TURKEY TRIBUNAL
Because Silence is the Greatest Enemy of Fundamental Human Rights

THE OPINION OF THE TURKEY TRIBUNAL

GENEVA

24 SEPTEMBER 2021

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I. INTRODUCTION

1. AN OPINION TRIBUNAL

1. The Turkey Tribunal (The Tribunal) is an Opinion Tribunal. It is neither a regular court subject to a State's judicial system, nor a court established by a Treaty or an international organisation. It is a Tribunal established by civil society and serves as an instrument and platform to give recognition, visibility and a voice to people who allegedly suffer(ed) violations of their fundamental rights.

2. An Opinion Tribunal is called upon to examine, on the basis of the specific applicable legal framework, highly problematic events or situations that directly affect and are of serious concern to individuals or groups of individuals, as well as society as a whole. An Opinion Tribunal is built around an international network of experts, social actors and scholars from different backgrounds and legal traditions, recognised for their high-level expertise.

3. The legitimacy of an Opinion Tribunal stems, on the one hand, from the independence and competence of its judges and rapporteurs and, on the other hand, from the imperatives of conscience, referring to existing international law instruments and involving the broad participation of witnesses to testify about the facts where flagrant violations of human rights and the rights of peoples occur.

3. The Tribunal has no investigative powers and the Opinion is not legally binding.[1] The Opinion shall serve as a source for raising awareness on the human rights situation in Turkey and as a source of information with strong moral authority.

2. THE ESTABLISHMENT AND FUNCTIONING OF THE TRIBUNAL

4. The Turkey Tribunal was established by a non-profit organisation[2], founded by Em. Prof. Dr. Marc Bossuyt[3], Jan De Bock[4], Christine Mussche[5], Prof. Rik Van De Walle[6] and Prof. Dr. Caroline Pauwels[7]. Its statutes were published in the Belgian *Official Gazette* on 27 May 2020.

5. The Tribunal held its public hearings in Geneva from 20 to 24 September 2021.

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[1] Article 11(1) of the Rules of Procedure.
[2] The Turkey Tribunal vzw.
[3] Marc Bossuyt is Professor Emeritus at the University of Antwerp, was President of the Constitutional Court of Belgium and President of the UN Commission on Human Rights.
[4] Jan De Bock was head of the Belgian Diplomacy and was Belgian ambassador both at the United Nations and the European Union.
[5] Christine Mussche is attorney at law in criminal cases and more specifically in cases of sexual assault.
[6] Rik Van De Walle is Rector of the University of Ghent (Belgium).
[7] Caroline Pauwels is Rector of the University of Brussels (Belgium).

The Tribunal consists of the following six judges, all internationally renowned legal practitioners (the Judges):

- Prof. Em. Dr. Françoise Tulkens (Belgium)[8], acting as President;
- Adj. Prof. Angelita Baeyens (Colombia/Belgium)[9];
- Ass. Prof. Ledi Bianku (Albania)[10];
- Prof. Em. Dr. Giorgio Malinverni (Switzerland)[11];
- Dr. John Pace (Australia)[12];
- Justice Johann Van Der Westhuizen (South Africa)[13].

The Tribunal is assisted by the Registry, consisting of Prof. Dr. Clara Burbano Herrera, Yasmina El Kaddouri, Esther Theyskens and Drs. Martijn Vermeersch.

6. The mandate of the Tribunal is to assess and report in an independent manner on all allegations of human rights violations taking place under the jurisdiction of Turkey.[14] The Tribunal will do so by answering questions posed by the Organising Committee on six topics, relating to the human rights situation in Turkey: torture; abductions; press freedom; impunity; and judicial independence and access to justice.

The Tribunal is informed on these topics by the rapporteurs appointed in accordance with Article 6 of the Rules of Procedure (the Expert Rapporteurs):

- Eric Sottas and Prof. Dr. Johan Vande Lanotte (subject 1: Torture, March 2021);
- Johan Heymans in cooperation with the Ankara Bar Association (subject 2: Abductions, July 2021);
- Philippe Leruth (subject 3: Press Freedom, July 2021);
- Prof. Dr. Yves Haeck and Dr. Emre Turkut (subject 4: Impunity, September 2020);
- Luca Perilli (subject 5: Judicial Independence and Access to Justice, February 2021);
- Prof. Dr. Johan Vande Lanotte (subject 6: Crimes Against Humanity under the Rome Statute, August 2021).

The Rapporteurs presented their findings in a written report (the Report) and orally during the hearings.[15]

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[8] Françoise Tulkens is Professor Emeritus at the UCLouvain and former Judge and Vice-President of the European Court of Human Rights.
[9] Angelita Baeyens is Vice-President of International Advocacy and Litigation at Robert F. Kennedy Human Rights, Adjunct Professor of Law at Georgetown University Law Center and Former Political Affairs Officer at the UN Department of Political Affairs.
[10] Ledi Bianku is an Associate Professor at the University of Strasbourg, former judge at the European Court of Human Rights and former member of the Venice Commission.
[11] Giorgio Malinverni is Professor Emeritus of the University of Geneva, Former Judge at the European Court of Human Rights and former member of the Venice Commission.
[12] John Pace is an expert in international human rights and humanitarian law with over 50 years of hands-on experience. He held several senior positions including with the United Nations, among them as Chief of the Human Rights Office of the UN Assistance Mission to Iraq, head of Special Procedures, and Secretary to the Commission on Human Rights from 1978 to 1994.
[13] Johann Van der Westhuizen is Professor Emeritus of the University of Pretoria, former Justice of the Constitutional Court of South Africa; and acting judge of the Court of Appeal in Lesotho.
[14] Article 2(1) of the Rules of Procedure.
[15] Article 9(1) of the Rules of Procedure.

7. The Tribunal heard 15 witnesses publicly and one witness *in camera*. The witnesses were not put under oath, nor were their statements subject to cross-examination.

3. THE TRIBUNAL'S PROCEDURE

8. The Rules of Procedure (annex 1) according to which the Tribunal functions were adopted on 8 April 2021.

The Tribunal is requested to formulate an answer to the questions in the form of an 'Opinion of the Turkey Tribunal' (the Opinion).[16]

The standards upon which the Tribunal bases the present Opinion are contained in the European Convention on Human Rights (ECHR) of 4 November 1950, other international legal instruments ratified by the Republic of Turkey and the general principles of international law, including soft law.

The Expert Reports were made public on the website of the Tribunal[17] on March 2021[18], July 2021[19], September 2020[20], February 2021[21] and August 2021[22].

4. NON-PARTICIPATION OF TURKEY

9. On Monday 9 August 2021, an official copy of all the Reports and of the schedule was sent to the Ambassador of Turkey in Geneva via registered post and the Turkish government was invited to present its observations on the Reports (annex 2).[23] On Friday 17 September 2021, a second letter in this sense was sent to the Ambassy of Turkey in Geneva. However, no response was received.

[16] Article 10(4) of the Rules of Procedure.
[17] https://turkeytribunal.com/
[18] Subject 1: Torture.
[19] Subject 2: Abductions and subject 3: Press Freedom.
[20] Subject 4: Impunity.
[21] Subject 5: Judicial Independence and Access to Justice.
[22] Subject 6: Crimes Against Humanity.
[23] According to Article 8(3) of the Rules of Procedure.

II. QUESTIONS

1. CHAPTER 1: TORTURE

Question 1: Can we see a pattern in the facts underlying the (torture) testimonies? What groups are targeted and why? What is the motivation, and what is the highest level of state involvement? Question 2: Do the testimonies about torture allow us to conclude that there is a systematic and organised use of torture in Turkey?

A. APPLICABLE LEGAL FRAMEWORK

International human rights instruments

10. The International Covenant on Civil and Political Rights (ICCPR), which was signed by Turkey on 15 August 2000 and ratified on 23 September 2003, holds in article 7 the prohibition on torture and other forms of ill-treatment:

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

Article 10.1 ICCPR implicitly reaffirms this prohibition for all persons deprived of their liberty:

> *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."*

11. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (UNCAT), which was signed by Turkey on 25 January 1988 and ratified on 2 August 1988, provides a definition of the concept of torture in article 1:

> *"For the purposes of this Convention the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesce of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions."*

Article 1 is to be read in conjunction with article 16 UNCAT, which requires States to prevent "*other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.*"

According to article 2.1 UNCAT, States shall take effective legislative, administrative, judicial and other measures to prevent torture in any territory under their jurisdiction. UNCAT mentions in a non-exhaustive manner certain preventive obligations: the prohibition of non-refoulement (article 3 UNCAT), the obligations relating to the criminal persecution of perpetrators of torture (articles 4 to 9 UNCAT), the obligation to provide education and training to law enforcement and other personnel (article 10 UNCAT), the obligation to systematically review interrogation methods and conditions of detention (article 11 UNCAT), the obligation to investigate *ex officio* possible acts of torture and any torture allegation (articles 12 and 13 UNCAT) and the prohibition to invoke evidence extracted by torture in any proceedings (article 15 UNCAT).

In addition, article 12 UNCAT provides that "*(e)ach State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction"*

The prohibition of torture is absolute and non-derogable, as confirmed by article 2.2 UNCAT:

> *"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."*

General Comment No° 2 relating to the implementation of article 2 UNCAT by State Parties affirms that UNCAT is applicable to *"public officials or other persons acting in an official capacity."*[24] The Committee Against Torture has emphasised that States bear responsibility not only for the acts and omission of their officials, but also for others, such as agents, private contractors, and others acting in official capacity or on behalf of the State, in conjunction with the State under its direction or control.[25]

12. Article 3 ECHR, which was signed by Turkey on 4 November 1950 and ratified on 18 May 1954, reads as follows:

> *"[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment."*

According to article 15.2 of the ECHR, no derogation of article 3 ECHR is possible.

The European Court of Human Rights (ECtHR) has confirmed in its case law that article 3 ECHR includes a duty to effectively investigate allegations of torture.[26]

Domestic law

13. In addition, torture is also prohibited under national Turkish law. The Turkish Constitution provides in article 17.3:

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[24] UN Committee Against Torture (CAT), *General Comment no. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html.
[25] *Ibid.,* para 15.
[26] *Inter alia* ECtHR, *Salikhov v. Russia*, no. 23880/05, 2 May 2012, § 82.

"No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity."

Article 94.1 of the Turkish Criminal Code criminalises acts of torture:

"*A public officer who performs any act towards a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally, or affects the person's capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years."*

Article 95 of the Turkish Criminal Code relates to aggravated torture, which is described as follows:

"(1) Where the act of torture causes (of the victim);
a) a permanent impairment of the functioning of any one of the senses or an organ,
b) a permanent speech defect;
c) a distinct and permanent scar on the face,
d) a situation which endangers a person's life, or
e) the premature birth of a child, where eth victim is a pregnant woman
the penalty determined in accordance with the above article shall be increased by one half.

(2) Where the act of torture causes (of the victim):
a) an incurable illness or if it has caused the victim to enter a vegetative state,
b) the complete loss of functioning of one of the senses or organs,
c) The loss of the ability to speak or loss of fertility,
d) a permanent disfigurement of the face, or
e) the loss of an unborn child, where the victim is a pregnant woman
The penalty determined in accordance with the article above shall be doubled.

(3) Where an act of torture results in the breaking of a bone, the offender shall be sentenced to a penalty of imprisonment for a term one to six years according to the effect of the broken bone on his ability to function in life.

(4) Where an act of torture causes the death of the victim, the penalty to be imposed shall be aggravated life imprisonment."

Lastly, article 96 of the Turkish Criminal Code criminalises acts of torment:

"Any person who performs any act which results in the torment of another person shall be sentenced to a penalty of imprisonment for a term of two to five years."

B. REPORT

14. The Report is based on a thorough analysis of data provided by the Turkish government (especially in terms of statistical information), on reports of the CPT, the UN Committee Against Torture, the Special UN Rapporteur on Torture and the reports from the Office of the High Commissioner for Human Rights (OHCHR).

15. Firstly, the Report provides a brief history of the use of torture in Turkey. It identifies three – not so strictly delineated – phases:

1) The use of torture after the military *coup d'État* of 1980: in the 1990's the European Committee for the Prevention of Torture (CPT) and the Committee Against Torture (CAT) published reports clearly and critically pointed out the generalised use of brutal torture, especially within the activities of the Turkish police and security forces.

2) In 2003 the new Erdogan government declared that it would apply a "zero tolerance policy towards torture": by the beginning of the 21st century positive legislative changes were made. Several publications by international bodies reported an improvement and stated that when torture was used it was less violent, however when it concerned the application of torture in relation to the PKK and other extreme left-wing (Kurdish) organisations this was not the case.

3) In the last ten years the situation deteriorated again: due to several factors, one of them being the attempted *coup d'État* of July 2016, far-reaching exceptional legislative measures were introduced (such as the possibility of long-term custody in police stations without judicial review, possibility to deny contact with a lawyer for five days, refusing access to lawyers, prohibiting access to the file including medical reports, impunity of security officials,…) which resulted in a sharp increase of allegations of cases of torture. This increase has been well-documented by the aforementioned international bodies.

   The Report acknowledges that – at present – there are no clear figures on the exact number of torture cases. However, based on official statistics[27] (and emphasising the need to approach this number with caution) the Report states that around 3000 complaints of torture are filed per year on average. At most, no more than 1% of these complaints eventually lead to conviction and imprisonment.

15. Secondly, the Report states that the Turkish government systematically denies these torture-allegations and torture-complaints. According to the Report, the Turkish government refers to (1) the fact that the complainants are opponents of the government and therefore have an interest in spreading false rumors and accusations; (2) the lack of medical evidence for most of the torture-complaints; (3) the fact that the complaints examined by the judiciary very rarely lead to a conviction.

However, the Report states that the ECtHR almost on a continuous basis concluded that Turkey violated article 3 ECHR due to the state's lack of effort to conduct an effective investigation and to take into account medical reports that are redacted in line with the international standards and the almost pervasive culture of losing crucial time in the criminal proceedings.[28]

16. In relation to the first question, the Report comes to the following conclusions.

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[27] http://www.adlisicil.adalet.gov.tr/Home/SayfaDetay/adalet-istatistikleri-yayin-arsivi

[28] ECtHR, *Kavala vs Turkey*, no. 28749/18 10 December 2019, §229; ECtHR, *Rahmi Şahin v. Turkey*, no. 39041/10, 5 July 2016, §47; ECtHR, *Alpar v. Turkey*, no. 22643/07, 21 January 2016, §48; ECtHR, Şakir Kaçmaz v. Turkey, no. 8077/08,10 November 2015, §88.

- Based upon the various reports from the UN Treaty bodies and other international organisations, five targeted groups can be identified: (1) Kurdish people; (2) people perceived to be linked with or supportive of the Gülen movement; (3) suspects of "ordinary" crimes and especially aggravated and sexual crimes; (4) juveniles; and (5) people arrested with the intention of "convincing" them to become police informants.

- The motivation behind the use of torture – in line with the definition of torture in article 1 UNCAT – can either be (1) obtaining a confession; (2) obtaining information; (3) punishing; (4) intimidating or coercing or (5) discriminating the torture-victim.

17. In relation to the second question, the Report came to the following conclusions.

- Based upon the frequency, the consistent pattern and testimonies of the victims stating the presence of 'specialised persons (oftentimes M.I.T. officers) taking matters into their own hands, it can be established – without a doubt and with absolute clarity – that the frequent use of torture of certain groups of people does not constitute a spontaneous reaction of certain police officers but constituted an organised practice within the security services.

- With all due precaution given the absence of precise numbers, the Report concludes that – certainly in the last five years – the use of torture has been systematic[29] towards members of identified targeted groups.

- For the systematic and organised use of torture in Turkey there is nearly no prosecution and punishment which is in contradiction with the applicable international law and the official position of the Turkish government that they apply a zero-tolerance policy towards torture.

C. TESTIMONIES BY THE WITNESSES

Mehmet ALP

18. The witness, who used to be a schoolteacher in Cizre (in the Kurdish region), testified that he was abducted on 18 April 2015 by persons who said that they were policeman. The witness testified that these persons asked him questions about four of his students, of which they said one had joined the PKK and the others the Gülen movement. They allegedly asked him to sign a statement confirming this, under the threat of a gun and of reprisals for him and his family.

[29] 'Systematic' in the sense of the report of UN Committee against Torture for the 48th session of the General Assembly: *"(…) when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question"* and *"inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice."*

The witness further stated that on 20 April 2015, the police raided his house and took his wife into custody for four days. The witness declared that one month before the attempted *coup d'État* in 2016, he was arrested based on criminal charges relating to falsifications. Later, the charges were changed to membership of an armed organisation.

The witness testified that he was constantly moved from one prison to another (often by men in plain clothes), that he was subject to torture during a non-consecutive period of 24 days, that he was exposed to degrading prison conditions and that he was denied medical care (necessary due to the inflicted torture). The witness elaborated on the fact that he was denied access to his lawyer and that during the court hearings the policemen that tortured him were also present and threatened that if he told the court that he had been tortured, he would be tortured again. He was also forced to sign a statement recognising that he himself was responsible for not taking his medication and that he had rejected the assistance of his lawyer. The witness testified that he told the court about the torture, but that no action was taken.

Erhan DOGAN

19. The witness, who used to be a history teacher, declared that he was detained for 9 days after the attempted *coup d'État* of 15 July 2016. He stated that he was called by his colleagues to come to the school because police officers were asking for him. He testified that at the school, he was battered and being forced to disclose the names of the people he had met since the police considered them to be part of a terrorist organisation. If he would give these names, he would be released.

The witness stated that the Ankara police seized their computers and cell phones and that they were not allowed to have contact with anyone. Afterwards, he and his colleagues were taken to the Ankara Police Anti-Terror Department. There, the witness testified that he was threatened with torture by men in plain clothes. He was taken to a gym, where he was handcuffed and placed against the wall. The witness declared that there were blood stains all over the wall, which for him was proof that people had been tortured there, which terrified him even more.

Afterwards, the witness stated that he was asked to disclose ten names and to acknowledge in writing that he was part of a terrorist organisation.

The witness testified to different forms of torture and ill-treatment. He stated that they sprayed cold water on him and then beat him with a stick, that they used the so-called 'Palestinian hanging technique' during several hours, that he heard people being tortured in other rooms, that he heard women screaming '*please don't rape us'*, that he was threatened that if he didn't disclose information on other people, his wife and daughter would end up the same way as the women he had heard screaming,… After this threat, the witness testified that he decided to commit suicide (which he eventually didn't do because of his religious beliefs).

The witness declared that eventually (and finally) he was taken to a prison and he was brought before a judge. However, the policemen that tortured him were also in the room and the judge didn't even look at him. He was sentenced to 7,5 years in prison. Pending his appeal, the witness declared that he was released under conditions. When he returned to society, the

witness testified that he was completely isolated from his family and friends since he was labelled as a terrorist – this is when he decided he could no longer stay in Turkey and fled the country.

Eren KESKIN

20. The witness, who has been a human rights lawyer in Turkey for over thirty years, testified that torture is used against political opponents but also against people charged with ordinary crimes. The witness stated that not only the acts of torture in itself were problematic, but also the lack of investigations into allegations of torture.

The witness further stated that the courts do not accept independent medical reports as evidence of torture, but only reports drawn up by the forensic department, which is controlled by the government and consists only of civil servants.

She also testified that since the AKP governed the country, lawyers were excluded from the judicial system and often persecuted for doing their job. She stated that she was attacked twice and arrested once. She was sentenced to 29 years imprisonment and expects to be sent to prison any day.

D. THE TRIBUNAL'S OPINION

21. Based on the documents, reports and testimony presented to it, the Tribunal is of the following opinion. In the first place, the Tribunal is of the view that there is a systematic[30] and organised use of torture in Turkey[31], particularly against people perceived to be linked with or supportive of the Gülen movement, Kurdish people, as well as people suspected of ordinary crimes.

22. The Tribunal recalls that Turkey is bound by the international prohibition of torture. While it acknowledges that Turkey declared the state of emergency following the attempted *coup d'État* and notified the Council of Ministers of its derogation of the ECHR on 20 July 2016, it reiterates that the prohibition of torture enshrined in the applicable international legal documents is absolute and that non-derogable (article 2 UNCAT; article 4 ICCPR and article 15.2 ECHR).

23. The Tribunal acknowledges that under national Turkish law there is a distinction in terms of threshold and sanction between 'torture' and 'torment', whereas both 'torture' and

[30] For the meaning of the word "systematic" the Tribunal refers to the report of the UN Committee against Torture for the 48th session of the General Assembly, which states that torture may be considered as "systematic": *"(…) when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question" and "inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice."*

[31] The Tribunal also refers to, among other things, the following cases of the ECtHR in this regard: *İltümür Ozan e.a. v. Turkey*, no. 38949/09, 16 February 2021; *Akin v. Turkey,* no. 58026/12, 17 November 2020; *Yavuz Çelik v. Turkey*, no. 34461/07, 26 July 2011; *Saçilik e.a. v. Turkey*, no. 43044/05, 5 July 2011, *Ilhan v. Turkey*, no. 22277/93, 27 June 2000; *Aydin v Turkey*, no. 23178/94, Rep. 1997-VI, 25 September 1997; A*ksoy v Turke*y, no. 21987/93, Rep. 1996-VI, 18 December 1996.

'inhuman and degrading treatment' are covered by the prohibition provided in the applicable international legal framework. The Tribunal takes note of the allegations that, in some cases, medical staff were pressured to downgrade the physical evidence of suffering inflicted on victims in their medical reports to avoid the qualification of torture under national law. However, for the purposes of its Opinion, the Tribunal has applied the definition of torture in article 1 UNCAT and does not pronounce itself on alleged numbers of cases of torture.

24. The witness statements are consistent with the other information that was presented to the Tribunal in relation to the systematic and organised use of torture and confirm the prevailing pattern in the acts of torture. In this regard, the Tribunal reiterates that it is not called upon to pronounce itself on individual cases of torture but to formulate an opinion on the global human rights situation in Turkey.

The Tribunal particularly notes that the threats of torture to relatives, especially the rape of one's wife and daughter, affected some of the victims more than physical acts of torture to themselves. In this regard, the Tribunal joins the recognition by some international instances that mental suffering of persons that are forced to watch severe mistreatment being inflicted on others, can rise to the level of gravity required under the international crime of torture.

Furthermore, the Tribunal acknowledges that the arbitrary arrest, detention – especially on suspicions of terrorism – and torture have a serious and long-lasting impact on victims, not only on a physical and a mental level, but also on a social level. The Tribunal observes that some people, after their release from prison, were rejected by their families and communities. This social rejection can become unbearable for them, influencing their decision to flee the country.

25. The Tribunal reiterates the obligation of the Turkish State to take measures to prevent and to investigate allegations of ill-treatment. The Tribunal refers to the testimony by Ms. Eren Keskin, who has been active as a human rights lawyer for over thirty years in Turkey, and notes that she confirmed the lack of independent investigations into torture. The Tribunal further notes her statement that the courts do not accept independent medical reports regarding torture, but only medical reports drawn up by the government-controlled forensic department. This statement is consistent with the information that has been presented to the Tribunal, which is also included in chapter 4 on impunity.

26. In the light of the foregoing, the Tribunal deems that the conduct of Turkey is not in conformity with its obligations under international law.

2. CHAPTER 2: ABDUCTIONS

Question 3: Can we, taken in account the reports and the testimonies produced before the tribunal, conclude that abductions again are a part of the action of the state towards opposing persons and that no serious inquiry is organised about these facts?

A. APPLICABLE LEGAL FRAMEWORK

International human rights instruments

27. According to the United Nations Declaration for the Protection of all Persons against Enforced Disappearances (UN Declaration),[32] enforced disappearances occur when -

> *"(…) persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law."*[33]

An enforced disappearance constitutes a grave offence under international law, as stressed by Article 1(1) of the UN Declaration:

> *"Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field."* [34]

Therefore, pursuant to Article 7 of the UN Declaration,[35] no circumstances whatsoever, whether a threat of war, terrorism or any other public emergency may be invoked to justify enforced disappearances. Several General Comments have been adopted in this regard.[36]

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[32] UN Declaration on the Protection of all Persons from Enforced Disappearances, General Assembly Resolution, 18 December 1992, UN Doc. A/Res./47/133.
[33] *Ibid*., third preambular paragraph.
[34] UN Declaration on the Protection of all Persons against Enforced Disappearances, General Assembly Resolution, 18 December 1992, UN Doc. A/Res./47/133.
[35] UN Declaration on the Protection of all Persons against Enforced Disappearances, General Assembly Resolution, 18 December 1992, UN Doc. A/Res./47/133.
[36] General comment on women affected by enforced disappearances (A/HRC/WGEID/98/2); General comment on children and enforced disappearances (A/HRC/WGEID/98/1); General comment on the right to recognition as a person before the law in the context of enforced disappearances (A/HRC/19/58/Rev.1, § 42); General comment on the right to the truth in relation to enforced disappearance (A/HRC/16/48, § 39); General comment on enforced disappearance as a continuous crime (A/HRC/16/48, para.39); General comment on enforced disappearance as a crime against humanity (A/HRC/13/31, para.39); General comment on the definition of enforced disappearance (A/HRC/7/2, § 26); General comment on article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/2006/56, § 49); General comment on article 17 of the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/2001/68, paras. 25-32); General comment on article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance

Moreover, this prohibition of enforced disappearances has, according to the Inter-American Court on Human Rights[37] and the ICRC study on customary international humanitarian law[38], attained a *jus cogens* status.[39]

28. Other international instruments too outlaw the use of forced disappearances. While neither the ICCPR nor the ECHR explicitly use the term "enforced disappearance" in any of their articles, enforced disappearance is said to constitute "a unique and integrated series of acts that represent continuing violation of various rights"[40] recognised in the ICCPR[41] and ECHR[42]. The rights which are at issue include the right to recognition as a person before the law (Article 16 ICCPR); the right to liberty and security of the person (Article 9 ICCPR and Article 5 ECHR); the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment (Article 7 ICCPR and Article 3 ECHR) and the right to life (Article 6 ICCPR and Article 2 ECHR).

29. While Turkey is bound by the previously mentioned instruments, it is not a party to the International Convention for the Protection of All Persons against Enforced Disappearances.

Prohibition of forced disappearances

30. An enforced disappearance requires three "cumulative minimum elements" to be reunited:[43]

(E/CN.4/1998/43, paras.68-75); General comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/1997/34, paras. 22-30); General comment on article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/1996/38, paras.54-58); General comment on article 3 of the Declaration on the Protection of All Persons from Enforced Disappearance (E/CN.4/1996/38, paras. 48-53).

[37] IACtHR, *Goiburu v. Paraguay*, 22 September 2006, § 84; Confirmed in IACtHR, *Tiu Tojin v. Guatemala*, 26 November 2008, § 91; IACtHR, *Castro v. Peru*, 22 September 2009, § 59; IACtHR, *Radilla-Pacheco v. Mexico*, § 139;

[38] ICRC Study on Customary International Humanitarian Law, Rule 98.

[39] IACtHR, *Goiburu v. Paraguay*, 22 September 2006, § 84. Confirmed in IACtHR, *Tiu Tojin v. Guatemala*, 26 November 2008, § 91; IACtHR, *Castro v. Peru*, 22 September 2009, § 59; IACtHR, *Radilla-Pacheco v. Mexico*, 23 November 2009, § 139.

[40] UN Human Rights Committee, *Sabita Basnet v. Nepal*, 22 November 2016, CCPR/C/117/D/2164/2012, at 10.4.

[41] See communications No. 2658/2015, *Bolakhe v. Nepal*, Views adopted on 19 July 2018, §§ 7.7 and 7.18; No. 225972013, El Boathi v. Algeria, Views adopted on 17 March 2017, §§ 7.4 and 7.10 (see original text in French language); 2164/2012, Sabita Basnet v. Nepal, Views adopted on 12 July 2016, paras. 10.4 and 10.9; and No. 2134/2012, Serna and others v. Colombia, Views adopted on 9 July 2015, §§ 9.4 and 9.5. By contrast, see previous jurisprudence Communications No. 2031/2011, Bhandari v. Nepal, 29 October 2014, § 8.8; 1924/2010, Boudehane v. Algeria, Views adopted on 24 July 2014, § 8.9; 1328/2014, Kimouche v. Algeria, Views adopted on 10 July 2007, § 7.8.

[42] Among others: ECtHR, *El-Masri V. The Former Yugoslav Republic Of Macedonia*, no. 39630/09, 13 December 2012; ECtHR, *Al Nashiri v. Poland,* no. 28761/11, 27 July 2014; ECtHR, *Nasr and Ghali v. Italy,* no. 44883/09, 23 February 2016; ECtHR, *Abu Zubaydah v. Lithuania,* no. 46454/11, 31 May 2018; ECtHR, *Mahmut Kaya v. Turkey*, no. 22535/93, 28 March 2000; ECtHR, *Gongadze v. Ukraine*, no. 34056/02, 8 November 2005; ECtHR, *Cyprus v. Turkey*, no. 25781/94, 10 May 2001; ECtHR, *Kurt v. Turkey*, 15/1997/799/1002, 25 May 1998; ECtHR, *Taş v. Turkey*, no. 24396/94, 14 November 2000.

[43] Commission on Human Rights, Report of the Working Group of Enforced or Involuntary Disappearances of 15 January 1996, E/CN.4/1996/38, General comment on Article 4 of the Declaration, p. 15.

- a deprivation of liberty against the will of the person concerned[44], in other words an abduction
- an involvement of governmental officials, at least indirectly by acquiescence[45]
- a refusal to disclose the fate and whereabouts of the person concerned[46].

Regarding the second criterion, reference should be made to the general rules regarding the attribution of acts to the state, contained in the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001.[47] Article 4 of the Draft Articles states:

> *"[the] conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State."*

In this respect, in its commentary on the Draft Articles, the International Law Commission specified that:

> *"the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government."*[48]

As to the third criterion, article 17(1) of the UN Declaration on the Protection of all Persons against Enforced Disappearances stresses that "[*acts] constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified."* In other words, a detainee continues to be the victim of an enforced disappearance for as long his whereabouts are not disclosed.

Positive obligations of States in this context

31. Furthermore, in cases of abduction and disappearance of individuals, a State has two positive obligations.

First, it has the positive obligation, as enshrined in Article 2 ECHR and Article 6 ICCPR, to take adequate measures to protect the right to life of the disappeared individual.[49] A State fails in this obligation if the authorities knew or ought to have known - at the time - of the existence of a real and immediate risk to the life of an identified individual and when they failed to take all

[44] *Ibid*.
[45] *Ibid.*
[46] *Ibid*.
[47] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[48] International Law Commission, Commentary to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.
[49] See ECtHR, Koku v. Turkey, Application No. 27305/95, 31 May 2005, at 132; ECtHR, Osmanoğlu v. Turkey, Application no. 48804/99, 24 January 2008, at 75; UN Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, § 4.

reasonable measures within the scope of their powers to avoid that risk.[50] Such a risk to life is deemed to exist when there is a pattern of disappearances. The ECtHR upheld such a pattern in light of the important number of disappearances in south-east Turkey between 1992 and 1996. This was considered to be qualified as a life-threatening event.[51]

Second, a State has the obligation to conduct an effective investigation.[52] This means that a State must promptly investigate cases of alleged enforced disappearance to establish the fate and whereabouts of the disappeared persons and to identify and prosecute those responsible. Enforced disappearance is a continuous crime and lasts until the fate and whereabouts of the victim are established with certainty. Reparation, in the form of compensation, restitution, rehabilitation, satisfaction, or guarantees of non-repetition must also be ensured. This obligation requires the authorities to take all reasonable measures available to secure evidence concerning the incident at issue.[53]

Domestic Law

32. Before 8 November 2016, Article 91 of the Turkish Code of Criminal Procedure was in force, stating:

> *"(1) If the person arrested according to the above article is not released by the Office of the Public Prosecutor, he may be taken into custody for the completion of the investigation. The detention period cannot exceed twenty-four hours from the moment of arrest, excluding the mandatory period for sending it to the nearest judge or court. Mandatory time to be sent to the nearest judge or court to the place of arrest cannot be more than twelve hours.*
>
> *(2) A person shall be taken into custody only if this measure is necessary in respect to the investigation and if there is circumstantial evidence suggesting that he has committed an offence.*
>
> *(3) In crimes committed collectively, due to the difficulty in collecting evidence or the large number of suspects; The public prosecutor may order in writing to extend the detention period for three days, not exceeding one day at a time. The order to extend the detention period shall be immediately notified to the detainee."*

33. On 8 November 2016 Emergency Law no. 6755 and Emergency Law [54] no. 29957 entered into force, amending article 91 of the Turkish Code of Criminal Procedure. Article 3 of Emergency Law no. 6755 states:

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[50] ECtHR, Koku v. Turkey, Application No. 2730/95, 31 May 2005 at 128; ECtHR, Osmanoğlu v. Turkey, Application No. 48804/99, 24 January 2008.
[51] ECtHR, Meryem Çelik and Others v. Turkey, 16 April 2013, Application No. 3598/03, at 58; ECtHR, Enzile Özdemir v. Turkey, 8 January 2008, 54169/00, at 45.
[52] Council of Europe, Missing persons and victims of enforced disappearance in Europe, March 2016, p. 5. See also ECtHR, *Varnava and Others v. Turkey*, no. 6064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009.
[53] ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, 14 April 2015, § 173.
[54] Article 9(1) of the Rules of Procedure.

"(1) The offenses defined in the Second Book Part Fourth, Fifth, Sixth and Seventh Chapters of the Turkish Penal Code dated 26/9/2004 and numbered 5237, crimes within the scope of the Anti-Terror Law dated 12/4/1991 and numbered 3713 and crimes committed collectively, during the continuation of the state of emergency;

(a) An arrest warrant may also be issued by the Public Prosecutor in cases where delay is inconvenient. The detention period for the suspect, who is caught upon the arrest warrant given by the judge or the public prosecutor, cannot exceed thirty days."

Article 10 of Emergency Law No. 29957 states:

"Subparagraph (a) of the first paragraph of Article 6 of the Law on the Adoption of the Decree-Law on the Measures Taken Under the State of Emergency dated 18/10/2016 and numbered 6749 has been amended as follows:

a) The detention period cannot exceed seven days from the moment of arrest, excluding the mandatory period for the suspect to be sent to the nearest judge or court to the place of arrest. Due to the difficulty in collecting evidence or the large number of suspects, the public prosecutor may order in writing to extend the detention period for seven days."

B. REPORT

Internal and international abductions

34. The Report distinguishes between, on the one hand, the abductions within Turkey itself and, on the other, the abductions of Turkish citizens abroad in order to bring them back to their homeland. With regard to the former Turkey consistently denies any involvement. Regarding the latter it openly acknowledges having executed these abductions.

The Report investigates and concludes that in both cases the course of events is identical: opponents of the government are abducted and, consequently, disappear from the radar. For some, this situation continues unabated to this day. Most, however, tend to reappear in certain Turkish police stations after a few months. The Report explains that often these individuals were tortured and forced to make incriminating statements. For these people, a second phase begins: that of continued deprivation of liberty – this time in a Turkish prison – during which their human rights tend to be strongly restricted. The Report provides a number of examples – amongst which the fact that the abductees are not allowed to openly discuss their situation with their relatives and generally cannot choose their own lawyer. In the same vein, it takes an unlawfully long period of time before these individuals are first presented to a judge having to decide on the need to extend their detention. The Report also states that abductees are put under pressure not to fully defend themselves and forced to withdraw complaints on torture and ill-treatment. They are also prevented from consulting independent physicians to attest their injuries.

<u>Internal abduction of its perceived opponents</u>

35. The Report concludes that, in spite of the fact that the Turkish government consistently denies any state implication with regard to internal abductions, it seems beyond reasonable doubt that an increasing number of enforced disappearances is taking place in Turkey. Eyewitnesses, statements of abductees who eventually resurfaced and camera footage clearly show that this is due to Turkish police and intelligence services which are actively intercepting opponents of the Turkish government to illegally transport them to hidden locations where they are often tortured. According to the report, these practices are significant examples of enforced disappearances and are unanimously outlawed by international law.

The Report stresses that, when the victims reappear, their situation of lawlessness continues, and they remain deprived of their most fundamental human rights – the right not to be arbitrarily deprived of one's freedom, the right to a fair trial, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment and even the right to life.

Extra-territorial abduction of its perceived opponents

36. The Report elaborates that, in sharp contrast with the internal abductions, Turkey is much more open about its responsibility in terms of extra-territorial abductions. In spite of the fact that the Report's investigation of the publicly known cases only allowed the Rapporteur to identify 63 cases of such abductions, Turkish officials have repeatedly and publicly claimed that Turkey was involved in more than 100 international abductions. For instance, Turkish Foreign Minister Mevlüt Çavuşoğlu confirmed that 104 Gülenists from 21 countries were abducted and brought back to Turkey as part of the Turkish government's global manhunt. Similarly, Deputy Foreign Minister Yavuz Selim Kiran stated that this happened to more than 100 Gülenists.

Many extra-territorial abductions start with the arrest of Turkish citizens at foreign border crossings due to the fact that the passports of these citizens are, unbeknown to them, cancelled by Turkey. Such behaviour has been declared unlawful by the UN Human Rights Committee and the ECtHR. Similarly, the active involvement of Turkish intelligence officers abducting the opponents of the government with or sometimes even without the consent of the host state is, stresses the report, without doubt contrary to international law and has already been condemned by the European Commission and the ECtHR.

Does Turkey effectively investigate complaints and allegations of enforced disappearances?

37. The Report states that in Turkey there currently exists no effective protection of the right to life of political opponents of the government and no effective investigations are carried out into cases of enforced disappearances. The Report elaborates that a thorough investigation into such complaints is prevented in every possible way. The authorities simply refuse to execute essential investigative acts. When crucial evidence is collected and filed by the relatives of the abductees, the authorities choose to ignore it. The Report concludes that this is diametrically opposed to Turkey's positive obligations under international law to investigate such allegations and complaints.

38. In the light of the foregoing, the Report comes to the conclusion that abductions – both internally and internationally – can be considered as part of a deliberate action and strategy of

the Turkish State to target opponents of the government and that no effective inquiry takes place into these abductions within Turkey itself.

C. TESTIMONY BY THE WITNESSES

Mustafa OZBEN

39. The witness testified that he was abducted on 9 May 2017 and disappeared for 92 days. He was a lawyer and academic at a Gülen affiliated university. After the July 2016 events he went into hiding since he noticed that colleagues and perceived members of the Gülen movement were targeted. On 9 May 2017 he went to withdraw money from the bank. When returning to his car, he was pushed into a black or dark coloured van by at least 3 individuals. He was immediately handcuffed and blindfolded.

After a 30-minute drive he was detained in a small cell without windows and lined with isolation material. In the period after his deprivation of liberty, he was interrogated by individuals trying to hide their identity. The witness considered them to work for MIT since during his interrogations he was shown pictures apparently collected by intelligence services of individuals presenting themselves before customs, sitting on terraces. The interrogators asked him to identify and provide information about the individuals on these photos. They also requested him to work for them as an agent. Since the witness did not collaborate with his abductors, he was subjected to electroshocks, loud noise, food deprivation and threats to his family (particularly his wife).

The witness stated that he asked his abductors where he was. He was told that he was in a place that “neither exists, nor does not exist”. One day he was not blindfolded when he was allowed to leave his cell to take a shower and he noticed that he was in a detention facility with several cells and interrogation rooms.

After having provided all the information he held, he was left to heal from the inflicted injuries and eventually released. The abductors told him to go home but to come to a specific park a few days later where he needed to follow their instructions. He did not want to comply with these instructions and went into hiding – first in Turkey and afterwards by fleeing abroad.

During his disappearance his wife was very vocal about inquiring the authorities on his whereabouts. She was pressured by the police and prosecutor in retracting her complaints and was ordered to stop looking for her husband.

The witness presents the symptoms of severe psychological trauma. He is not receiving any psychological treatment at the moment.

Gökhan GUNES

40. The witness was represented by his lawyer, since he did not feel capable of addressing the general public.

The witness testified that he was an electrician, a labour union representative and shared socialist ideas. He was abducted on 20 January 2021 by being pushed into a car. He disappeared for six days and was allegedly released because of the multiple complaints his lawyer and family had filed to the authorities and the media outcry his disappearance had caused.

During his disappearance, the witness was tortured notably with electroshocks and by being beaten. He suffers from physical and mental trauma until this day, but he is receiving treatment.

The lawyer of the witness also elaborated on the pressure exercised on lawyers. She explained that many lawyers were subjected to trials. The lawyer was herself detained for a while and still faces on-going procedures related to her work as a lawyer. According to her, particularly the adoption of the emergency decrees has caused the position of lawyers to deteriorate.

Mesut and Meral KACMAZ

41. The witnesses are a couple who have been living in Pakistan. They testified that, on 27 September 2017, they were abducted with their two minor children in Pakistan. Their house was raided by Pakistani officers assisted by two members of the Turkish intelligence services.

The family was held in secret and incommunicado detention in Pakistan for 17 days. On 14 October 2017 they were all transferred to a military airport in Pakistan where a Turkish private plane was waiting for them. The personnel of the plane spoke Turkish. During their flight back to Turkey the husband was beaten and threatened to have his family raped in front of him.

After a five-hours flight the plane arrived at the civilian Atatürk airport in Istanbul. They and their children were forced to pass through passport control where they were asked to present their passports. The witnesses could not present the required documents to the authorities. They were handed over to the airport police and held in the detention facility. While their children were released after 20 hours, they were further detained and appeared before a judge in February 2018 for the first time.

D. THE TRIBUNAL'S OPINION

42. Slightly reformulated, the question posed as question 3 to this Tribunal is:

> *"Can the Tribunal, having taken into account the report and testimony presented to it, conclude that abductions are a part of state action towards perceived political opponents; and that those complaints and allegations of abductions are not properly investigated?*

As mentioned in the applicable legal framework, while Turkey is not a party to the International Convention for Protection of All Persons from Enforced Disappearances, it nevertheless has obligations under *jus cogens*.

43. Based on the reports and accompanying documentation and testimony presented, the Tribunal is of the opinion that abductions are a part of state action towards perceived political opponents and that complaints and allegations of abductions are not properly investigated.

There are reasonable grounds to accept that: the alleged victims are arbitrary deprived of their liberty; Turkish governmental officials are at least indirectly by acquiescence involved in their deprivation of liberty; and the Turkish authorities refuse to disclose the fate and whereabouts of the persons concerned. Therefore, as understood under international law, the abductions amount to enforced disappearances.

44. The Tribunal furthermore observes a recurring pattern used to execute the enforced disappearances. Regarding domestic enforced disappearances, firstly, the perpetrators do not seem to be worried about an intervention by the law enforcement authorities since the forcible deprivations of liberty are carried out in broad daylight, in the presence of eye witnesses or security cameras; secondly, the abductions are carried out in a similar manner, namely using the same type of vehicles, often by provoking a car accident and by a bag being put over the heads of the alleged victims after which they are pushed into a black transporter van.

45. As to extra-territorial enforced disappearances, the Tribunal observes the following recurring situations. The extra-territorial abduction is either incited by Turkey through the cancellation of the passport of the abductee which results in his arrest when travelling, or is executed by the Turkish National Intelligence Organisation (*Milli Istihbarat Teskilati* - MIT) without the formal consent of the host state or is conducted with the formal consent of the host state. Regarding the last situation, the Tribunal particularly refers to the establishment of the MIT's Office for Human Abduction and Execution in 2017.

The Tribunal is of the opinion that the subsequent disappearance for a prolonged period of time and arbitrary detention are not in conformity with international law.

46. Based upon the information presented to the Tribunal, there are reasonable grounds to come to the conclusion that domestic enforced disappearances are conducted by MIT officials or other individuals working with or for the Turkish State. The Tribunal notes that Turkey publicly recognises its involvement – with some apparent pride – and thus its responsibility in regard to enforced disappearances in countries other than Turkey itself.

Furthermore, the Tribunal is of the opinion that the complaints and allegations of these enforced disappearances are not effectively investigated. A striking and recurrent element that the Tribunal notes is that the family members of the disappeared persons are very active in gathering evidence and lodging complaints, but without any success. Even more, the Tribunal observes that the family members oftentimes seem to get pressured into retracting their complaints and stop looking for their missing relatives.

47. The Tribunal concludes that Turkey does not act in conformity with its positive obligation to investigate under international law and that there exists no effective protection of the rights to liberty, personal integrity and life of perceived opponents of the government.

The Tribunal draws special attention to the fact that the witness statements presented during the hearings touched upon very cruel events. It expresses its concern to the psychological

state of many of the alleged victims. It is recommended that they receive proper psychological and medical treatment as a matter of urgency.

3. CHAPTER 3: PRESS FREEDOM

Question 4: Can Turkey at this stage be considered as a country within which a sufficient degree of freedom of the press and freedom of expression is guaranteed, so it can be in compliance with the standards of a good functioning democracy?

Question 5: Can the decisions taken by the Turkish government (still) be considered as a reaction linked to the "*coup d'État*" or need them to be evaluated as a way to "destroy" the voices and/or organisations critical towards the government in Turkey?

A. APPLICABLE LEGAL FRAMEWORK

48. A free press has long been recognised as one of the cornerstones of a democratic society and essential to guarantee freedom of opinion and expression and the enjoyment of other fundamental rights[55]. More broadly, freedom of expression is protected under international law, most notably by the United Nations and the Council of Europe. Although some of the relevant instruments are not considered to be fully legally binding, their high moral authority and widespread acceptance have rendered them indispensable in monitoring respect for human rights.

49. First and foremost, freedom of expression and its accompanying duties are enshrined in article 19 of the Universal Declaration of Human Rights.[56] Further, Turkey is a party to the ICCPR, which defines this right in its article 19 as to include the *"*(…) *freedom to* seek, receive and impart information and ideas of all kinds, regardless of frontiers, either *orally, in writing or in print, in the form of art, or through any other media of his choice."*[57] It is important to note that articles 19 and 20 (the prohibition of incitement to discrimination, hostility or violence) of the ICCPR are compatible with and complement each other, all subject to restriction pursuant to article 19.

To guide states parties on the scope of article 19 ICCPR, the UN Human Rights Committee additionally adopted general comment 34, which highlights certain traits of the freedom of expression that are crucial to an interpretation that is compatible with the object and purpose of the Covenant.[58] It also emphasises the limitative scope of restrictions on the freedom of expression, indicating that *"*(…) *all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism*.[59] Indeed, any restriction placed on the exercise of freedom of expression has to conform with the principles of legal certainty, predictability, transparency, legitimacy, necessity and proportionality.[60]

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[55] *See* https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, para 13 (citing communication no. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005).
[56] Article 19, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.
[57] Article 19, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.
[58] *E.g*. the notion that *"A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights."* Human Rights Committee, General comment no. 34 of 12 September 2011. Article 19, p. 3, §13.
[59] *Ibid*., p. 9, §38.
[60] *Ibid*., p. 9-12, §§37-52.

The UN Human Rights Committee places such high value upon uninhibited expression that it has emphasised that *"*(…) *it can never become necessary to derogate from it during a state of emergency."*[61] Under Article 4 ICCPR and Article 15 ECHR, in a state of "public emergency which threatens the life of a nation", the State "may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation."[62] Freedom of expression is one of the freedoms that may be subjected to this type of derogation, provided the conditions of derogation are met. Specifically, it refers to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed"[63] As held by the ECtHR, the margin of appreciation a State enjoys in this regard is not unlimited and such emergencies should not serve as a pretext for limiting freedom of political debate.[64]

Through several resolutions, the Human Rights Council[65] and the UN General Assembly[66] have further affirmed their commitment to freedom of expression and, more specifically, their concern for the safety of journalists in the exercise of their professional duties. In doing so, the UN General Assembly has called upon States *"to create and maintain, in law and in practice, a safe and enabling environment for journalists to perform their work independently and without undue interference."*[67] In the same vein, the Human Rights Council has recognised the importance of ensuring access to information, emphasising *that "*(…) *the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government.*[68]

50. The ECHR enshrined freedom of expression in article 10, is disposing that the right *"*(…) *shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."*[69] Similar to the ICCPR, this provision allows States parties to limit the exercise of this right as prescribed by law, in pursuit of a legitimate aim, insofar necessary in a democratic society and in compliance with the requirement of proportionality.[70] The correction mechanisms of articles 17 and 18 of the ECHR prohibit the abuse of rights and limit the scope of restrictions, compelling member states to interpret the Convention in conformity with its object and purpose.

As a Member State of the Council of Europe, in addition to implementing effective domestic legislation that adheres to the principles of the ECHR, Turkey is required to fulfil certain positive

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[61] *Ibid*., p. 2, §5.
[62] Article 4 ICCPR and Article 15 ECHR.
[63] ECtHR, *Lawless v. Ireland (no. 3)*, Application no. 332/57, 1 July 1961, § 28.
[64] ECtHR, *Mehmet Hasan Altan v. Turkey*, Application no. 13237/17, 20 March 2018, § 91, §210; *Şahin Alpay v. Turkey,* Application no. 16538/17, 20 March 2018, § 75, §180.
[65] Human Rights Council resolution 21/12 of 9 October 2012; Human Rights Council, resolution 27/5 of 2 October 2014; Human Rights Council, resolution 33/2 of 6 October 2016; Human Rights Council, resolution 39/6 of 5 October 2018.
[66] General Assembly, resolution 68/163 of 21 February 2013; General Assembly, resolution 69/185 of 18 December 2014; General Assembly, resolution 70/162 of 17 December 2015; General Assembly, resolution 74/157 of 18 December 2019; General Assembly, resolution 75/101 of 10 December 2020.
[67] General Assembly, resolution 70/162 of 17 December 2015. p. 4, §9.
[68] Human Rights Council resolution 12/12 of 1 October 2009, p. 2.
[69] Article 10, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.
[70] Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, PC-SHDM.DEL/10/14 (2014).

obligations concerning the prevention and prosecution of violence against journalists, according to the Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors.[71]

B. REPORT

51. The Report presents a distressing picture of press freedom in the country, with many of the challenges going back several decades,[72] particularly with Turkey's adoption of its Terrorism Act (2000) and the chilling effect its sweeping provisions caused. The Report identifies numerous violations of freedom of the press, often as part of a wider attack on freedom of expression and an array of other human rights violations. It highlights the following main areas of concern: the prolonged pre-trial detention or imprisonment of journalists and media actors; the continuation of legal proceedings even when journalists are released (acting as a the "sword of damocles"); the abusive application of ambiguous legislation by the judiciary; the use of libel laws against journalists that "insult" the president or the State; the abuse of emergency powers to shut down media outlets and broadcasters; censorship (including digital), and the direct interference by its authorities in the internal affairs of the journalistic profession; among others.

52. Journalists from across the media spectrum face arrests and prosecution. They are often the target of violence for their coverage of issues considered sensitive by the government.[73] Attacks on journalists include physical violence, such as armed and gun violence, but also (online) harassment and verbal attacks by government officials, in addition to death threats.[74] Pre-trial detention, often for prolonged periods of time, is used as a means of intimidation and punishment of journalists.

53. The Report points out that the protection of State interests can be achieved by means that do not infringe upon the freedom of expression, in particular by maintaining an open dialogue between government and the free press, instead of the current antagonistic atmosphere that hinders constructive reform. An example is the arrest of six journalists in March 2020 for "revealing the name of a national intelligence agent" after reporting on the agent's death in Libya. The journalists were held for several months and five of them were found guilty before being released pending appeal, notwithstanding the agent's identity had already been made public in parliament before the journalists' arrest.[75] The Report holds that such treatment is also in clear violation of the proportionality requirement, considering that the ICCPR places high value upon uninhibited expression in public debate concerning figures in the public and political domain[76]. The ECtHR has emphasised that "(…) pre-trial detention

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[71] Committee Ministers, recommendation 2016/4 of 13 April 2016.
[72] ECtHR, *Tulsap v. Turkey*, Application nos. 32131/08 and 41617/08, 21 February 2012; ECtHR, *Sürek and Özdemir v. Turkey*, Applications nos. 23927/94 and 24277/94, 8 July 1999, §61; ECtHR, *Sürek v. Turkey (No. 4)*, Application no. 24762/94, 8 July 1999, §58.
[73] In particular: military operations, economic decline, Kurdish issues and those of Turkey's other minority groups. In 2020, this also included coverage of the Covid-19 Pandemic. *See Turkey's Journalists on the Ropes: Joint International Press Freedom Mission to Turkey (October 6-9, 2020)*, Mission Report, International Press Institute (IPI), 12-13.
[74] *Ibid*., 12.
[75] *Id.* 21, 5.
[76] UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, p. 8, §34.

should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable."[77]

54. The Report points out the existence of an unanimous agreement on the negative impact of the application of the Anti-Terror Law, the Criminal Code, and the Media Law, all of which allow the government to prosecute and fine media outlets and journalists on broad charges relating, for example, to threats to national security, public decency, and protection against libel. In fact, Turkey has delivered the highest number of sentences in trials concerning freedom of expression cases at the ECtHR. Many of these cases relate to the legal framework restrictions or deliberate misinterpretation of the aforementioned laws. Anti-terrorism laws are poorly defined, its low evidence requirements are in breach of article 6 ECHR, and their adoption has opened the path for prosecutors to conflate criticism of the government with terrorist propaganda (or even affiliation to terrorist groups). As a result, it has been reported that by the end of 2016, 178 media outlets – including news agencies, newspapers and television channels – were closed by Executive Decrees. A further 30 publishers and 19 labour unions were closed, with the Free Journalist Initiative denouncing that 187 journalists had been placed under arrest by July 2018.

55. As the Report recalls that on several occasions, the ECtHR has expressed its views on the essential role of the media in reporting on terrorism,[78] and that as long as it does not incite violence, even though provocative, insulting, offensive, shocking or disturbing, such reporting should be protected. In its overzealous prosecution of alleged insults to the president or the state, the government disregards the established wider limits of permissible criticism against public authorities than in relation to a private citizen[79]. It particularly contradicts the findings of the ECtHR "(…) that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda."[80]

The Report also refers to the criticism by the Venice Commission of Turkey's use of emergency decree laws on a permanent basis following the attempted *coup d'État* in 2016, casting additional doubt upon the necessity of these measures to fight terrorism. Regarding the government's censorship policy in particular, the Commission found "(…) that mass liquidation of media outlets by emergency decree laws (and hence without individualised reasoning) is incompatible with Article 10 of the ECHR, even taking into account the very difficult situation in which the Turkish authorities found themselves after the attempted *coup d'État*."[81]

56. The Report recalls that government interference with media and journalists takes many forms, including but not limited to: public condemnation or criticism of individual members of

[77] ECtHR, *Mehmet Hasan Altan v Turkey*, no. 13237/17, 20 March 2018, §211.
[78] ECtHR, *Mehmet Hassan Altan v. Turkey*, no. 13237/17, 20 March 2018.
[79] ECtHR, *Castells v. Spain*, Application no. 11798/85, 23 April 1992, §46.
[80] ECtHR, *Mehmet Hasan Altan v Turkey*, no. 13237/17, 20 March 2018, §211.
[81] European Commission for Democracy Through Law (Venice Commission), Turkey - Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017), CDL-AD(2017)007-e, §57.

the press, calls for public boycotting, calling on editors to rein in or fire critics, filing libel suits in retaliation for criticism, ordering the removal of published information, excessive license fees and transmission regulations, and abuse of the accreditation system for journalists.[82] This takes place against a background of far-ranging conflicts of interest, often financial or political in nature, that critically impair independent and impartial journalism.[83]

57. According to the Report, it is therefore evident that freedom of expression and press freedom cannot be guaranteed under these circumstances, as the actions of Turkish authorities do not meet the requirements of article 10 ECHR or article 19 ICCPR. The Turkish government has not been able to prove the necessity or proportionality of the aforementioned limitations to these freedoms. In failing to do so, Turkey is not acting in compliance with the standards of a functioning democracy. In exercising its emergency powers, it has overstepped the boundaries of their inherent temporary nature. The abuse of pre-trial detention and judicial prosecution effectively predate the attempted *coup d'État* of 2016, severing whatever ties these measures may have had to countering the national security threat of the time. Consequently, Turkey has used these measures for ulterior purposes, contrary to Article 18 ECHR.

C. TESTIMONY BY THE WITNESSES

Meltem OKTAY

58. The witness, a Kurdish journalist, testified as to the crime she was accused of and to her years' imprisonment. The witness explained that on 12 April 2016, around 15 special operations and police officers raided her house in Nusaybin (South East Turkey) and detained her and a colleague. They searched the house for 2 hours and confiscated all of her journalistic equipment, including cameras and computers. The witness was later taken to a police station, interrogated and pressured to become a collaborator. Two days later she was charged with "membership of a terrorist organisation" and "spreading propaganda". The witness was released following a second hearing. While she was acquitted for the charges of belonging to a terrorist organisation, in November 2016 the witness was sentenced to 4 years of prison on the propaganda charges aggravated by the use of news and social media. The evidence used against the witness consisted of articles covering the conflict in Southeast Turkey between Kurdish rebel forces and Turkey forces. She was held in different prisons for a total of 2 years and 11 months, including some periods in solitary confinement. The witness escaped the country and currently lives in exile in Europe. Her appeal before the Cassation Court is still pending.

Cevheri GÜVEN

59. The witness**,** a journalist, testified with regard to the judicial harassment he was subjected to for reporting on government corruption and later, for other critical publications. He

[82] *Id*. 17, 13-14; *Id.* 16, 32, 39-40.
[83] *Id*. 17, 12.

also testified about his arrest and detention at Turkey's Silivri Prison, as well as the different forms of direct and indirect interference with press freedom in Turkey.

The witness declared that in 2013, he was fired from his job at a newspaper for reporting on corruption involving then prime minister Erdogan's ruling Justice and Development Party. In 2015, the witness Güven became Editor-in-Chief of Nokta a Turkish biweekly magazine sympathetic to the opposition Gülen movement and critical of the ruling Government. From this time, the magazine was drowned in court cases, pressure was put on advertisers, and three consecutive issues of the magazine were consecutively seized by the authorities. On 2 November 2015, the witness and his assistant were arrested and sent to Silivri prison. During his time in prison, both were exposed to a number of different human rights violations, including prolonged solitary confinement. After two months, the witness was conditionally released pending trial. In the aftermath of the 2016 attempted *coup d'État*, following an Emergency Decree, Nokta magazine was closed, all properties confiscated, and an arrest warrant was issued for the witness and his assistant. The witness fled to Greece with his wife and two children, while his assistant is in prison serving a 22.5 year-long sentence handed down against him and the witness for allegedly participating in the attempted *coup d'État*. The witness also testified about the continuing risk he faces outside of Turkey, which prompted him to relocate to Germany. He has appeared in several hit lists from Turkish intelligence services targeting academics and journalists living abroad, while his brother, mother and father in Turkey have been harassed by the authorities on numerous occasions.

Witness 9

60. The witness is a Turkish journalist and activist for media freedom and independence. He appeared before the Tribunal *in camera*, due to security concerns for him and his family, even in exile. As part of his testimony to the Tribunal, he referred to the different challenges to freedom of expression in Turkey including the lack of editorial independence, lack of media pluralism, the systematic destruction of digital archives, the instrumentalisation of the judiciary and overall hostile legal framework for the press. Furthermore, the witness testified to the existence of at least three institutions through which the Turkish president exerts extensive control over the media: the Radio TV Supreme Board (RTUK), the Directorate of Communications (TIB), and the Information and Communications Authority (BTK).

D. THE TRIBUNAL'S OPINION

61. Based on the documents, reports and testimony presented to it, the Tribunal formulates the following opinion. The Tribunal notes that currently freedom of expression and press freedom are not sufficiently guaranteed in Turkey. Indeed, the received information indicates a policy to restrict press freedom. Challenges to independent journalism are not a recent phenomenon and while the attacks on the press became particularly acute in the aftermath of the attempted *coup d'État*, they cannot be considered as a reaction to it. Instead, the repression against the press and freedom of expression more broadly point to a larger policy of the State to silence critical voices and limit people's access to information.

62. The Tribunal reiterates the indispensable role of freedom of expression in promoting democratic principles, including transparency and accountability. As highlighted by the UN Human Rights Committee:

> *"Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights."*[84]

Press freedom functions as a necessary "watchdog" for government accountability and respect for human rights. It can only perform its role in a democratic society if access to information and the freedom to disseminate it are guaranteed.

The ECtHR has expanded on the role of the press in relation to freedom of expression and affirmed that "(…) *its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas, with regard to the print media as well as to the audio-visual media; the public also has a right to receive them.*"[85] As a counterweight to this duty, Article 10 ECHR – as interpreted by the Court – also includes certain professional obligations and responsibilities.[86]

63. This Tribunal acknowledges with concern the plight of journalists kept in pretrial or long-term imprisonment; the prosecutions and severe convictions for insult or defamation of the president or state; the criminalisation of journalists covering Kurdish and Armenian issues; the recurring physical and mental violence inflicted upon members of the press and media; the application of ambiguous defamation, insult and terrorism law provisions against them; the abuse of emergency powers, as well as the direct and ongoing interference by State authorities in the internal affairs of the journalistic profession. The extensive and historic case law of the ECtHR on violations of Article 10 ECHR by Turkey, as mentioned in the Report, is a testament to the seriousness and widespread nature of the challenges to freedom of expression, including freedom of the press, in the country.

64. The primary area of tension between the government and its media is situated within the public and political sphere. Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech. This is not to say this freedom cannot be subjected to exceptions, but as the ECtHR has established, such exceptions must be construed strictly and the need for any restrictions must be established convincingly. This is particularly the case where the nature of the speech is political rather than commercial.[87] This means, if engaged in political expression, it is significantly harder for a State to justify

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[84] Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, p. 1, §§2-3.
[85] ECtHR, *Handyside v. the UK*, Application no. 5493/72, 7 December 1976, §49.
[86] ECtHR, *Mater v. Turkey*, Application no. 54997/08, 16 July 2013, §55.
[87] ECtHR, *Mouvement raëlien suisse v. Switzerland*, Application no. 16354/06, 13 July 2012, § 61; ECtHR, *Sürek v. Turkey (no. 1)*, Application no. 23927/94, 8 July 1999, § 61.

interference with the press and media. This is particularly important in the present case, since freedom of expression may be restricted in the interests of national security or to maintain public order.[88] However, as a key characteristic of a "democratic society", freedom of expression is not only applicable to information or ideas that are favourably received, but also to those that "offend, shock or disturb the State or any sector of the population."[89] The scope of the freedom of expression and press freedom is further enhanced when considering the limits of permissible criticism being wider with regard to the government than in relation to a private citizen. Not only should the legislative and judicial authorities be subjected to journalistic scrutiny, the dominant position occupied by the government should engender restraint in resorting to criminal proceedings.[90]

65. Turkish media have a duty towards the public to report on matters of public interest, including terrorism, even in a context of political violence.[91] In combatting terrorism, the State may impose certain restrictions on the press, but these must strictly follow a balancing test to ensure they are in accordance with international law.[92]

The Tribunal recognises the difficult and troubling political situation in which many of the reported cases of media interference take place, in particular in the aftermath of the attempted *coup d'État* of 2016. There is no denying that terrorism poses a significant threat to democracy and stability in Turkey, as elsewhere. However, it is a principal characteristic of democracy that it offers the possibility to resolve problems through public debate, as it has often done before.[93] In the words of the ECtHR: "In this context, the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society."[94] Criminal prosecution and detention of journalists for the mere reporting on sensitive yet important political topics (e.g. corruption, terrorism and counter-terrorism activities) is in itself a form of direct interference with freedom of the press and have a chilling effect that may result in self-censorship.

66. The restriction of freedom of expression, in particular press freedom, e.g. through the extensive use of criminalisation, prosecution, and pre-trial detention of journalists, has been exacerbated by the events of 15-16 July 2016. These restrictions inhibit both the media and the public from actively exercising these freedoms, essential in a democratic society. In addition, they deeply impact the families and communities of their direct targets.

In light of the above, the Tribunal is of the opinion that the conduct of Turkey, as far as press freedom is concerned, does not meet its obligations under international law.

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[88] ECtHR, *Observer and Guardian v. UK*, Application no. 13585/88, 26 November 1991, §59.
[89] ECtHR, *Handyside v. the UK*, Application no. 5493/72, 7 December 1976, §49.
[90] ECtHR, *Castells v. Spain*, Application no. 11798/85, 23 April 1992, §46.
[91] ECtHR, Party for a Democratic Society (DTP) and Others v. Turkey, Application nos. 3840/10 and 6 others, § 74, 12 January 2016; ECtHR, Mehmet Hassan Altan v. Turkey, Application no. 13237/17, 20 March 2018.
[92] ECtHR, *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11, 8 November 2016, § 57, §196.
[93] ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Application no. 19392/92, 30 January 1998, § 57; ECtHR, *Party for a Democratic Society (DTP) and Others v. Turkey*, Application nos. 3840/10 and 6 others, § 74, 12 January 2016.
[94] *Id.* 59, §210.

4. CHAPTER 4: IMPUNITY

Question 6: Is there an internal system of preventing and monitoring torture or mistreatment, and if yes, how does it function in reality? Question 7: Is there an efficient system of sanctioning possible mistreatment or torture? Or can we speak of an organised impunity towards mistreatment and torture against people hold in detention?

A. APPLICABLE LEGAL FRAMEWORK

International human rights instruments

67. Article 7 ICCPR and Article 3 ECHR prohibit torture. The procedural aspect of this prohibition of torture consists out of the positive obligation to investigate. The ECtHR's caselaw on articles 2 and 3 require that when an individual raises an arguable claim that he has been seriously ill-treated by the police or other State agents, there should be an effective official investigation, which should be capable of leading to the identification and punishment of those responsible. Otherwise the protection of Articles 2 and 3 ECHR, *"despite its fundamental importance, would be ineffective in practice and It would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."*[95]

For an investigation to be effective, ECtHR has established certain minimum conditions in its caselaw: the investigation should be independent from those implicated in the events, all reasonable steps available should be taken to secure the evidence concerning the incident, including eyewitness testimony, forensic evidence or an autopsy. There should be a prompt response and a reasonable expedition and there must be a sufficient element of public scrutiny.[96]

In the case of *Ahmet Özkan v. Turkey*, the ECtHR held that authorities that are confronted with clear information in official documents concerning possible violation of Article 3 ECHR and are n3 ot competent to take any investigative steps themselves, should bring this information to the attention of those authorities who are competent in the matter.[97]

68. Article 2.3 ICCPR and article 13 ECHR contain the right to an effective remedy. Article 13 ECHR reads as follows:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

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[95] ECtHR, *Assenov and Others v. Bulgaria,* no. 24760/94, 28 October 1998, §102.
[96] ECtHR, *Güleç v. Turkey, Reports* 1998-IV, no. 21593/93, 27 July 1998, §81-82; ECtHR, *Ogür v. Turkey,* no. 21954/93, 20 May 1999, §§91-91; ECtHR, *Kelly and others v. UK,* no. 30054/96, 4 May 2001, §§95-98; ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, no. 39630/09, §§ 182-185, ECHR 2012; ECtHR, *Mocanu and Others v. Romania,* no. 10865/09, §§ 316-326; ECtHR, *Kuchta And Mętel v. Poland,* no. 76813/16, 2 September 2021.
[97] ECtHR, *Ahmet Özkan v. Turkey,* no. 21689/93, 6 April 2004, §359.

The ECtHR has repeatedly emphasised that once an individual makes out an arguable claim relating to the substance of the complaints under Articles 2 and 3 ECHR, the notion of effectiveness under Article 13 ECHR entails the institutional and investigative/procedural elements parallel to those established under Articles 2 or 3.[98]

69. Furthermore, UNCAT confirms the aforementioned obligations in the following articles:

> *"Article 12 - Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.*
>
> *Article 13 - Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.*
>
> *Article 14 - 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.*
>
> *2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."*

Domestic law

70. Article 17 of the Turkish Constitution provides that:

> *"No one shall be subjected to torture or ill-treatment incompatible with human dignity."*

The Turkish Criminal Code similarly prohibits the use of torture by the police in Article 94.1:

> *"A public officer who performs any act towards a person that is incompatible with human dignity, and which causes that person to suffer physically or mentally, or affects the person's capacity to perceive or his ability to act of his own will or insults them shall be sentenced to a penalty of imprisonment for a term of three to twelve years."*

Article 95 of the Turkish Criminal Code relates to aggravated torture, which is described as follows:

> *"(1) Where the act of torture causes (of the victim);*

[98] ECtHR, *D. v. Bulgaria,* no. 29447/17, 20 July 2021; ECtHR, *Polgar v. Romania,* no. 39412/19, 20 July 2021; ECtHR, *Batyrkhairov v. Turkey,* no. 69929/12, 5 June 2018; ECtHR, *Alimov v. Turkey,* no. 14344/13, 6 September 2016.

a) a permanent impairment of the functioning of any one of the senses or an organ,
b) a permanent speech defect;
c) a distinct and permanent scar on the face,
d) a situation which endangers a person's life, or
e) the premature birth of a child, where eth victim is a pregnant woman
the penalty determined in accordance with the above article shall be increased by one half.

(2) Where the act of torture causes (of the victim):
a) an incurable illness or if it has caused the victim to enter a vegetative state,
b) the complete loss of functioning of one of the senses or organs,
c) The loss of the ability to speak or loss of fertility,
d) a permanent disfigurement of the face, or
e) the loss of an unborn child, where the victim is a pregnant woman
The penalty determined in accordance with the article above shall be doubled.

(3) Where an act of torture results in the breaking of a bone, the offender shall be sentenced to a penalty of imprisonment for a term one to six years according to the effect of the broken bone on his ability to function in life.

(4) Where an act of torture causes the death of the victim, the penalty to be imposed shall be aggravated life imprisonment."

Article 96 of the Turkish Criminal Code holds:

> *"Any person who performs any act which results in the torment of another person shall be sentenced to a penalty of imprisonment for a term of two to five years."*

Article 160/1 of the Turkish Code of Criminal Procedure reads as follows:

> *"As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not."*

71. The Law no. 4483 on the Prosecution of Civil Servants and Other Public Officials foresees that Turkish civil servants, including police, cannot be prosecuted without the permission of relevant administrative authorities for crimes that are not excluded from the scope of the law and that have been committed in the course of the civil servant's duties.

The Turkish Law no. 2937 of 2011 on the State Intelligence Services and the National Intelligence Agency (MIT) – as amended by the Law no. 6532 of 2014 gives MIT personnel effective immunity from prosecution unless the head of the intelligence agency issues an authorisation.

The Turkish Law no. 6722 of 2016 introduced the requirement to seek authorisation from relevant authorities (in particular ministries) before any public officials taking part in counter-

terrorism operations can be prosecuted for any offences committed while carrying out their duties.

Decree no. 667 of 22 July 2016 granted full immunity from legal, administrative, financial and criminal liabilities to state officials who would otherwise be subject to criminal investigation and prosecution. Article 37 of Decree no. 66897 and its subsequent amendment, (article 121 of) Decree no. 69698, extended this immunity to civilians - those *'who have adopted decisions and executed decisions or measures with a view to suppressing the coup attempt and terrorist actions performed on 15/7/2016 and the ensuing actions'* (…) *'without having regard to whether they held an official title or were performing an official duty or not'.*

B. REPORT

72. The Report sheds a clear light on the persistent and prevailing impunity problems in Turkey. It explains that the pervasive culture and overwhelming legacy of impunity for serious human rights violations lasted through the 1980s in the aftermath of the 12 September 1980 military *coup d'État* and through the 1990s in the context of the Kurdish 'troubles' in the Eastern and South-eastern part of Turkey. Despite some of the most flagrant human rights abuses against the Kurdish people, including systematic torture, kidnapping, enforced disappearances, extra-judicial killings, the Turkish authorities shows no willingness to react to these grave human rights violations.

73. In more recent years, the entrenched practice of impunity and the allegations of torture and ill-treatment have reached unprecedented levels, especially during the period that started after the 7 June 2015 parliamentary elections and continued until the aftermath of the 15 July 2016 attempted *coup d'État*. This, despite increasingly persistent allegations, rare formal investigations and prosecutions continue to create a strong perception of impunity for acts of torture and other forms of ill-treatment.

The Report concludes that impunity in Turkey has virtually become the norm, as far as the human rights violations committed by state officials are concerned.

It highlights that the impunity issue is emblematic of many structural and inextricably intertwined problems in Turkey. In this regard, each problem is either a result or a cause of one another factors that cumulatively contribute to the entrenched culture/practice of impunity.

74. The Report identifies the follow factors:

1. Gaps in the legal structure: the AKP Government introduced in 2002 a 'zero tolerance policy against torture and ill-treatment'. As a result of this policy, the government took some legal and institutional steps in the last decade with a view of introducing better safeguards to protect suspects against torture and ill-treatment. Yet, the report states that these changes served merely as a 'band-aid' solution on prevailing impunity problems and did not have a real impact on the ongoing investigative, prosecutorial and judicial practice. As such, the shortcomings in ensuring accountability and reparation, and the inadequate and inefficient procedural safeguards at domestic legal level still persist. This culture of impunity and the ensuing lack of accountability is further

fostered via laws and emergency decrees that operate as amnesties and impunity clauses. These legislative measures granted legal, administrative, criminal and financial immunity to public authorities and created insurmountable obstacles for investigations and the prosecution.

2. Political rhetoric reinforcing patterns of impunity: despite the official discourse, the patterns of impunity are clearly reinforced by the political rhetoric, which resulted in a moral legitimisation towards state officials who violate the absolute prohibition of torture and other ill-treatment. In many cases in the aftermath of the 2016 attempted *coup d'État*, Turkish state authorities have made public pronouncements on cases by either labelling them part of a 'misinformation campaign' or strongly implying that the result of the investigation has already been decided and absolving members of the security forces of blame. Moreover, in many other non-official occasions, such as television interviews and rallies, they have appeared to encourage torture and ill-treatment, thus contributing to the climate of impunity.

3. Lack of political will to hold state officials/agents accountable: while a 'zero tolerance policy' for torture and ill-treatment per definition must mean that perpetrators are brought to justice by being thoroughly and independently investigated, prosecuted and convicted to custodial sentences commensurate with the gravity of their crimes, the implementation of such a policy requires a clear commitment and a strong political will to hold state officials/agents accountable. As examined more particularly in case studies (see section 5 of the report), the Turkish authorities have failed to adequately and thoroughly investigate, prosecute and punish perpetrators.

4. Ineffective and delayed investigations by prosecutors: as noted in case studies (see section 5 of the report), the low number of investigations initiated in response to allegations of torture and ill-treatment remains flagrantly disproportionate given the alleged frequency and the greater number of such violations. The Report provides the Tribunal in Annex II with the numbers that clearly indicate the insufficient determination or unwillingness on the part of the prosecutors to investigate claims of torture and ill-treatment, much less to hold the perpetrators to account and take such cases forward.

5. Complicit judiciary: the attitude of Turkish judges coupled with the severe challenges experienced in the judicial system inter alia the political pressure, the chilling effect of dismissals and forced transfers, the widespread self-censorship among judges and prosecutor, feed into the practice as well as the perception of impunity in the country. As shown in detailed in Annex I to the report, judges frequently exercise greater discretion in arbitrarily rejecting cases as exemplified in countless 'acquittal and dismissal verdicts.'

75. Based on the foregoing, the report comes to the conclusion that there is an organised, institutionalised and entrenched impunity problem in Turkey and that there isn't any internal system of preventing and monitoring nor of sanctioning of torture or mistreatment and therefore there exists an organised system of impunity towards torture or mistreatment.

C. TESTIMONY BY THE WITNESSES

Tülay Açıkkollu (Wife of Gökhan Açıkkollu)

76. The witness testified that both she and her husband used to be schoolteachers. However, after the *coup d'État,* they were both dismissed from their schools.

The witness testified that a search took place in their apartment and that her husband was violently interrogated by the police and taken into custody on 24 July 2016.

She stated that at first she wasn't informed of his whereabouts. When she found out where he was detained four days later, she brought his medication as he was diabetic. She further testified that she was not allowed to choose her own lawyer but that the prosecutor had one appointed through the bar.

The witness stated her husband died of a heart attack 13 days after he had been taken into custody. According to the witness, the medical evidence showed that the heart attack was triggered by acts of torture he endured in custody. When she collected his personal belongings at the police office, she also saw that his diabetic medication had not been touched.

The witness stated that she filed an individual application to the Constitutional Court but that the case is still pending. She testified that criminal proceedings had also been initiated against her.

Ercan Kurkut (Brother of Kemal Kurkut)

77. The witness testified that his 23-year-old brother was killed by Turkish police officers during the Newroz festivities in Diyarbakir on 21 March 2017. The witness stated that the day after his brother was killed, the state seized all photographs and footage taken of the incident in order to fabricate their own version of events. According to the witness, the state claimed that there had been a suicide bomber and that his brother had been killed in that context.

The witness stated that a befriended journalist had been able to get camera footage of the killing, which was then published. The footage, according to the witness, clearly showed that it was not a suicide bombing, but a murder.

The witness stated that two policemen were taken into custody. Eventually the policemen were acquitted due to insufficient proof. The witness stated that the case is pending before the Court of Cassation.

The witness referred to an expert report in which, according to the witness, it was stated that the policemen were responsible for the murder of his brother. However, the policemen and their lawyer refuted this report which was accepted by the judiciary. The witness testified that based on the photos he showed to the Tribunal, it is clear that the policemen had murdered the witness' brother.

The witness stated that in democratic states with a rule of law, the state should try to collect all the evidence, whereas here they tried to destroy all the evidence. The police officers that confiscated all the footage were not questioned, but instead, he stated that his house was raided because he kept trying to get justice for his brother.

Barbaros Şansal

78. The witness, who is a fashion designer and an activist for LGBTQ rights, testified that on multiple occasions he has been subject to violence. He testified that on 28 December 2012 he was subjected to organised violence and that none of the perpetrators were caught. In 2013, he took part in the Gezi Park protests. The witness reported that in 2017 the Turkish government started a campaign against him, and he was deported from Cyprus to Turkey. He landed at Atatürk Airport where, according to his testimony, he was physically and verbally attacked by people on the tarmac. The witness stated that they were trying to lynch him at the airport and that nobody has been held accountable for these actions.

D. THE TRIBUNAL'S OPINION

79. Based on the reports, accompanying documentation and testimony presented, the Tribunal is of the opinion that there has been a prevailing culture of impunity in Turkey since 1980, which has reached unprecedented levels in recent years, particularly since the attempted *coup d'État* of 15 July 2016.

80. The Tribunal acknowledges the Report's identification of five interconnected causes which cumulatively contribute to impunity and show the organised and institutionalised nature of the problem: (i) the deficient legal structure, (ii) the political rhetoric reinforcing the patterns of impunity, (iii) the lack of political will to hold state agents accountable, (iv) the ineffective and delayed investigations by prosecutors, and (v) the lack of an independent judiciary.

81. The Tribunal notes that the lack of effective investigations into allegations of serious human rights violations such as torture and enforced disappearances is the result of the unwillingness – induced by the political rhetoric of the government – of prosecutors to initiate investigations into crimes committed by State officials. Furthermore, the Tribunal observes that the impunity clauses under Turkish law[99] make the prosecution of civil servants, public officials, security forces and personnel of the intelligence services – at least in practice[100] – subject to an authorisation of the relevant administrative authority that is controlled by the government.

82. The Tribunal is also deeply concerned by the lack of independence of the judiciary as a root cause for impunity and refers to chapter 5 in this regard. If cases relating to serious

[99] Law no. 4483 on the Prosecution of Civil Servants and Other Public Officials, Turkish civil servants, Law no. 2937 on the State Intelligence Services and the National Intelligence Agency and Law no. 6722 on the legal protection of security forces participating in the fight against terrorist organisations.
[100] In theory, the crime of torture is excluded from the scope of Law no. 4483 on the Prosecution of Civil Servants and Other Public Officials. However, due to the distinction between the judicial and administrative law enforcement in terms of the requirement of an authorisation to prosecute (such authorisation is only needed to prosecute crimes committed as part of the administrative law enforcement), prosecutors seem to generally ask such authorisation in practice.

human rights violations committed by State agents are brought before the court, they generally seem to lead to dismissals and acquittals. Thus, the Tribunal is of the view that impunity has virtually become the norm in Turkey.

83. The Tribunal notes that the culture of impunity is entrenched in the judicial and more specifically the criminal justice system. As a result of the lack of effective investigations into serious human rights violations, the real and perceived lack of independence of the judiciary and the lack of accountability of perpetrators, citizens have lost their confidence in the judicial system. Moreover, victims of serious human rights violations are further traumatised by the lack of effective access to justice, not “being heard” by an independent judge and the lack of any form of psychological support from the judicial system.

84. The Tribunal is of the view that the prevailing impunity for serious human rights violations is not in conformity with Turkey’s obligations under international law. Further, this impunity sustains and even fosters the systematic and organised use of torture and enforced disappearances in Turkey.

5. CHAPTER 5: JUDICIAL INDEPENDENCE & ACCESS TO JUSTICE

Question 8: Can we evaluate the judiciary system of Turkey as corresponding to internationally protected standards of independence and impartiality? Question 9: Can we evaluate the judicial system of Turkey as ensuring full access to justice and effective judicial protection in case of human rights violations?

A. APPLICABLE LEGAL FRAMEWORK

1. Judicial independence

International human rights instruments

85. The Universal Declaration of Human Rights provides in article 10:

> "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*."

The right to an impartial and independent tribunal or judiciary is enshrined in article 14.1 of the ICCPR. This article reads as follows:

> "*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."*

Article 6.1 of the ECHR also provides:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

The ECtHR has recently clarified that the concepts of a "tribunal established by law", "independent" and "impartial" are very closely interconnected concepts that form the "institutional requirements" of Article 6 § 1.[101]

The ECtHR has ruled in this regard that "[i]*n determining whether a body can be considered to be 'independent' – notably of the executive and of the parties to the case – the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."*[102]

The notion of impartiality, according to the ECtHR, *"normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to [its] constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality."*[103]

86. The United Nations Basic Principles on the Independence of the Judiciary[104] further provide in articles 2-6:

> *"2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
> *3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
> *4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*
> *5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures.*
> *Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*

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[101] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020, § 218.
[102] ECtHR, *Campbell and Fell v. the United Kingdom*, no. 7819/77, 28 June 1984, § 78; ECtHR, *Le Compte, Van Leuven and De Meyere*, Series A no. 43, 23 June 1981, § 55; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, 6 November 2018, § 144; ECtHR, *Guðmundur Andri Ástráðsson v. Iceland,* no. 26374/18, 1 December 2020, § 232.
[103] ECtHR, *Kyprianou v. Cyprus* [GC], no. 73797/01, 15 December 2005, § 119; ECtHR, *Micallef v. Malta* ([GC], no. 17056/06, 2005-XIII; ECtHR 2009, *Morice v. France* [GC], no. 29369/10, 24 April 2015, § 73.
[104] adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

Domestic law

87. The impartiality and independence of the judiciary is protected by article 9 of the Turkish Constitution, which states:

"Judicial power shall be exercised by independent and impartial courts on behalf of the Turkish Nation."

Furthermore, article 138 of the Turkish Constitution guarantees the independence of the courts and reads as follows:

"Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, laws, and their personal conviction conforming to the law.
No organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions.
No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial.
Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution."

Article 140, § 2 of the Turkish Constitution also provides:

"Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges."

Article 36 of the Turkish Constitution guarantees the right to a fair trial:

"Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. No court shall refuse to hear a case within its jurisdiction."

2. <u>Access to justice</u>

International human rights instruments

88. The minimum rights every person charged with a criminal offence is entitled to are guaranteed by article 14 of the ICCPR. This article provides in paragraphs 2, 3 and 5:

"2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.
[…]"
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

In case of an arrest or detention, article 9 of the ICCPR reads as follows in paragraphs 2-5:

"2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Article 6 §§ 2 and 3 of the ECHR provides the following minimum rights:

"2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has

not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

Furthermore, article 5, §§ 2-5 of the ECHR provides:

"2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

89. The right to an effective remedy in case of human rights violations is enshrined in article 2.3 of the ICCPR, which provides:

"*3. Each State Party to the present Covenant undertakes:*
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 13 of the ECHR ("Right to an effective remedy") also provides in this regard:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Also, the United Nations Basic Principles on the Role of Lawyers[105] provide in articles 5-8:

"5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

[105] United Nations, *Basic Principles on the Role of Lawyers*, 7 September 1990.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in
full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

90. Lastly, the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism[106] provide under Guideline VII ("Arrest and police custody"):

"1. A person suspected of terrorist activities may only be arrested if there are reasonable suspicions. He/she must be informed of the reasons for the arrest.
2. A person arrested or detained for terrorist activities shall be brought promptly before a judge. Police custody shall be of a reasonable period of time, the length of which must be provided for by law.
3. A person arrested or detained for terrorist activities must be able to challenge the lawfulness of his/her arrest and of his/her police custody before a court."

Guideline VIII ("Regular supervision of pre-trial detention") reads as follows:

"A person suspected of terrorist activities and detained pending trial is entitled to regular supervision of the lawfulness of his or her detention by a court."

Finally, guideline IX ("Legal proceedings") reads as follows:

"1. A person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law.
2. A person accused of terrorist activities benefits from the presumption of innocence.
3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:
(i) the arrangements for access to and contacts with counsel;
(ii) the arrangements for access to the case-file;
(iii) the use of anonymous testimony.
4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance."

[106] Council of Europe: Committee of Ministers, *Guidelines on human rights and the fight against terrorism*, 11 July 2002.

Domestic law

91. The right to an effective remedy in case of a violation of the constitutional rights and freedoms is protected by article 40 of the Turkish Constitution, which reads as follows:

> *"Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities. The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications.*
> *Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law. The state reserves the right of recourse to the official responsible."*

B. REPORT

92. The Report on the independence of the judiciary and access to justice indicates that, while Turkey adopted important constitutional reforms that reinforced the independence of the judiciary and the protection of fundamental rights of citizens between 2010 and 2012, December 2013 marked the start of the deterioration of the rule of law in Turkey. The attempted *coup d'État* of 15 July 2016 did therefore not trigger the reported erosion of judicial independence and decline of the rule of law but accelerated what has already started a couple of years earlier.

93. As to the question whether the judiciary system corresponds to internationally protected standards of independence and impartiality, the Report notes multiple legislative amendments that were adopted that in December 2013. These legislative amendments required the police investigators assisting prosecutors in the investigations to report those investigations to their police superiors instead of to the prosecutors and increased the control of the government over the High Judicial Council of Judges and Prosecutors (the High Judicial Council) (which was an independent organ that was in charge of, among other things, the appointment, promotion and transfer of and disciplinary proceedings against judges).

As a result of the curtailment of its independence and under pressure from the government, the Report reveals that, between 2014 and 2016, the High Judicial Council engaged in the large-scale relocation of judges and prosecutors, the reallocation of cases and the appointment of new judges without a public call for applications. In addition, the Report indicates that multiple judges and prosecutors who had adopted decisions or performed investigations disliked by the government were arrested and detained in that period.

94. After the attempted *coup d'État* and the declaration of the state of emergency on 20 July 2016, emergency decrees amending key pieces of legislation on the functioning of the judiciary were adopted. The Report states that, based on one of the emergency decrees, the Supreme Court (with respect to its own members) and the High Judicial Council (for all lower court judges and prosecutors) were given competencies to dismiss "suspect" judges and prosecutors, who appeared on a list approved by the High Judicial Council the day after the attempted *coup d'État*. According to the Turkish government, the dismissals targeted alleged

members of the Gülen movement, which had been labelled as a terrorist organisation. However, the Report reveals that the mass dismissals of thousands of judges and prosecutors occurred without proper individualised accusations and without minimum procedural requirements. According to the Report, multiple judges and prosecutors were placed in pre-trial detention on suspicion of being members of a terrorist organisation without supporting evidence and detained by peace judgeships which do not have jurisdiction to detain other judges. Most of them reportedly faced ill treatment in prison.

In addition, the Report notes that the emergency became a pretext to dismantle the free associations of judges, which played a role in the protection of the judicial independence and the fostering of the rule of law. Two associations were reported to have been shut down and the president of one of them was arrested and convicted to 10 years of imprisonment, while the biggest association perceived as being close to the government remained in place.

95. The Report also documents that, on 20 January 2017, the Parliament approved eighteen amendments to the Constitution, which among other things increased the influence of the executive over the Constitutional Court and put the High Judicial Council under full political control through changed selection and appointment procedures of their members. In this context of a judicial council deprived of its independence, the Report shows that Turkey has conducted massive recruitment of new judges and prosecutors, most of them through a non-transparent selection process and without adequate training. These new judges are constantly subject to forced transfers.

The Report further indicates that the lifting of the state of emergency in August 2018 did not put an end to the political control over and the forced transfers of judges and prosecutors. In 2019, 4.027 judges were reported to be transferred, without a reason given. The Report refers also to, among other sources, the joint letter dated 26 August 2020 by the Special Rapporteurs of the UN OHCHR to the Turkish Government, in which it was stressed that Turkey's anti-terrorism legal framework granted the government excessive authority over the judiciary, thus undermining its independence.

96. As to the question of effective access to justice in Turkey, the Report states that early 2014 marked the start of threats against lawyers and human rights defenders mainly through the abuse of the anti-terror criminal provisions. The ECtHR observed in its judgment dated 22 December 2020 in *Selahattin Demirtas v.Turkey*[107] that the provisions of the Criminal Code relating to membership of an armed terrorist organisation are indeed too vague and overly broadly interpreted.

The Report indicates that, in the aftermath of the attempted *coup d'État*, 615 lawyers were arrested, and 1.600 lawyers faced prosecution based on terrorism-related charges. The arrest and detention of lawyers have allegedly created a climate of fear, making it very difficult for detainees to have access to a defence lawyer. In addition, human rights defenders were reported to have been targeted through the closure of 1.400 associations based on emergency decrees and multiple representatives of NGO's were persecuted.

[107] ECtHR, *Selahattin Demirtasv.Turkey,* [GC], no. 14305/17, para 277, 22 December 2020.

The Report also notes unjustifiable limitations of the right of defence based on the emergency decrees, especially in anti-terror cases, such as the prosecutors' right to suspend lawyer-client privilege and to deny access to a lawyer to detainees for a certain time. In addition, the Report reveals that there is often a lack of credible evidence supporting detentions and convictions. Usually, the hearings would be held by videoconference or in closed courtrooms and secret witnesses would be used. According to the Report, pre-trial detention has become a form of summary punishment under anti-terror legislation adopted in 2018.

97. The Report raises concerns about the perceived influence of the executive over the decisions and the jurisdiction and practice of 'criminal judges of peace' established by Law no. 6545, which entered into force on 28 June 2014, as they have extensive powers (such as to issue search warrants, detain individuals, block websites or seize property), their decisions can only be reviewed by another single-judge institution, not a higher judicial body, and the decisions rarely provide sufficiently individualised reasoning.

These practices were reportedly followed in multiple cases of lawyers and human rights defenders who were arrested, detained and/or convicted since the lifting of the state of emergency.

98. As to the question whether the judicial system of Turkey ensures effective judicial protection in case of human rights violations, the Report considers that multiple decisions to release detainees were not enforced, but swiftly reversed following comments from the executive. In addition, the Constitutional Court's decisions were ignored by lower courts[108].

Furthermore, after the lifting of the state of emergency, the Constitutional Court reportedly refused to implement the ECtHR's judgements in two cases (*Baş v. Turkey*[109] and *Alparslan Altan v. Turkey*[110]) in an admissibility decision of 4 June 2020. Moreover, the Report recalls that two judgements of the ECtHR which ordered the immediate release of the detainees (*Demirtas v. Turkey*[111] and *Kavala v.Turkey*[112]), were not enforced. Rather, the detainees were reported to be re-arrested in new investigations.

99. Although on 23 January 2017, the Commission to Review the Actions Taken under the Scope of the State of Emergency was established by the Decree-law no. 685 to review dismissals, closure of associations, annulment of ranks of retired personnel ordered through decree-laws, the Report states that it has been ineffective. The main issue according to the Report is its lack of independence and impartiality. The Report also considers that neither of the two Turkish institutions on human rights, the National Human Rights and Equality Institution (NHREI) and the Ombudsman institution have operational, structural, or financial independence.

100. Lastly, the Judicial Reform Strategy for 2019- 2023 announced by the President of the Republic in May 2019 reportedly falls short of addressing key shortcomings regarding the independence of the judiciary.

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[108] ECtHR Mehmet Hasan Altan v. Turkey, no. 13237/17, 20 March 2018.
[109] ECtHR, *Baş v. Turkey,* no. 66448/17, 3 March 2020.
[110] ECtHR, *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.
[111] ECtHR, *Demirtas v. Turkey,* no. 14305/17, 20 November 2018.
[112] ECtHR, *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

C. TESTIMONY BY THE WITNESSES

Faysal Sarıyıldız

101. The witness is a persecuted, imprisoned and exiled Kurdish politician for HDP and a former member of parliament. He is currently a refugee in Europe. The witness referred to documents attesting that soldiers and police officers were informed during operations in the Kurdish part of Turkey that they should not be afraid to be brought to justice for the acts they committed in that region. Even if civilians were around, they could proceed with their destructions.

Hasan Dursun

102. The witness was a prosecutor in different cities in Turkey between 2004 and 2016. Between 2011 and 2014, he served as an expert on the High Judiciary Council. From 2012 to 2013, he served as a member of the Council of Europe, the Advisory Council of European Prosecutors. The witness testified that he was suspended from his post on 16 July 2016 and eventually expelled from his function. He was also detained and arrested on the same day.

The witness stated that immediately after his arrest, he requested the prosecutor and judges to confront him with the evidence. According to the witness, the casefile did, however, only consist of one page – a decision of the Ankara Prosecutor ordering his arrest. This document did not mention any specific allegations or evidence. To this page, the witness stated that a list was attached with 245 names of judges and prosecutors. The prosecutor and judges informed the witness that they had to arrest him because otherwise they risked being arrested themselves.

The witness testified to having spent thirty months in prison under severe conditions. During this time, he did not manage to access his casefile which was kept secret. Normally a specific procedure would have to be followed for judges and prosecutors (with the High Judicial Council having to start the proceedings) but this procedure was not followed in the witness' case, he stated. The witness complained about this but without any result. While in prison, he stated that he dit not fully have access to a lawyer since all conversations were listened into by the authorities. During his detention, the witness stated that he was subjected to torture.

The detention of the witness was prolonged since the High Judicial Council delayed his indictment with almost 2 years.

The witness was eventually convicted to 7 years, 9 months and 15 days in prison. The evidence that was used against him was, according to the witness, the fact that he had worked abroad and that he had a PhD. There was no evidence that he had neglected his duty. After his release, the witness could not find any employment anymore and eventually fled abroad.

Süleyman Bozoglu

103. The witness testified that he was a judge for 15 years and served as investigative judge at the Supreme Court Criminal General Assembly. He was a member of YARSAV and member of its board of directors between 2012 and 2014.

In July 2016, he stated that he was not in office since he took a one-year leave to take care of his two autistic children. Nevertheless, on 16 July 2016 the witness stated that he noticed his name was included by the High Judiciary Council on the list of judges to be detained. He decided to await the authorities at home and eventually presented himself with his lawyers at the Prosecutor's office on 22 July 2016.

The witness stated that he asked to be confronted with the evidence, but that the casefile did only exist of a one-page letter ordering his arrest, to which a list was attached with the names of all the other judges and prosecutors which had to be arrested. The witness also stated that the specific legal procedure to prosecute judges was not followed. The witness immediately challenged the legality of the procedure, but the prosecutor nevertheless continued with the interrogation.

During his detention, the witness testified that his right to speak to a lawyer was limited to maximum thirty minutes and all client-lawyer meetings were video recorded and observed by guards. Letters sent to his lawyers were also read by the authorities and stamped with the sign "seen".

After 11 months, the first indictment was made against him. The witness stated that he never had the opportunity to appear before a judge during that time to challenge his continued arrest. He did not have the possibility to appeal the prolongation of his detention. When the witness appeared before the court, he stated that he did not have the opportunity to access all evidence mentioned in the indictment. The witness was also hampered in his defense by not receiving sufficient time to prepare his defense. Certain pieces of evidence could not be accessed at all.

The witness testified that he eventually remained in prison for 16 months. He was sentenced to 8 years, 1 month and 5 days of imprisonment, but released because of the health of his two sons.

The witness also explained that more than 1000 judges were sentenced to a prolonged detention on the basis of one judicial decision mentioning no legal rationale and only one generalised paragraph of justification for all these prolonged detentions.

D. THE TRIBUNAL'S OPINION

104. Based on the documents, reports and testimony presented to it the Tribunal is of the following opinion.

The Tribunal observes that Turkey made important reforms to its legal and judicial system in the period between 2010 and 2013. The Tribunal refers in particular to the constitutional reform adopted in 2010 which extended the powers of the Constitutional Court in order to receive

individual applications for the protection of human rights and changed the composition and the appointment procedure for the members of the High Judicial Council. This reform was a step in the right direction towards ensuring judicial independence and guaranteeing access to justice of individuals in case of human rights violations.

105. However, the Tribunal notes with concern that, even though the applicable legal framework provided effective safeguards, the rule of law was destabilised very swiftly by the government's reaction to the Gezi Park protests in June 2013 and furthermore to the concrete threat of prosecution of high-ranking state officials for corruption in December 2013.

106. First, the Tribunal notes the adoption of multiple (amendments to) laws that disrupted the independence of the judiciary. In particular, the Tribunal refers to Law no. 6524 of 26 February 2014 that curtailed the independence of the High Judicial Council. Although this law was later annulled by the Constitutional Court with *ex tunc* effect, the Tribunal observes that it had by then formed the basis for the transfer of numerous judges and prosecutors without their consent, the reallocation of cases and the appointment of new magistrates through a non-transparent selection process and without adequate training. Moreover, the political control over the High Judicial Council and the Constitutional Court was reinforced through several amendments to the Constitution passed on 20 January 2017 that changed the selection and appointment procedures of their members. The legal provisions that enshrine the control of the executive over the judiciary are, in the view of the Tribunal, a manifest violation of the applicable international principles regarding the independence of the judiciary.

107. Second, in addition to the forcible relocations, the Tribunal notes with concern the mass dismissals of approximately 4.560 judges and prosecutors in the aftermath of the attempted *coup d'État*, based on a list drawn up by the High Judicial Council.

108. Third, the Tribunal notes that multiple judges and prosecutors who had adopted decisions or performed investigations disapproved by the government, were summarily arrested and placed in pre-trial detention on suspicion of membership of a terrorist organisation after the attempted *coup d'État*. This constitutes, in the view of the Tribunal, a severe intimidation of the judiciary.

109. The Tribunal is of the opinion that in such a situation, the lack of independence of the judiciary and the deficient legal framework impair the essence of effective access to justice in Turkey.

The Tribunal refers in this regard to the national anti-terror criminal provisions, which are too vague and overly broadly interpreted, as observed by the ECtHR in its judgment dated 22 December 2020 in *Selahattin Demirtas v.Turkey*[113]. In addition, the Tribunal notes the extensive limitations of the right of defence, especially in anti-terror cases, introduced by emergency decrees, which in its opinion are not in conformity with the international human rights obligations of Turkey.[114] The Tribunal is further concerned by the prosecution of multiple

[113] ECtHR, *Selahattin Demirtas v.Turkey,* no. 14305/17, 22 December 2020, § 277.
[114] See among others, in relation to the extended period of pre-trial detention: ECtHR, *Aksoy v. Turkey*, no. 21987/93, 12 December 1996, § 66. "*The Court recalls its decision in the case of Brogan and Others v. the United Kingdom (judgment of 29 November 1988, Series A no. 145-B, p. 33, § 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time*

lawyers and human rights defenders as an apparent way to further diminish the possibility of an effective defence for detainees. Furthermore, the Tribunal observes that Law 6545[115] established 'criminal judges of peace' and granted them extensive powers such as the issuance of search warrants, detention of individuals, blocking of websites or seizure property, without an effective review by a higher judicial authority.

110. Lastly, the Tribunal expresses particular concern over the lack of enforcement of two judgements of the ECtHR ordering the immediate release of detainees (*Demirtas v. Turkey*[116] and *Kavala v. Turkey*[117]) and the recent position taken by Constitutional Court[118] that the interpretation of national laws on the imprisonment of members of the judiciary pertains to the Turkish courts and not to the ECtHR, thus openly refusing to comply with two decisions by the ECtHR.[119]

111. In the view of the Tribunal and referring to the lack of independence of the judiciary as well as the prevailing culture of impunity (dealt with in chapter 4), effective access to justice and thus the protection of fundamental human rights in the current state of the judicial system in Turkey is illusory.

permitted by Article 5 § 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr. Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of "promptness".

[115] Dated 8 June 2014, which entered into force on 28 June 2014.

[116] ECtHR, *Demirtas v. Turkey,* no. 14305/17, 20 November 2018.

[117] ECtHR, *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

[118] The admissibility decision of 4 June 2020.

[119] ECtHR, *Baş v. Turkey,* no. 66448/17, 3 March 2020; ECtHR, *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.

6. CHAPTER 6: CRIMES AGAINST HUMANITY

Question 10: Do we need to qualify the acts of torture, as well as the national and the extraterritorial abductions, as described in the reports brought before the Turkey Tribunal, as crimes against humanity, according to the Rome Statute?

A. APPLICABLE LEGAL FRAMEWORK

112. The Tribunal notes that the Rules of Procedure provide that it only has a mandate to deal with "human rights provisions contained in the European Convention on Human Rights and other international human rights conventions ratified by the Republic of Turkey and covers the respect of the general principles of international law." Since Turkey is not a party to the Rome Statute[120], the Tribunal does not have a mandate to assess the situation under the Rome Statute.

However, crimes against humanity are part of customary international law[121] and *jus cogens*, and as such fall within the scope of the Tribunal's mandate. Customary international law is the body of international obligations arising from established international practices. *Jus cogens* norms enjoy a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. Such norms are non-derogable and override any other norms.[122]

113. To constitute a crime against humanity under customary international law, a crime must be committed in the context and as part of a widespread or systematic attack against a civilian population.[123] This is the contextual element of crimes against humanity, which is divided into five sub-elements:[124]

1. There must be an attack.
2. The attack must be directed against any civilian population.
3. The attack must be widespread or systematic.
4. There must be a sufficient link or nexus between the acts of the accused and the attack.
5. The accused must have known that there was a widespread or systematic attack directed against a civilian population; and that the acts formed part of that attack.

114. An **attack** is defined as a course of conduct involving the commission of acts of violence.[125] This notion indicates that a crime against humanity is not merely an accumulation

[120] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.
[121] Among others: *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, § 648.
[122] Among others: *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, § 550.
[123] Inter alia: *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34-T, Judgment, 31 March 2003, § 232; *Prosecutor v. Tadić*, Case No. IT-94-I-T, Opinion and Judgment, 7 May 1997, §§ 618, 626; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, paras 172–87; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, 22 February 2001, § 410; *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, paras 247–72.
[124] *Inter alia*: *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001, § 85; *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, 29 November 2002, § 28; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004, § 698.
[125] *Inter alia*: *Kunarac et al.* Trial Judgment § 415; *Kunarac et al.* Appeal Judgment § 86; *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion on the Form of the Indictment, 14 November

of unrelated, random or isolated criminal acts, but rather part of a collective criminal endeavour.[126] The concept of 'attack' thus requires a multiplicity of mutually linked criminal acts, without however setting a minimum threshold.[127] These acts may all be performed in a single incident in which many crimes are committed, or in a succession of violent acts.[128] They may include acts that themselves constitute crimes against humanity, but also other criminal acts. The concept of an 'attack' does not require the existence of an armed conflict or military operations.[129]

115. The attack must be **directed against any civilian population**. This requirement can also be fulfilled when certain groups of individuals within the population, distinguished for instance by their religious, racial or ethnic features, are targeted.[130] To constitute a 'population' for the purpose of this requirement, a number of individuals must form a sufficiently stable and identifiable group and must not be randomly or fortuitously assembled.[131] The term 'civilian' refers to those individuals not involved in any form of military activity or armed resistance.[132]

116. The attack should be **widespread** or **systematic**.[133] The widespread or the systematic nature of the attack are relative notions, which means that they are measured against what is identified as the targeted civilian population in the case at hand.[134] Whether the attack was either widespread or systematic must be ascertained in light of the means, methods, resources used, and the result of the attack.[135] The term 'widespread' connotes the large-scale nature of the attack and the number of victims,[136] while the expression 'systematic' refers to the

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1995, § 11; *Vasiljević* Trial Judgment § 29; *Prosecutor v. Bemba*, Judgment Pursuant to article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, paras 148–69.

[126] *Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06, 8 July 2019, § 662; *Prosecutor v. Rašević & Todović*, No. X-KR/06/275,Verdict, 28 February 2008, § 41.

[127] *Prosecutor v. Bemba*, Judgment Pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, § 150: *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001, paras 96, 100; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, § 550.

[128] *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012, § 701; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, paras 103–14.

[129] *Prosecutor v. Ntaganda*, Judgment, ICC-01/04-02/06, 8 July 2019, § 662.

[130] Inter alia: *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Public Judgment with Confidential Annex, 23 February 2011, paras 1592, 1599-1600.

[131] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, § 207.

[132] *Inter alia*: *Prosecutor v. Kličković & Drljača*, No. X- KR-06/213, Second Instance Judgment, 7 May 2013, § 55.

[133] *Inter alia*: *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Public Judgment with Confidential Annex, 23 February 2011, § 1590; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012, § 698; *Prosecutor v. Lukić & Adamović*, No. S1 1 K 003359 12 Kžk, Second Instance Verdict, 8 November 2013, § 70.

[134] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, 22 February 2001, § 430; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001, § 95; *Prosecutor v. M Radić et al.*, No. X-KR-05/139, Second-Instance Verdict, 9 March 2011 § 166.

[135] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-7 & IT-96-23/1-T, Judgment, 22 February 2001, § 430; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001, § 95; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, 30 November 2005, § 210.

[136] *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, § 648; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, § 329; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, 16 May 2003, § 439; *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436, 7 March 2014, paras 1098.

organised nature of the acts of violence and the improbability of their random occurrence.[137] Patterns of crimes, meaning the non-accidental repetition of similar criminal conduct on a regular basis, indicate such systematic occurrences.[138]

117. As the Tribunal cannot assess the potential individual criminal responsibility in individual cases, it does not consider the fourth and fifth contextual element, as that would include an assessment of the specific conduct and intent of an accused.

B. REPORT

118. The Report states that there is and has been a widespread or systematic attack directed against part of the civilian population in Turkey. To come to this conclusion, it relies on the reports 'Abductions in Turkey' and 'Torture in Turkey' and on the interpretation of the contextual elements by the International Criminal Court (ICC). The Report notes that the ICC case law is authoritative in this regard since the Rome Statute was both a codification of existing international law and a progressive development thereof.

119. The Report states that an attack directed against a civilian population exists, since the statistics show that the occurrence of torture in Turkey it is not a mere aggregate of random acts. Rather, there is a course of conduct in which torture is used to obtain confessions from perceived terrorists and to obtain the names of other perceived terrorists. In addition, enforced disappearances imply a certain level of organisation and preparation. According to the Report, two specific groups (people perceived to be part or supportive of the Gülen movement and the Kurdish people) are targeted, confirming that the acts of torture and the enforced disappearances are not random. Finally, the statistics show that the quantitative threshold is met.

120. As to the widespread or systematic nature of the attack, the Report notes that these requirements apply in the alternative. It concludes from the ICC case law that the term 'widespread' can be defined as "massive, frequent, large scaled, directed against a multiplicity of victims" whereby the assessment must be carried out on the basis of the individual facts, while an attack can be considered 'systematic' in case of "a non-coincidental repetition of crimes" or "improbability of their random occurrence". Applying these definitions to the Turkish situation, the Report states that taking into account the number of victims relative to the size of the targeted group, the seriousness of the acts and the high impact on the targeted group, torture can be qualified to be widespread in Turkey. It also states that based on the high numbers during a long period, the specific targeting of some groups, the existence of recurring patterns and the use of specialised teams, torture in Turkey can also be considered as systematic. The Report acknowledges that the qualification of the internal and/or international abductions executed by the Turkish authorities as widespread within the context of the Rome

[137] *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2001, § 94; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, § 580; *Prosecutor v. Gbagbo*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11-656-Red, 12 June 2014, paras 223 and 225.
[138] *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, 27 September 2006, § 710; *Prosecutor v. Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07-3436, 7 March 2014, § 1123.

Statute is disputable. However, the Report states that it is undisputable that these abductions must be considered as systematic within this framework.

121. Regarding the third contextual element, according to which the attack must be directed against any civilian population, the Report notes that the victims of the acts of torture and enforced disappearance are not randomly selected persons but belong to two groups that are critical towards the government and are abducted and/or tortured for that reason: the Gülen movement and the Kurdish people.

Under the Rome Statute, the attack must also be carried out pursuant to or in furtherance of a State or organisational policy to commit such attack. The Report concludes that this additional contextual element is also fulfilled in the case of Turkey. It states that the Turkish State policy can be described as follows: by torturing and abducting the persons who are allegedly linked to the Gülen movement, the members of which it indicates as terrorists, and the Kurdish people, the Turkish State wants to make them confess and physically punish them. The state also aims to extract information – true or false – about other persons who in turn will be tortured. All these persons are then condemned to long prison sentences, based on declarations done under torture.

The Report finds that the policy of torture is organised, encouraged, actively promoted or tolerated at every level of the State, meaning the legislator, government, governors, the judicial system and the security services, directly or indirectly. With regard to enforced disappearances, the Report notes that they imply the coordination of different state services and require substantial resources, which point at the involvement of the state. In addition, the (internal) enforced disappearances result in impunity, by refusing to conduct effective investigations and limiting the access to justice for victims. As to the extraterritorial enforced disappearances, the Report notes the government's statements, openly admitting to the state policy and even boasting about its results.

122. Finally, the Report notes that, in order to constitute a crime against humanity under the Rome Statute, one or more of the underlying offences referred to in article 7(1) of the Statute must be committed as part of the widespread or systematic attack. In the case of Turkey, the relevant underlying offences are the acts of torture and enforced disappearance of persons, which, according to the Report, are in line with the definition of the crimes of torture and enforced disappearance in the Rome Statute.

C. THE TRIBUNAL'S OPINION

123. The Tribunal firmly reiterates that it does not have a mandate to assess the potential individual criminal responsibility in specific cases. However, the Tribunal is called upon to formulate an opinion on whether the acts of torture and abductions that in its view have taken place and continue to take place in Turkey (see chapters 1 and 2) are part of a specific, global context that would allow to qualify them as crimes against humanity under customary international law and *jus cogens*.

Based on the information[139] presented to the Tribunal, it is of the view that, at least since the attempted *coup d'État* in July 2016, the acts of torture and enforced disappearances have occurred in a systematic and organised manner. In this regard, the Tribunal particularly notes the high numbers of reported cases;[140] the existence of specialised teams for torture; the lack of effective investigations and the prevailing impunity of state officials;[141] the deficient legal framework;[142] the lack of enforcement of ECtHR decisions;[143] and the serious, long-lasting impact of these gross human rights violations on the victims and their families. In addition, the Tribunal observes that the acts of torture and enforced disappearances specifically target civilians perceived to be opponents of the government.

As a result, the Tribunal is of the view that these acts of torture and enforced disappearances cannot be viewed as mere isolated occurrences. Rather, in the opinion of the Tribunal, they are to be considered as part of a widespread and systematic attack against a civilian population that has taken place in Turkey at least since July 2016.

Thus, the Tribunal is of the view that the acts of torture and enforced disappearances committed in Turkey, in applications brought before an appropriate body and subject to the proof of the specific knowledge and intent of the accused, could amount to crimes against humanity.

[139] Including the six reports, the accompanying documents and testimony.
[140] See chapters 1 and 2.
[141] See chapter 4.
[142] See chapter 5.
[143] For example the following decisions: ECtHR, *Demirtas v. Turkey,* no. 14305/17, 20 November 2018; ECtHR, *Kavala v. Turkey*, no. 28749/18, 10 December 2019; ECtHR, *Baş v. Turkey,* no. 66448/17, 3 March 2020 and ECtHR, *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.

III. CONCLUDING OPINION OF THE TURKEY TRIBUNAL

124. As an Opinion Tribunal, the Turkey Tribunal was mandated to assess and report independently on allegations of human rights violations taking place under the jurisdiction of Turkey. This Opinion is not legally binding but may serve as a source, with moral authority, for raising awareness. Indeed, silence is the greatest enemy of fundamental human rights.

125. The Tribunal is independent. All its judges have experience in the field of human rights. Three were judges in the European Court of Human Rights. One of the judges of the Tribunal was a justice of the Constitutional Court of South Africa, the apex court in that country. One judge held senior positions in the United Nations. Another judge holds a senior position in a reputable international civil society organisation. All the judges are or were professors at well-known universities. None of the judges of the Tribunal has any links with Turkey or any other party that could result in either the improper favoring of, or bias. They performed their task *pro bono*. This unanimous Opinion is the result of serious consideration and intense debate.

126. The Tribunal's hearing was an enlightening and profound experience. It will hopefully contribute to enhance vigilance about the human rights situation not only in Turkey, but also in the region and indeed worldwide.

127. The Opinion of the Tribunal is based on international and European human rights law and on the information made available to the Tribunal by Expert Rapporteurs and the testimony of witnesses.

To the extent that the government of Turkey might have been in a position to place before the Tribunal information or submissions relevant to the Tribunal's mandate, it is unfortunate that it chose not to do so.

The Expert Reports presented to the Tribunal were thorough, detailed and comprehensive. They contained highly valuable information.

The Opinion of the Tribunal is based the totality of information that emerged from the reports and the oral testimony.

128. As a result of the varied nature of the topics addressed the presentation, nature and contents of oral testimony by witnesses necessarily differed. The witnesses told the stories of their respective experiences. Human frailties, understandably sometimes, came to the fore. Some witnesses were nervous; and some emotional. A few showed symptoms of trauma and will hopefully receive medical or psychological attention. The Tribunal acknowledges the courage shown by the witnesses during their testimony and their contribution to breaking the silence.

Aspects of the testimony presented were touching; and others somewhat chilling. One witness, for example, said that when he asked his abductors where he was, he was told that he was "in a place that neither exists, nor does not exist". Others told the Tribunal not only how they had been physically tortured, but also of threats that their wives and daughters would be raped. The Tribunal realizes the long-term and perhaps everlasting consequences for future

generations of gross human rights violations. The Tribunal hopes that its Opinion will inspire and encourage the improvement of respect for and the protection of the human dignity and rights of all.

Witnesses did not testify under oath. Because of the absence of the Turkish government or its representatives, the testimony was not tested, for example by way of cross-examination. None of the witnesses contradicted other witnesses, or the contents of the reports. Several in fact corroborated the information in the reports.

129. The Tribunal was mandated to address questions on six topics: torture; abduction; press freedom; impunity; judicial independence; and whether the acts of the Turkish government amount to a crime against humanity. These topics of course overlap. For example, someone who is abducted and disappears, is often tortured. Without a free press to report on events, complaints and allegations, the public and international community would not know about the abduction and torture. This silence and ignorance result in the failure to investigate the matter and bring it to a court. If the legal profession is furthermore intimidated and the judiciary not independent, impunity will necessarily follow.

130. As to the six topics subjected the Tribunal's assessment, it is of the following opinion:

Torture

131. The Tribunal is of the view that there is a systematic and organised use of torture in Turkey, particularly against people perceived to be linked with or supportive of the Gülen movement, the Kurdish people, as well as people suspected of ordinary crimes.

132. The Tribunal recalls that Turkey is bound by the international prohibition of torture. While it acknowledges that Turkey declared the state of emergency following the attempted *coup d'État* and notified the Council of Ministers of its derogation from the ECHR on 20 July 2016, it reiterates that the prohibition of torture enshrined in the applicable international legal documents is absolute and that no derogation is possible.

133. The witness statements are consistent with the other information that was presented to the Tribunal in relation to the systematic and organised use of torture and confirms the prevailing pattern in the acts of torture. In this regard, the Tribunal reiterates that it is not called upon to pronounce itself on individual cases of torture but to formulate an opinion on the global human rights situation in Turkey.

134. The Tribunal particularly notes that the threats of torture to relatives, especially the rape of one's wife and daughter, affected some of the victims more than physical acts of torture to themselves. In this regard the Tribunal joins the recognition by some international instances that mental suffering of persons that are forced to watch severe mistreatment being inflicted on others, can rise to the level of gravity required under the international crime of torture.

Furthermore, the Tribunal acknowledges that the arbitrary arrest, detention and torture have a serious and long-lasting impact on victims, not only on a physical and a mental level, but also on a social level. In this regard, the Tribunal observes that some people, after their release

from prison, were rejected by their family and communities. This social rejection can become unbearable for them, influencing their decision to flee the country.

135. Finally, The Tribunal reiterates the obligation of the Turkish State to take measures to prevent and to investigate allegations of ill-treatment.

136. In the light of the foregoing, the Tribunal deems that the conduct of Turkey is not in conformity with its obligations under international law.

Abductions

137. Regarding abductions, the Tribunal is of the opinion that abductions are a part of state action towards perceived political opponents and that complaints and allegations of abductions are not properly investigated. While Turkey is not a party to the International Convention for Protection of All Persons from Enforced Disappearances, it nevertheless has obligations under *jus cogens*.

138. There are reasonable grounds to accept the following: the alleged victims are arbitrarily deprived of their liberty and outside a formal legal procedure; Turkish governmental officials are at least indirectly by acquiescence, involved in their deprivation of liberty; and the Turkish authorities refuse to disclose the fate and whereabouts of the persons concerned. Therefore, as understood under international law, the abductions amount to enforced disappearances.

139. The Tribunal furthermore observes a recurring pattern used to execute the enforced disappearances. Regarding domestic enforced disappearances, firstly, the perpetrators do not seem to be worried about an intervention by the law enforcement authorities since the forcible deprivations of liberty are carried out in broad daylight, in the presence of eye witnesses or security cameras; secondly, the abductions are carried out in a similar manner, namely using the same type of vehicles, often by provoking a car accident and by a bag being put over the heads of the alleged victims after which they are pushed into a black transporter van.

As to extra-territorial enforced disappearances, the Tribunal observes the following recurring situations: the extra-territorial abduction is either incited by Turkey through the cancellation of the passport of the abductee which results in his arrest when travelling, or is executed by the Turkish National Intelligence Organization without the formal consent of the host state or is conducted with the formal consent of the host state, outside a formal legal procedure.

140. The Tribunal is of the opinion that the subsequent disappearance for a prolonged period of time and arbitrary detention is not in conformity with international law.

141. Based upon the information presented to the Tribunal, there are reasonable grounds to come to the conclusion that domestic enforced disappearances are conducted by MIT officials or other individuals working with or for the Turkish State. The Tribunal notes that Turkey publicly recognizes its involvement and thus its responsibility in regard to enforced disappearances in countries other than Turkey itself.

Furthermore, the Tribunal is of the opinion that the complaints and allegations of these enforced disappearances are not effectively investigated.

142. The Tribunal concludes that Turkey does not act in conformity with its positive obligation to investigate under international law and that there exists no effective protection of the rights to liberty, personal integrity and life of perceived opponents of the government.

Press freedom

143. The Tribunal is of the opinion that the repression against the press and freedom of expression points to a larger policy of the State to silence critical voices and limit people's access to information.

144. The Tribunal reiterates the indispensable role of freedom of expression in promoting democratic principles, including transparency and accountability. A free press can only perform its role in democratic society if access to information and the freedom to disseminate it are guaranteed. Therefore, press freedom functions as a necessary "watchdog" for government accountability and respect for human rights.

145. This Tribunal acknowledges with concern the following: the plight of journalists kept in pretrial or long-term detention; the prosecutions and severe convictions for insult or defamation of the president or state; the criminalisation of journalists covering Kurdish and Armenian issues; the recurring physical and mental violence inflicted upon members of the press and media; the application of ambiguous defamation, insult and terrorism law provisions against them; the abuse of emergency powers, as well as the direct and ongoing interference by State authorities in the internal affairs of the journalistic profession.

The primary area of tension between the government and its media is situated within the public and political sphere. Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech. This is not to say this freedom cannot be subjected to exceptions, but as the ECtHR has established, such exceptions "must, however, be construed strictly, and the need for any restrictions must be established convincingly.

146. Turkish media have a duty towards the public to report on matters of public interest, including terrorism, even in a context of political violence. In combatting terrorism, the State may impose certain restrictions on the press, but these must strictly follow a balancing test to ensure they are in accordance with international law.

The Tribunal recognises the difficult and troubling political situation in which many of the reported cases of media interference take place, in particular in the aftermath of the attempted coup of 2016. There is no denying that terrorism poses a significant threat to democracy and stability in Turkey, as elsewhere. However, it is a principal characteristic of democracy that it offers the possibility to resolve problems through public debate, as it has often done before. Criminal prosecution and detention of journalists for the mere reporting on sensitive yet important political topics in itself a form of direct interference with freedom of the press and have a chilling effect that may result in self-censorship.

147. The restriction of freedom of expression, in particular press freedom, through the extensive use of criminalisation, prosecution, and pre-trial detention of journalists, has been exacerbated by the events of 15-16 July 2016. These restrictions inhibit both the media and the public from actively exercising these freedoms, essential in a democratic society. In addition, they deeply impact the families and communities of their direct targets.

148. In light of the above, the Tribunal is of the opinion that the conduct of Turkey, as far as press freedom is concerned, does not meet its obligations under international law.

Impunity

149. The Tribunal is of the opinion that there has been a persistent and prevailing culture of impunity in Turkey since 1980, which has reached unprecedented levels in recent years, particularly since the attempted *coup d'État* of 15 July 2016.

150. The Tribunal acknowledges the Report's identification of five interconnected causes which contribute to impunity and show the organised and institutionalised nature of the problem: (i) the deficient legal structure, (ii) the political rhetoric reinforcing the patterns of impunity, (iii) the lack of political will to hold state agents accountable, (iv) the ineffective and delayed investigations by prosecutors, and (v) the lack of an independent judiciary.

The Tribunal notes that the lack of effective investigations into allegations of serious human rights violations such as torture and enforced disappearances is the result of the unwillingness of prosecutors to initiate investigations into crimes committed by state officials. Furthermore, the Tribunal observes that the impunity clauses under Turkish law make the prosecution of civil servants, public officials, security forces and personnel of the intelligence services – at least in practice – subject to an authorisation of the relevant administrative authority that is controlled by the government.

The Tribunal notes that the culture of impunity is entrenched in the judicial and more specifically the criminal justice system. As a result of the lack of effective investigations into serious human rights violations, the real and perceived lack of independence of the judiciary and the lack of accountability of perpetrators, citizens have lost their confidence in the judicial system. Moreover, victims of serious human rights violations are further traumatized by the lack of effective access to justice.

151. The Tribunal is of the view that the persistent and prevailing impunity for serious human rights violations is not in conformity with Turkey's obligations under international law. Further, this impunity sustains and even fosters the systematic and organised use of torture and enforced disappearances in Turkey.

Independence of the judiciary and access to justice

152. The Tribunal observes that Turkey made important reforms to its legal and judicial system in the period between 2010 and 2013. The Tribunal refers in particular to the constitutional reform adopted in 2010 which extended the powers of the Constitutional Court in order to receive individual applications for the protection of human rights and changed the composition and the appointment procedure for the members of the High Judicial Council. This

reform was a step in the right direction towards ensuring judicial independence and guaranteeing access to justice of individuals in case of human rights violations.

153. However, the Tribunal notes with concern that, even though the applicable legal framework provided effective safeguards, the rule of law was destabilized very swiftly by the government's reaction to the Gezi park protest in June 2013 and furthermore to the concrete threat of prosecution of high-ranking state officials for corruption in December 2013.

154. First, the Tribunal notes the adoption of multiple (amendments to) laws that disrupted the independence of the judiciary. In particular, the Tribunal refers to the law of February 2014 that curtailed the independence of the High Judicial Council. Moreover, the political control over the High Judicial Council and the Constitutional Court was reinforced through several amendments to the Constitution passed on 20 January 2017 that changed the selection and appointment procedures of their members.

155. Second, in addition to the forcible relocations, the Tribunal notes with concern the mass dismissals of approximately 4.560 judges and prosecutors in the aftermath of the attempted *coup d'État*, based on a list drawn up by the High Judicial Council.

156. Third, the Tribunal notes that multiple judges and prosecutors who had adopted decisions or performed investigations disapproved by the government, were summarily arrested and placed in pre-trial detention on suspicion of membership of a terrorist organization after the attempted *coup d'État*. This constitutes, in the view of the Tribunal, a severe intimidation of the judiciary.

The Tribunal refers in this regard to the national anti-terror criminal provisions, which are too vague and overly broadly interpreted, as observed by the ECtHR in its judgment dated 22 December 2020 in *Selahattin Demirtas v. Turkey*. In addition, the Tribunal notes the extensive limitations of the right of defence, especially in anti-terror cases, introduced by emergency decrees, which in its opinion are not in conformity with the international human rights obligations of Turkey. The Tribunal is further concerned by the prosecution of lawyers and human rights defenders. Furthermore, the Tribunal observes that Law of June 2014 established 'criminal judges of peace' and granted them extensive powers such as the issuance of search warrants, detention of individuals, blocking of websites or seizure property, without an effective review by a higher judicial authority.

157. Lastly, the Tribunal expresses particular concern over the lack of enforcement of two judgements of the ECtHR ordering the immediate release of detainees.

158. In the view of the Tribunal and referring to the lack of independence of the judiciary as well as the prevailing culture of impunity, effective access to justice and thus the protection of fundamental human rights in the current state of the judicial system in Turkey is illusory.

Crimes against humanity

159. The Tribunal firmly reiterates that it does not have a mandate to assess the potential individual criminal responsibility in specific cases. However, the Tribunal is called upon to formulate an opinion on whether the acts of torture and abductions that in its view have taken

place and continue to take place in Turkey are part of a specific, global context that would allow to qualify them as crimes against humanity under customary international law.

160. The Tribunal is of the view that, at least since the attempted *coup d'État* in July 2016, the acts of torture and enforced disappearances have occurred in a systematic and organised manner. In this regard, the Tribunal particularly notes the following: the high numbers of reported cases; the existence of specialized teams for torture; the lack of effective investigations and the prevailing impunity of state officials; the deficient legal framework; the lack of enforcement of ECtHR decisions; and the serious, long-lasting impact of these gross human rights violations on the victims and their families. In addition, the Tribunal observes that the acts of torture and enforced disappearances specifically target civilians perceived to be opponents of the government.

161. As a result, the Tribunal is of the view that these acts of torture and enforced disappearances cannot be viewed as mere isolated occurrences. Rather, in the opinion of the Tribunal, they are to be considered as part of a widespread and systematic attack against any civilian population that has taken place in Turkey at least since July 2016.

Thus, the Tribunal is of the view that the acts of torture and enforced disappearances committed in Turkey, in applications brought before an appropriate body and subject to the proof of the specific knowledge and intent of the accused, could amount to crimes against humanity.

IV. ANNEXES