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Submission by the International Commission of Jurists pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments, concerning the cases of *Bilgen v. Turkey* (Application No. 1571/07) and *Eminagaoglu v. Turkey* (Application No. 76521/12), final judgements 9 March 2022

I. Introduction

1. In line with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the International Commission of Jurists ("ICJ") is pleased to submit this communication providing initial observations regarding the execution of the European Court of Human Rights ("the Court" or "ECtHR") judgments in the cases of *Bilgen v. Turkey* (Application No. 1571/07) and *Eminagaoglu v. Turkey* (Application No. 76521/12). The submission focuses on the general measures requested in consequence of the findings of the Court in the cases in question, with a particular focus on the issue of involuntary transfers of judges and the lack of judicial review over such decisions, which may pose a threat to the independence of the judiciary.
2. ICJ is a non-governmental organization working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations.

II. Main findings of the European Court of Human Rights in the cases in question

3. The cases both dealt with administrative and disciplinary decisions taken by the High Council of Judges and Prosecutors (hereinafter "the HSYK"), later renamed the Council of Judges and Prosecutors, ("the HSK"), in relation to individuals working in the justice system and the lack of judicial review over such decisions.
4. In *Bilgen v. Turkey*, the Court found a violation of Art 6(1), concerning the right to fair trial, on the basis of the lack of access to judicial review over an allegedly unjustified decision of non-voluntary administrative transfer of the applicant, who was a judge, to a lower-ranking court in another part of the country. The Court held that judges who were subject to mandatory transfers were entitled to appeal against them before an independent authority, which is competent to investigate the legitimacy of a transfer.¹ In reaching this determination, the Court looked to international standards on the rule of law and the independence of the judiciary, namely the importance of the principle of

¹ Ibid. para. 63.

irremovability and the prohibition of arbitrary transfers of judges. The right to appeal was a protected right within the meaning of Art 6(1) and the HSYK could not be qualified as a court or tribunal in the meaning of Art 6(1) of the Convention.² In addition judges may not be excluded from the protection of the Article in relation to disputes about their employment status.³ Therefore, Art 6(1) was applicable to the transfer decision. The Court acknowledged that the denial of judicial review, on the basis of a constitutional provision prohibiting such review of decisions of the HSYK,⁴ may have been consistent with provisions of domestic law.⁵ Nonetheless, it is imperative there are procedural safeguards for decisions affecting a judge's career and status, including transfers, so as to ensure that the judge's independence and autonomy are not jeopardized by undue external or internal influences.⁶ The Court also stressed "the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary",⁷ and the existing consensus on the need to have in place procedural safeguards, including the possibility to appeal against decisions affecting the career, including the status, of a judge. The Court also referred to various international reports expressing concern about the improper use of judicial transfers, without the possibility to appeal, in Turkey.⁸ The denial of judicial review therefore amounted to a violation of the right to access a court under Art 6(1).

5. In *Eminagaoglu v. Turkey*, the Court found violations of the applicant's rights under Articles 6(1), 8 and 10, in relation to the decision of disciplinary transfer following proceedings conducted against him by the HSYK on the basis of apparently contentious statements he had made to the media and in his role as the chair of *Yarsav*, an association of judges and prosecutors. The Court found that the applicant lacked access to judicial review over the decision by the HSYK in violation of his right to access to court; that the defective sanction procedure, based on his statements, and lack of adequate safeguards, violated his right to freedom of expression;⁹ and that the disciplinary procedure included the unlawful use of information gathered through phone-tapping in the context of a discontinued criminal investigation.¹⁰ The Court highlighted the serious consequences of disciplinary proceedings on the lives and careers of members of the judiciary,¹¹ and found that the HSYK could not, considering its non-judicial character and the high standards on procedural safeguards in similar situations, be considered to fulfil the requirements for a tribunal under Art 6(1) of the Convention.¹² This, together with the lack of a possibility to appeal the transfer decision, entailed a violation of the applicant's right under Article 6(1).¹³
6. Both of these cases decided by the Court and the measures adopted by Turkey in response to the findings and detailed in the State's Action Plan,¹⁴ must be considered against the background of the many years of concerning trends in relation to rule of law and judicial independence in Turkey. The negative trend has escalated significantly in the years since the events dealt with in the present cases, particularly in the context of the two-year state of emergency between 2016 and 2018.

² *Bilgen v. Turkey*, para. 74-75.

³ *Ibid.* para. 79.

⁴ Constitution of the Republic of Turkey, 1982, Article 159.

⁵ *Bilgen v. Turkey*, para. 95.

⁶ *Ibid.* para. 96.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Eminagaoglu v. Turkey*, para. 152-153.

¹⁰ *Ibid.* para. 161.

¹¹ *Ibid.* para. 97.

¹² *Ibid.* para. 99.

¹³ *Ibid.* para. 104-105.

¹⁴ Action Plans are issued by Governments to outline the measures they have undertaken and/or will undertake to implement a judgement of the European Court of Human Rights that found a breach of their obligations under the European Convention on Human Rights.

III. Context: Rule of law and judicial independence in Turkey

7. Since 2014, Turkey has seen an alarmingly negative trend in relation to the rule of law and judicial independence. Developments have included, for instance, retrogressive legislative changes, increased executive control, and harassment, violence and threats directed at opposition politicians, those expressing disfavoured views, human rights defenders and legal professionals. The developments have been accompanied by severe curtailment of human rights, including the freedom of expression and the media, and cracking down on various forms of expression through closure of civil society organizations, prosecutions, and other harassment.¹⁵
8. The negative trend escalated greatly in connection with the two-year state of emergency following the attempted coup d'état, which took place in July 2016. The extended period of emergency rule had a devastating effect on human rights and the rule of law in Turkey and led to various repressive measures being adopted in the name of counterterrorism and protecting democracy. For instance, the measures adopted to purge state institutions and wider society from alleged terrorist supporters led to the dismissal of hundreds of thousands of people from their jobs, including civil servants, judges, military personnel, and academics. Thousands of people were arrested and convicted through unfair trials; associations were closed and banned; and key state institutions were overhauled so as to be brought under stronger executive control. Many of the changes adopted under emergency rule, including constitutional amendments of 2017, led to the consolidation of power with the executive, have become effectively permanent and entail a persistent undermining of the rule of law in Turkey.¹⁶ The process for the adoption of the consequential constitutional changes, including the constitutional referendum held in April 2017, lacked appropriate participation or sufficient democratic guarantees.¹⁷
9. 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. Without access to effective remedies for violations, the enjoyment of human rights becomes illusory.¹⁸ It is

¹⁵ See e.g. International Commission of Jurists (ICJ), *Turkey: the Judicial System in Peril*, 2016, p. 3-4; Parliamentary Assembly of the Council of Europe (PACE), *Resolution 2376 (2021) The functioning of democratic institutions in Turkey*, 22 April 2021; PACE, *Resolution 2156 (2017) The functioning of democratic institutions in Turkey*, 25 April 2017; PACE, *Resolution 2121 (2016) The functioning of democratic institutions in Turkey*, 22 June 2016; UN Special Rapporteur on the independence of the judiciary, *Press Release: Turkey must ensure fair appeal for Judge Murat Arslan after gross attack on judicial independence, says UN expert*, 6 February 2019; PACE, Resolution 2260 (2019) *The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?*; PACE, *Resolution 2347 (2020) New crackdown on political opposition and civil dissent in Turkey: urgent need to safeguard Council of Europe standards.*

¹⁶ See further e.g. ICJ, *Justice Suspended: Access to Justice and the State of Emergency in Turkey*, 2018; 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*, CDL-AD(2017)005-e; PACE, *Resolution 2156 (2017) The functioning of democratic institutions in Turkey*, 25 April 2017; 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*.

¹⁷ See e.g. OSCE/ODIHR Limited Referendum Observation Mission, *Final Report, Republic of Turkey Constitutional Referendum of 16 April 2017*, 22 June 2017; 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*, CDL-AD(2017)005-e.

¹⁸ See e.g. European Convention on Human Rights, Art 13; Universal Declaration of Human Rights, Art 8; International Covenant on Civil and Political Rights, Art 2(3); *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious*

therefore essential that a judicial system is able to guarantee the independence and effectiveness of its courts and judges, particularly in times of crisis. However, the significant overhaul of the justice system, including the mass dismissal of judges and prosecutors, and modifications to the structure of judicial self-governance through constitutional changes, considerably undermined the Turkish judiciary's ability to administer justice and provide an effective remedy for human rights violations, both during and after the state of emergency. The mass dismissal of some 30 percent of active judges and prosecutors in Turkey, including judges of the highest courts, on unclear or vague grounds, such as "association with terrorism", during the post-coup attempt state of emergency, significantly weakened the already strained justice system and created an atmosphere of fear among the remaining judges and prosecutors.¹⁹ About 4 000 judges and public prosecutors were dismissed on suspicion of connections to the Gülen movement, which the government alleges was behind the coup.²⁰ Furthermore, the need to recruit thousands of new judges and prosecutors to fill the positions of dismissed officials, the relative inexperience of new recruits, and the heavy caseloads brought on by emergency measures, have had a serious negative impact on the effectiveness, competence and fairness of the Turkish justice system.²¹

10. The structural changes to the justice system introduced through the 2017 constitutional amendment, adopted during the state of emergency, included, for instance, the reform and renaming of the HSYK (now HSK). The reforms included changes to the composition and appointment of the HSK's members, including the reduction of the number of members from 22 to 13.²² In accordance with international standards on the independence of the judiciary, the governing bodies of the judiciary must be independent of the executive and legislative powers.²³ However, instead of making the body more independent and ensuring stronger protections and safeguards for judicial independence, the reforms adopted have significantly undermined the independence of the HSK and brought the body under strong executive control. While the majority of the members of the former HSYK had previously been appointed by different judicial actors and bodies, following the reform, all members of the HSK are now appointed by the President of the Republic, Minister of Justice or National Assembly and none are appointed by judges or prosecutors, in contravention of international standards.²⁴

[Violations of International Humanitarian Law](#), General Assembly resolution 60/147, 2005; *ICJ Geneva Declaration on Upholding the Rule of Law of Judges and Lawyers in Times of Crisis*, 2008, Principle 1; [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, pp. 1-15.

¹⁹ ICJ, [Justice Suspended: Access to Justice and the State of Emergency in Turkey](#), 2018, p. 15-17.

²⁰ Exact numbers vary somewhat between sources, see European Commission, [Turkey 2021 Report](#), SWD(2021) 290 final/2, p. 23; 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, para. 49.

²¹ ICJ, [Turkey's Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 8.

²² [Law no.6771](#). Revised structure and regulation of the HSK can be found in Constitution of the Republic of Turkey, 1982, Art 159.

²³ See for instance *European Charter on the Statute for Judges*, 1998, Principle 1.3; Consultative Council of European Judges (CCJE), [Opinion no.10\(2007\) on the Council for the Judiciary at the service of society](#), 2007, para. 15; Council of Europe Committee of Ministers, [Recommendation No R \(2010\) 12 to Member States on judges: independence, efficiency and responsibilities](#), para. 36; European Network of Councils of the Judiciary, [ENCJ Compendium on Councils of the Judiciary](#), 2021, p. 4.

²⁴ European standards recommend that no less than half of members of councils of the judiciary should be members of the judiciary be elected by their peers. See Council of Europe Committee of Ministers, [Recommendation No R \(2010\) 12 to Member States on judges: independence, efficiency and responsibilities](#), paras 27 and 46; European Network of Councils of the Judiciary, [ENCJ Compendium on Councils of the Judiciary](#), 2021, p. 5-6. Revised structure and selection process for members of the HSK can be found in Constitution of the Republic of Turkey, 1982, Art 159;

11. The reformed selection process, together with the centralization of power with the President brought on by the 2017 constitutional amendments, entails in practice that a government with a controlling parliamentary majority may select all members of the HSK, as has been the case for the ruling Justice and Development Party since 2017. The changes were condemned by the Council of Europe's Commissioner for Human Rights and the Venice Commission as seriously undermining the independence of the judiciary since control over the HSK would mean control over the judiciary.²⁵ The membership of the Minister and deputy Minister for Justice on the HSK is especially problematic as increasing the opportunity for executive interference in its work.²⁶
12. Even prior to the institution of these structural reforms, the independence of the HSYK was lacking.²⁷ For instance, the European Network for Councils of the Judiciary (ENCJ) had suspended the observer status of the HSYK to the network, citing the council's lack of independence from the executive and legislature, and non-compliance with the ENCJ Statutes and European Standards for Councils of the Judiciary.²⁸ The suspension still remains in force today.
13. In addition, the Turkish supreme courts, the Court of Cassation and Council of State, have been subject to significant and frequent reforms to their structure, composition and functioning. For instance, between 2011 and 2017, the courts were reformed four times, first drastically increasing the number of members on each court to more than double the original number in 2011 and 2014, and subsequently reducing the number to even below the original again in 2016.²⁹ Such frequent and far-reaching changes to the membership of the courts poses a risk of increasing executive influence over them by manipulating the courts' composition. In addition, the 2017 reforms affecting the independence of the HSK, also impact the supreme courts, the members of which are elected by the HSK. Since the Court of Cassation and Council of State are in turn, together with the President, involved in the selection of judges to the Constitutional Court, that Court is necessarily subject to greater executive influence as a consequence. The 2017 constitutional amendments additionally limited the Constitutional Court's power to review certain decrees with the force of law, thereby hampering its ability to exercise checks and balances over the executive.³⁰
14. A wide variety of other systemic issues are also prevalent in the Turkish justice system and undermine the independence of the judiciary and rule of law more widely. Examples include:
 - the lack of objective, merit-based, pre-established and uniform criteria for the recruitment of judges;
 - the recruitment of these judges being organised by the Ministry of Justice;

²⁵ 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 2007](#), adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e, in particular paras 114-119; Council of Europe Commissioner for Human Rights, [Statement of 7 June 2017](#). See also 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, para. 34; European Commission, [Turkey 2018 Report](#), Doc. No. SWD(2018) 153 final, 17 April 2018, p. 22-27.

²⁶ Such membership is discouraged by international standards, see e.g. Consultative Council of European Judges (CCJE), [Opinion no.10\(2007\) on the Council for the Judiciary at the service of society](#), 2007, para. 23; European Network of Councils of the Judiciary, [ENCJ Compendium on Councils of the Judiciary](#), 2021, p. 7.

²⁷ ICJ, [Justice In Peril](#), *op. cit.*

²⁸ European Network of Councils of the Judiciary, [ENCJ votes to suspend the Turkish High Council for Judges and Prosecutors](#), 8 December 2016.

²⁹ ICJ, [Turkey's Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 7.

³⁰ 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 2007](#), adopted at its plenary session, 10-11 March 2017, Doc. CDL-AD(2017)005-e, paras 120-134.

- the non-reinstatement of judges dismissed following the coup attempt, despite their acquittal from charges against them;
- excessively lengthy proceedings in the cases brought by dismissed judges and prosecutors before the Council of State;
- continuation of the power granted to the HSK during state of emergency to dismiss judges and prosecutors on the suspicion of their contact or connection with “terrorist organizations”;
- obstacles to the work and independence of lawyers; and
- failure to implement and statements of open rejection of the judgements of the European Court of Human Rights.³¹

15. A number of UN and European intergovernmental bodies have raised serious concerns about the state of the rule of law and independence of the judiciary in Turkey, particularly in the aftermath of the coup attempt and subsequent state of emergency, and demanded the State to take decisive measures to remedy the situation and revert the problematic changes and practices adopted.³² The many remaining issues related to independence of the judiciary are multifaceted and interlinked and span many different areas of the administration and functioning of the legal profession and the judicial system.

IV. Judicial transfers as a tool of executive control

16. In Turkey, rotation between different posts is a normal part of the career of judges and prosecutors and transfers normally take place with the consent of the individual in question. However, the way in which the transfer practices are carried out can pose a threat to the independence of the judiciary. Mandatory and arbitrary judicial transfers have therefore been an ongoing problem in relation to the independence of the judiciary in Turkey since already before the failed coup attempt and subsequent state of emergency measures.³³

17. The threat to the independence of the judiciary posed by forced transfers has been exacerbated further by the crack-down on the rule of law during and after the state of emergency between 2016 and 2018, as well as through the structural reforms to the HSYK/HSK. Following the reforms, which took place after the events dealt with by the European Court of Human Rights in the cases at hand, the HSK significantly escalated the number of transfers, transferring thousands of judges and prosecutors from 2017 to 2019.³⁴ In May 2021, just before the end of its mandate, the HSK transferred a further 3 070 judges and prosecutors.³⁵

³¹ European Commission, [Turkey 2021 Report](#), SWD(2021) 290 final/2, p. 23-24; ICJ, [Turkey’s Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 7-9.

³² See e.g. Commissioner for Human Rights of the Council of Europe, [Country Report Turkey](#), 19 February 2020; 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; European Commission, [Turkey 2018 Report](#), Doc. No. SWD(2018) 153 final, 17 April 2018; and 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.

³³ See e.g. ICJ, [Turkey: the Judicial System in Peril](#), 2016, p. 17-18; International Association of Judges, Resolution on the Situation of the Judiciary in Turkey, 8 October 2015; Venice Commission, [Opinion on the Draft Law on Judges and Prosecutors of Turkey](#), (CDL-AD(2011)004), 29 March 2011, para. 47-49.

³⁴ ICJ, [Turkey’s Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 7-8.

³⁵ European Commission, [Turkey 2021 Report](#), SWD(2021) 290 final/2, p. 23.

18. Already prior to the failed coup attempt in 2016 and constitutional reforms of 2017, the ICJ raised concerns about the government's effective co-opting of the HSYK for its purposes. The ICJ underscored that arrangements in place made opportune the potential for the use of judicial transfers and allocations to exert pressure on individual judges, and for administrative transfers to be used as a hidden disciplinary sanction to punish judges and prosecutors considered to be unsupportive of the government and its interests.³⁶ With the increased number of transfers and the consolidation of governmental power brought on following 2016, these threats have been exacerbated further and significant structural reforms and sufficient safeguards are required to stop the negative impact of the transfer system on the independence of the judiciary.
19. According to Article 159 of the Turkish Constitution, the decisions of HSK, other than dismissal from the profession, shall not be subject to judicial review. Furthermore, Article 46 (3) of Law no. 6216 on Constitutional Court stipulates that "Individual applications cannot be made directly against legislative transactions and regulatory administrative transactions and similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be the subject of individual application". As decisions of the HSK were excluded from judicial review by the Constitution, transfer decisions of the HSK cannot be the subject of individual application either.
20. As a result, there is no judicial review available in the Turkish law against the decisions of the HSK other than decisions on dismissal from the profession.

V. Reforms adopted by Turkey

21. Turkey has since 2018 taken measures to reform the justice system with the purported aim of strengthening the rule of law and the independence of the judiciary, enhancing rights protections, increasing transparency, and facilitating access to justice and the right to fair trial. However, important structural shortcomings in the justice system remain and seriously undermine any reform efforts.³⁷
22. Both European and universal standards and best practices on judicial independence, including the UN Basic Principles on the Independence of the Judiciary, provide that disciplinary, suspension or removal decisions related to judges should be subject to independent decision-making or review.³⁸ The Council of Europe Committee of Ministers has further asserted that such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and should provide the judge with the right to challenge the decision and sanction, which must also be proportionate.³⁹
23. While constitutional amendments adopted in 2010 subjected disciplinary decisions on dismissal of judges and prosecutors by the HSYK/HSK to judicial review, such review does not apply to other

³⁶ ICJ, *Turkey: the Judicial System in Peril*, 2016, p. 13-14.

³⁷ See e.g. ICJ, *Turkey's Judicial Reform Strategy and Judicial Independence*, November 2019.

³⁸ See e.g. UN Basic Principles on the Independence of the Judiciary, Principle 20; European Charter on the Statute for Judges of 8-10 July 1998, Art 1.3, 1.4, 3.4; Consultative Council of European Judges (CCJE), Opinion No. 1 (2001), para 37; Council of Europe Committee of Ministers, *Recommendation No R (1994) 12*, Principle VI(3); The European Network of Councils for the Judiciary (ENCJ), *Report of 2012-2013: Development of Minimal Judicial Standards III*, p. 20; Venice Commission, *Report on the Independence of the Judiciary, Part I: Independence of Judges*, 2010, para. 43; International Bar Association, *IBA Minimum Standards of Judicial Independence*, 1982, Art 4 and 12.

³⁹ Council of Europe Committee of Ministers, *Recommendation No R (2010) 12 to Member States on judges: independence, efficiency and responsibilities*, para. 69.

disciplinary and administrative decisions impacting the career and status of judicial officials, such as mandatory transfers, as illustrated by the *Bilgen* and *Eminagaoglu* cases.⁴⁰ This state of affairs, which is the main underlying issue in the Court's findings of violations of Art 6(1) in the two cases against Turkey, has not been remedied in any way by the reform measures undertaken or promised by Turkey in its Action Plan concerning the execution of the judgements in question.⁴¹ The only remedy against transfer and other decisions by the HSK is therefore to request re-evaluation by the same chamber of the HSK and then by the Plenary Session of the HSK, at which time the individual may appear and make their defense in person before the Plenary.

24. In the relevant cases, the European Court of Human Rights found that the HSYK was by nature not a judicial body, and therefore could not by itself fulfil the requirements for access to a tribunal under Art 6(1).⁴² This applies to both the chambers and the Plenary Session. Considering this and the continued lack of judicial review mechanisms for decisions of the HSK, other than dismissal decisions, the changes adopted by Turkey do not remedy the fundamental lack of access to a tribunal, which was identified as a violation by the Court. The main basis for the Court's findings therefore remains in place and is highly likely to continue to give rise to further violations of Article 6 of the ECHR in the future. Turkey therefore cannot be considered to have taken the necessary measures to execute the judgements as relates to general measures intended to prevent the recurrence of similar violations.
25. Not only has Turkey failed to remediate the deficiencies identified by the Court in the present cases, but the structural changes to the justice system adopted since the events dealt with in the cases have further exacerbated the existing problems in relation to the independence of the judiciary in general, and the threat posed by arbitrary transfer decisions by the HSYK/HSK in particular, by bringing the body under executive control, as discussed above. The lack of independence of the HSK from the government places the body under excessive political control and allows the government to use it as a political tool to undermine the independence of the judiciary and in extension the rule of law.
26. While the Action Plan submitted by Turkey states that the HSK is an independent organ and that the role of the Minister of Justice in the Council is limited, in practice the executive can exercise control over the body by selecting Council members considered favourable to the government's interests and open to using their role to put pressure on judges and undermine the independence of the judiciary according to the wishes of the governing authorities. The changes made to the investigation and decision procedure applied by the HSK in relation to transfers and other disciplinary measures therefore do not meaningfully change the inherently non-independent and flawed HSK transfer procedure. They also do not protect judges and prosecutors from being subject to "hidden sanctions" in the form of administrative decisions, the procedure for which does not benefit from the safeguards put in place in relation to investigation and defense in disciplinary procedures.
27. The government contends that considering the large number of transfers, it is not practically possible to provide judges being transferred with the reasons for their transfer, but that information regarding the legal basis for a transfer can be requested specifically.⁴³ However, considering that the government also holds that forced transfers are only applied rarely and that the vast majority of transfers are voluntary, as well as the risk of transfers being used improperly to set aside

⁴⁰ ICJ, *Turkey: the Judicial System in Peril*, 2016, p. 12.

⁴¹ See Government of Turkey, Action Plan for the Execution of Judgements, Communication from Turkey concerning the cases of *Eminagaoglu v. Turkey* (Application No. 76521/12) and *Bilgen v. Turkey* (Application No. 1571/07) DH-DD(2022)324, para. 21. [Action Plan]

⁴² See *Bilgen v. Turkey*, para. 74-75; *Eminagaoglu v. Turkey*, para. 99.

⁴³ Action Plan, para. 54.

inconvenient judges and prosecutors,⁴⁴ this explanation is unconvincing. The introduction of the availability of individual applications to the Constitutional Court related to alleged violations of Convention rights, also does nothing to remedy the lack of judicial review for HSK decisions, aside from dismissal decisions, as such review is explicitly prohibited by the Turkish constitution.⁴⁵

28. The Turkish Judicial Reform Strategy of 2019 (JRS) foresees activities such as prohibiting the transfer of higher-ranking judges and prosecutors to lower positions, strengthening the safeguards and guarantees to increase predictability of judicial careers, and revoking the power of the Minister of Justice to assign judges to another jurisdiction in case of urgency.⁴⁶ However, the Action Plan submitted by the government does not reflect any adoption of these changes. On the contrary, the Plan foresees the possibility of judges being transferred down in the judicial hierarchy, holding only that their salary shall remain the same.⁴⁷ Other reform measures recommended in the Strategy and highlighted as important in the present Action Plan have yet to be adopted. For instance, the Plan does not introduce of judicial review of HSK decisions, which are currently possible only against dismissal decisions but which should be extended to all disciplinary sanctions, as well as the public disclosure of all disciplinary decisions on condition that personal data is protected.⁴⁸
29. While the ICJ welcomes Turkey's recognition of the need for reforms and to strengthen the independence of the judiciary, the measures foreseen by the JRS and reiterated in the Action Plan have not yet been adopted. This leaves the actual implementation – namely whether, when and how such changes will be adopted and implemented – up to the government and makes it impossible to predict whether the measures will have a real effect on strengthening the independence of the judiciary, or whether they will be completely undermined by existing systemic issues.

VI. Conclusion

30. Even outside of the present proceedings, Turkey has shown itself unwilling to comply with binding judgements and decisions of the European Court of Human Rights and to remedy its systemic issues related to the rule of law and human rights in the past. This is illustrated by for instance the February 2022 decision by the Council of Ministers to pursue infringement proceedings against Turkey, as the second state in the history of the Council of Europe, in the case of *Osman Kavala – Kavala v. Turkey* – who has been detained for several years due to political considerations.⁴⁹ Decisive action is therefore required to bring Turkey into compliance with its international human rights obligations and to strengthen the rule of law and judicial independence in Turkey, as systematic and structural problems pose a wide-ranging and serious threat to human rights protections in the country.
31. In light of the above, the ICJ considers that the Government of Turkey has not introduced the necessary general measures to effectively implement the Court's judgment and, in order to comply with this obligation, invites the Committee of Ministers to urge Turkey to:
- i. ensure an independent review of the system of transfer of judges, including laws and procedures, to ensure that transfers are not, in practice, used as a disguised disciplinary

⁴⁴ Action Plan, para. 50-51, 53.

⁴⁵ Constitution of the Republic of Turkey, Article 159. See also, Article 46 (3) of Law no. 6216 on Constitutional Court

⁴⁶ See Action Plan, para. 93.

⁴⁷ ICJ, [Turkey's Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 9; Action Plan, para. 51.

⁴⁸ ICJ, [Turkey's Judicial Reform Strategy and Judicial Independence](#), November 2019, p. 13.

⁴⁹ Council of Europe Committee of Ministers, [Interim Resolution CM/ResDH\(2022\)21 Execution of the judgment of the European Court of Human Rights: Kavala against Turkey](#), 2 February 2022.

measure. Administrative decisions on the transfer of judges and prosecutors should be transparent and subject to effective due process safeguards.

- ii. take necessary measures to repeal the constitutional prohibition on judicial review of decisions of the HSK, and to put in place a mechanism for review of all decisions impacting the career and status of judges, including both disciplinary and administrative judicial transfers. Individual complaints to the Constitutional Court should also be available against decisions of the HSK.