torture, para. 26

⁶² OHCHR, *Second Report on Turkey, op. cit.*, para. 57.

- **and whether legal aid schemes were open to them.**
- **With regard to judicial review of detention under Decree Law no. 668:**
 - **To provide detailed statistics of how many people have had the judicial review of their detention conducted without a hearing, based only on the case file.**
 - **To provide statistics on the length of time before a detainee appears physically before a judge or a court, and before which court they usually appear.**
- **To provide detailed statistics of number of people held in solitary confinement, including the length and reasons for such confinement, and the grounds of detention of the concerned persons.**

6. Conditions of detention (articles 2, 11, 16 CAT)

59. In its 2016 Concluding Observations, this Committee found that "overcrowding and inadequate health-care services remain a problem in the prison system and that the State party has taken insufficient measures to mitigate the dramatic increase in its prison population through the use of alternative measures to deprivation of liberty",⁶³ and expressed regret at the "lack of complete information on suicides and other sudden deaths in detention facilities during the period under review."⁶⁴

60. With regard to the conditions in prisons, the UN Special Rapporteur on torture has reported that, in the immediate aftermath of the failed coup, "[m]any places of detention were allegedly severely overcrowded and did not have adequate access to food, water or medical treatment."⁶⁵

61. The UN Special Rapporteur on torture also found that, following the attempted coup, "the massive influx of detainees led to overcrowding in many facilities and significantly increased the proportion of pre-trial detainees."⁶⁶

62. Based on the information provided by the Ministry of Justice General Directorate of Prisons and Detention Houses, there are 386 prisons with a total capacity of 208,830 in Turkey.⁶⁷ As of 20 March 2018, 224,974 persons were held in prisons and detention houses. In light of this, it would appear that, at that date, at least 19,307 individuals are deprived of their liberty in detention conditions of serious overcrowding.

63. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee should ask Turkey:

- **To provide information on the current exact numbers of persons held in prisons and detention centres in Turkey and measures undertaken to avoid overcrowding.**
- **To provide information on the number of suicides in prisons and detention centres as well as with the state of investigations into such events and the results of these investigations.**

⁶³ CAT, *Concluding observations on Turkey*, *op. cit.*, para. 31

⁶⁴ *Ibid.*, para. 33

⁶⁵ Special Rapporteur on torture, *op. cit.*, para. 26.

⁶⁶ *Ibid.*, para. 36.

⁶⁷ As of 4 January 2018.

7. Civil society

64. In 2016, this Committee expressed serious concern "about numerous consistent reports of intimidation and harassment of and violence against human rights defenders, journalists and medical doctors who provide assistance to victims of torture."⁶⁸

65. It urged Turkey to "[e]nsure the effective protection of journalists, human rights defenders and medical doctors against threats and attacks to which they may be exposed on account of their activities, and ensure that such cases ... are investigated promptly, and that suitable action is taken against those responsible and remedies granted to the victims; ... [r]efrain from detaining and prosecuting journalists and human rights defenders as a means of intimidating them or discouraging them from freely reporting on human right issues; [and] [e]nsure an independent review of cases in which journalists and human rights defenders are presently on trial or appealing sentences handed down against them for membership in, engaging in propaganda for, or facilitating the activities of a terrorist organization"⁶⁹

66. In its report for the follow-up to the 2016 Concluding Observations of this Committee, the Turkish Government has rejected "the allegations that journalists and human rights defenders were being detained or prosecuted as a means of intimidation. In line with the principle of the rule of law, which is one of the fundamental constitutional tenets of the Republic, judicial proceedings are initiated for those acts committed in violation of the national legislation and proceedings continue in accordance with the principles of independence of the judiciary, supremacy of the law, as well as the international obligations."⁷⁰

67. The ICJ and IHOP submit that these observations by the Turkish Government should be assessed in light of the concerning situation of the rule of law in Turkey and of lack of independence of the Turkish judiciary (see above, section 4).

68. By Emergency Decrees the authorities ordered the closure of 1607 associations.⁷¹ The majority of these organizations were closed down permanently, and their assets seized by emergency decrees.⁷² Among these, there were civil society organizations, including 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 victims of torture and other ill-treatment, and Mezopotamya Hukukçular Derneği (Mesopotamia Lawyers Association), representing people affected by the curfews in southeast Anatolia; Women's domestic violence and the child rights organization, such as Gündem Çocuk Derneği (Agenda Child), are among the organizations that have been closed down that have been permanently closed down. Closure decisions were revoked for 188 associations. As of 20 March 2018, the number of closed associations was 1419.

⁶⁸ CAT, *Concluding observations on Turkey*, *op. cit.*, para 43.

⁶⁹ *Ibid.*, para. 44.

⁷⁰ *Initial comments by Turkey on some of the Concluding Observations of the Committee against Torture*, *op. cit.*, para 53.

⁷¹ See, Decree Laws Nos. 667, 677, 679, 689, 693 and 695.

⁷² The majority

69. 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. Founded by lawyers, these associations were working on torture cases, disappearance cases and other human rights violations cases. The head of the Contemporary Lawyers Association, Selçuk Kozağaçlı, was arrested on 13 November 2017.

70. According to the recent Report entitled "Lawyers under the Judicial Pressure" published by the Human Rights Association, there are 76 cases involving investigations and trials launched against lawyers.⁷³

71. Furthermore, since the declaration of the state of emergency, certain 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:

72. **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 is 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 will take place on 7 November 2018.

73. **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 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. There is no indictment prepared yet.

74. **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. Out of this amount, 105,920 TL was confirmed. 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.

75. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee ask the Turkish government:

⁷³ IHD, *Zargi Baskisi Altındaki Avukatlar Raporu Yayinlandi*, 1 June 2018, available at <http://www.ihd.org.tr/yargi-baskisi-altindaki-avukatlar-raporu-yayinlandi/> .

- **To provide updated information on the current trials of human rights defenders, and other civil society members**
- **To provide information about the closure of human rights NGOs.**
- **To provide information on the grounds, rationale, standard of proof and evidence used to order the closure of human rights NGOs and the pre-trial detention or detention on remand of human rights defenders and other members of civil society. If some of the evidence cannot be disclosed to the public, please provide detailed grounds on the reason for classification and a summary of the content of such evidence.**

8. National human rights institution and its designation as national preventive mechanism (NPM)

76. The Turkish authorities in their follow-up report to this Committee's 2016 Concluding Observations stated that the Turkish National Human Rights Institution "has been vested with a broad mandate as carrying out activities to protect and promote human rights; reviewing and investigating petitions and applications on allegations of human rights violations, and following-up their outcomes; carrying out research activities, in order to monitor and evaluate the developments taking place in the area of human rights; submitting opinions and recommendations; conducting activities for awareness-raising and training. [It] has also been designated as the "National Preventive Mechanism" on 28 January 2014".⁷⁴The authorities also indicated that the National Human Rights Institution had been assigned anti-discrimination duties on 20 April 2016, and renamed the Human Rights and Equality Institution of Turkey.⁷⁵

77. The Board members of the Human Rights and Equality Institution of Turkey (HREIT) were only appointed in March 2017. The Regulation concerning Working Principles and Procedures of the Institution was published on the Official Gazette on 24 November 2017. The Regulation defining the experts to be employed by the Institution was published on 11 November 2017.

78. However, it appears that HREIT is not yet operational and has no capacity to fulfill effectively its mission as an NPM in terms of adequate number of trained personnel and financial resources.

79. Furthermore, the ICJ and IHOP note that the Prison and Detention House Monitoring Boards, the Sub-Committee on Convicts and Detainees of the Turkish Grand National Assembly's Human Rights Inquiry Committee, as well as the Council of Europe's Committee for the Prevention of Torture have all carried out visits in detention centres throughout the country since the issuance of this Committee's Concluding Observations in 2016. However, their reports and findings have not been made fully accessible to the public.

80. In light of the above, the ICJ and IHOP recommend that in the LOIPR for the examination of Turkey, the Committee should ask the Turkish government:

- **To provide information on the expertise of the members of the Board of the HREIT with regard to their ability to act as a national preventive mechanism (NPM).**

⁷⁴ *Initial comments by Turkey on some of the Concluding Observations of the Committee against Torture, op. cit.*, paras 14-15.

⁷⁵ *Ibid.*, para 16.

- **To provide information on the number of employed staff members assigned to fulfill the functions of an NPM and their relevant expertise.**
- **To provide information on the number of applications made to the HREIT, the number of prisons visited and the Institution's findings.**
- **To publish in full the report of the national independent institutions that have visited detention centres and authorize the CPT to publish the reports of their visits to Turkey in 2016 and 2017.**
- **To provide information on the concrete implementation of the recommendations of these national and international bodies since 2016.**