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**INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF TURKEY**

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

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SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE UNIVERSAL PERIODIC REVIEW OF TURKEY

Introduction:

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's (HRC) Universal Periodic Review (UPR) of Turkey. The ICJ hopes that its findings and recommendations will assist the UPR Working Group (WG) and the HRC in their UPR of Turkey.

Context

2. In reaction to the attempted military *coup* of 15 July 2016, a nation-wide state of emergency was declared. Shortly afterwards, 32 emergency Decree Laws were issued modifying legislation ranging from the Criminal Procedure Code to the Law on International Protection and media laws. All were eventually enacted into permanent laws. The state of emergency lapsed on 19 July 2018, but some of its measures were given permanent effect in legislation, leading to systematic limitations on human rights protections.

Lack of independence of the judiciary

Dismissals, arrests and transfers of judges

3. Following the attempted *coup*, around 30 percent of active judges and prosecutors (i.e., 4,113 as of 20 March 2018) were summarily dismissed, purportedly, based on unclear grounds of association with terrorism.¹ In order to justify dismissal of a judge, the law only requires a mere "connection" or "contact" with an "unlawful" structure, organization or group that the National Security Council has deemed as engaging in activities against the national security of the State.² The vague and overbroad nature of this language creates a very great potential for the arbitrary dismissal of judges in violation of guarantees of judicial independence. While the state of emergency lapsed in July 2018, the power of the Council of Judges and Prosecutor to dismiss judges and prosecutors based on the same criteria featured under emergency legislation was maintained for a further three years with the approval of Law no. 7145 in July 2018 (see, article 26). Since then at least 17 judges and prosecutors have been dismissed via this procedure in a way that was tainted by arbitrariness.³
4. The ICJ has significant concerns regarding the independence of judges who remain in office, as the situation of mass dismissal of their colleagues must exert a considerable chilling effect on their own decision-making. Furthermore, the need to recruit large numbers of new judges following the mass dismissals, the relative inexperience of many such new recruits, as well as the additional caseload generated by state of emergency measures, even after the state of emergency itself ended, has had a significantly adverse impact on the effectiveness, competence and fairness of the justice system. More than 8,000 judges and prosecutors have been appointed since the beginning of the state of emergency. Since then, the judicial appointment criteria have been eased in order to allow for the appointment of judicial interns before the end of their internship,⁴ and to make it easier for lawyers to become judges.⁵
5. Judges and prosecutors who have been dismissed under emergency legislation and Law no. 7145 are entitled to appeal against their dismissal to the Council of State, i.e. the supreme administrative court of Turkey. With respect to this, however, the ICJ is concerned that, to date, the Council of State has not issued a single ruling on the appeals of judges and prosecutors against their dismissal. Therefore, there appears to be no effective way to challenge these decisions.

6. These measures should also be seen in light of transfers of judges to other judicial positions in different regions of Turkey. These transfers have given rise to suspicion that they are being carried out, for all intents and purposes, as disciplinary sanctions, and as a means to marginalize judges and prosecutors seen as unsupportive of government interests or objectives.⁶
7. Furthermore, during the state of emergency there was a wave of arrests of judges, prosecutors and lawyers purportedly in connection with "terrorism" offences under Act no. 3173, often on grounds that were unclear, with little evidence provided as to the reasons for arrest. Many judges, prosecutors and lawyers remain in detention awaiting trial. The ICJ understands that, since the beginning of the state of emergency, more than 2,000 judges and prosecutors have been detained, and that at least 500 of them are still in detention.

Structural changes

8. On 16 April 2017 a constitutional reform modified the composition and appointment of the Council of Judges and Prosecutors (CJP). Out of its 13 members, six are now effectively appointed by the President of the Republic. The remaining seven members are appointed by the National Assembly. None of the members of the Council is appointed by judges or public prosecutors.
9. Since the CJP is responsible for all appointments, promotions, suspensions and dismissals of judges, as well as for all disciplinary proceedings,⁷ it is capable of having a significant impact on the independence of the judiciary. In addition, except for dismissal decisions, decisions on appointments, promotions and suspensions are not subject to judicial review.⁸ In light of this, the ICJ considers that, as things stand, the CJP lacks the institutional guarantees that would allow it to withstand political influence and, as a result, may act as a vehicle of executive and legislative interference in the work of individual judges.

Conclusion

10. In light of the above, the ICJ considers that the lack of institutional independence of the judiciary, the chilling effect of the mass dismissals of judges that took place under the state of emergency and the diminished quality and experience of the new members of the judiciary appointed following these purges are all serious threats to the rule of law and the independence of the judiciary in disregard of Turkey's obligations under international human rights law and standards, including, in particular, with respect to the rights to a fair trial and to an effective remedy. Furthermore, in light of the foregoing, the ICJ considers that Turkey's judicial system fails to meet international standards on the independence and accountability of the judiciary and of prosecutors.⁹

Remedies for mass dismissals in the public sector

11. The ICJ is concerned that no effective remedies are in place in Turkey against the mass dismissals that occurred in the public sector under emergency decrees, and that have continued since then under Law no. 7145. A Commission on the State of Emergency Measures was created as a domestic remedy for those affected by such measures. However, the appointment of the majority of the Commission's members by the Executive, the lack of hearings and adversarial proceedings, the extremely high rejection rate and the rapid work-pace are all factors casting doubt on its independence and effectiveness. Moreover, while the administrative courts may judicially review the Commission's decisions, as highlighted above, the Council of State has thus far not issued a single ruling clarifying the legitimacy and the scope of the grounds for dismissal, despite having had the opportunity to do so. The ICJ therefore considers that, currently, no effective remedy exists in Turkey against dismissals based on emergency decrees, contrary to Turkey's obligations under international law.¹⁰

Fair trial rights in the criminal justice system, including access to a lawyer

12. The state of emergency Decree Laws have introduced a set of measures that have considerably restricted the capacity of lawyers, in accordance with their professional responsibilities, to effectively represent clients who are under investigation in connection with "terrorism" allegations and/or who are otherwise "linked" to the attempted *coup* of 15 July 2016. Among those measures are: a five-day delay before access to a lawyer may be permitted, and limitations on the confidentiality, frequency and duration of interviews between detainees and their lawyer.¹¹ These measures strike at the core of the legal profession's guarantees, and of defendants' fair trial rights.¹² They may also facilitate violations of defendants' rights to liberty and to freedom from torture or other ill-treatment.¹³
13. Once those measures became permanent law, the ability of prosecutors to prevent lawyers' access to their clients was reduced to a maximum of 24 hours from the beginning of detention.¹⁴ However, the measures limiting the confidentiality of lawyer/client communications continue unabated since authorities are still allowed to record and monitor all communications between lawyers and their clients.¹⁵
14. Since the beginning of the state of emergency more than a thousand lawyers are reported to have been subject to prosecution and trial under "terrorism", with hundreds of them detained, as a reaction to the failed *coup* of 15 July 2016. The trials and detention of lawyers continue today.¹⁶

Obstacles to the action of civil society

15. The prosecution of a high number of human rights defenders in the country, the closure of several human rights non-governmental organizations, as well as the repression of peaceful demonstrations,¹⁷ and the prosecution of protesters,¹⁸ have all had a chilling effect on civil society as a whole. While human rights work has not stopped completely, thanks to the courageous dedication of civil society actors, the threat of proscription and prosecution for "derivative" offences (such as "collaboration" or "support") on the basis of vague and arbitrary criteria is a sword of Damocles hanging over every human rights defender's head. Their plight is made all the more serious due to the wide interpretation given in the country to "terrorism" offences, and remains a profound concern even after the official end of the state of emergency.¹⁹

Accountability for torture and enforced disappearances

16. Numerous allegations of enforced disappearances have been reported to the Turkish government over the past years without significant investigation or prosecution having followed.²⁰ Moreover, decree laws have permanently introduced a total retroactive immunity from prosecution for torture and other ill-treatment for state officials involved in those practices,²¹ in violation of articles 2, 6, 12, 13, 14 and 16 of the CAT.

Concerning international human rights instruments and mechanisms

17. In the last UPR cycle, Turkey accepted the recommendations to accelerate the ratification process of the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of the Child. The ICJ welcomes Turkey's ratification of both instruments on 26 March 2015 and 26 December 2017, respectively.

Recommendations:

18. The ICJ calls upon the WG and the HRC to recommend to the authorities of Turkey the following:

On independence of the judicial system

- 19. Abolish the Commission on State of Emergency Measures, and provide direct access to administrative courts in compliance with due process guarantees, full legal representation, access to all files, and the opportunity to have a hearing with an adversarial procedure.**
- 20. Amend constitutional provisions on the appointment of members of the Council of Judges and Prosecutors to ensure that a majority of the members of the Council be elected by their peers. Provide for judicial review of all decisions of the CJP relating to discipline and suspension, and not only dismissal, of a judge or prosecutor. Authorize individual complaints to the Constitutional Court against the decisions of the CJP.**
- 21. Abolish Article 26 of Law no. 7145, which essentially extended the emergency powers over judges and prosecutors for a further three years (see paragraphs 3 and following).**
- 22. Reform the Anti-Terrorism Law no. 3713 and related counterterrorism legislation in order to provide a definition of terrorism that is clear and in line with principles of legality and international human rights and counter-terrorism standards (see paragraph 7).**

On criminal procedural guarantees

- 23. Ensure access to a lawyer from the very beginning of detention of anyone arrested under criminal law.**
- 24. Release and discontinue the prosecution of all human rights defenders and lawyers who are subject to prosecution solely for activities carried out as part of their legitimate professional functions or the exercise of internationally protected human rights and fundamental freedoms.**

On obstacles to the action of civil society

- 25. Promote and protect the work of civil society and the legal profession for the respect, protection, fulfilment and advancement of human rights and the rule of law, including when critical of the State's laws, policies and actions.**

On torture and enforced disappearances

- 26. Promptly investigate all instances and allegations of abduction and enforced disappearance and effectively prosecute their perpetrators.**
- 27. Abrogate any provision that grants retroactive immunity from any legal, administrative, financial and criminal liability with respect to the perpetration of acts of torture or other ill-treatment, particularly article 37 of Decree Law n° 668.**

On international human rights instruments and mechanisms

- 28. The ICJ urges Turkey to become a party to: a) the International Convention for the Protection of All Persons from Enforced Disappearance; b) the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and c) the Rome Statute of the International Criminal Court.**

ENDNOTES

- ¹ ICJ, *Justice Suspended : Access to Justice and the State of Emergency in Turkey*, July 2018, p. 3, available at <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf> .
- ² Article 26, Law No. 7145 on the Amendment of Some Laws and Emergency Decrees; Press Release of the Constitutional Court in English, available at http://www.judiciaryofturkey.gov.tr/pdfiler/anayasa_Alparslan%20ALTAN%20and%20Erdal%20TERCAN.PDF, [accessed on 2 July 2019], paras. 35-38.
- ³ ICJ, "Turkey: Dismissal of Judges and Prosecutors tainted by unfairness, says ICJ", 4 February 2019, available at <https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-tainted-by-unfairness-says-icj/>.
- ⁴ Article 3.2, State of Emergency Decree no. 667 stated that regardless of the period of their internship all interns could be appointed as judges. Thus, even those who only performed two months of internship could become judges. The Decree enacted into Law (see Law no. 6749).
- ⁵ The Regulation Concerning the Internship of Judge and Prosecutor Candidates (Hakim ve Savcı Adaylarının Meslek Öncesi Eğitimlerine İlişkin Yönetmelikte Değişiklik Yapılmasına Dair Yönetmelik) was amended on 3 April 2018 (Official Gazette Publication no. 30380): instead of the previous 17-month internship, attorneys can be recruited as judges after an internship of only 3 months. Furthermore, during the state of emergency, the threshold of 70/100 for passing the exam as judge and prosecutor was eliminated. It has been reinstated by Law no. 7165 in February 2019, after thousands of judges had been recruited without this requirement.
- ⁶ ICJ, "Turkey: the Judicial System in Peril", 2 June 2016, available at <https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/>, p.18.
- ⁷ Article 4, Law no. 6078; Article 4, Law. No. 7078 on Amending the Decree Law, published in the Repeating Official Gazette numbered 30354 and dated 8 March 2018.
- ⁸ "The decisions of the Council, other than dismissal from the profession, shall not be subject to judicial review." Article 159, para. 10, Law No. 2709, Constitution of the Republic of Turkey.
- ⁹ See, articles 1, 10 and 17-20, UN Basic Principles on the Independence of the Judiciary; articles 26-29, 44 and 49-52, Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on judges; Articles 3 and 7, European Charter on the Statute for Judges.
- ¹⁰ Article 2.3 read with article 17 ICCPR; Articles 6 and 7 ICESCR.
- ¹¹ Article 6, Decree Law No. 667.
- ¹² Article 14 ICCPR.
- ¹³ Articles 7 and 9 ICCPR and articles 1 and 16 CAT.
- ¹⁴ Article 154.2, Turkish Criminal Procedure Code.
- ¹⁵ Article 59.5, Law on the Execution of Penalties and Security Measures (no. 5275).
- ¹⁶ Human Rights Watch, "Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey", 10 April 2019, available at <https://www.hrw.org/report/2019/04/10/lawyers-trial/abusive-prosecutions-and-erosion-fair-trial-rights-turkey>.
- ¹⁷ See for example, ICJ, "Turkey: ICJ alerts European Commissioner for Human Rights to protest ban against mothers of disappeared persons", 21 September 2018, available at <https://www.icj.org/turkey-icj-alerts-european-commissioner-for-human-rights-to-protest-ban-against-mothers-of-disappeared-persons/>.
- ¹⁸ See for example, ICJ, "Turkey: IBAHRI and ICJ observe criminal trial on "Gezi Park" protests", 24 June 2019, available at <https://www.icj.org/turkey-ibahri-and-icj-observe-criminal-trial-on-gezi-park-protests/>.
- ¹⁹ Council of Europe, Committee on Legal Affairs and Human Rights, "Protecting human rights defenders in Council of Europe member States – Report", 22 May 2018, paras 22-29, available at <http://website-pace.net/documents/19838/4246196/20180523-DefenderProtection-EN.pdf/7350b15e-61cc-4a51-b58d-a2788b3e00c4> ; *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, December 2018, pp. 380-384, available at <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/UNSR%20HRDs-%20World%20report%202018.pdf>.
- ²⁰ See, ICJ and IHOP, "Joint Submission in view of the UN Committee against Torture's adoption of a List of Issues to be transmitted to the Republic of Turkey prior to the submission of its Fifth Periodic Report under Article 19 of the Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment, 25 June 2018, available at <https://www.icj.org/wp-content/uploads/2018/07/Turkey-LOIPR-ICJIHOP-June2018-final.pdf>; Human Rights Watch, " Turkey: Investigate Ankara Abductions, Disappearances, 3 August 2017, available at <https://www.hrw.org/news/2017/08/03/turkey-investigate-ankara-abductions-disappearances>; Ankara Bar Association, "Ankara Barosu İnsan Hakları Merkezi, İzleme Raporu", 14 June 2019, available at <http://www.ankarabarusu.org.tr/HaberDuyuru.aspx?DUYURU&=3214>.
- ²¹ Article 37, Decree Law No. 668, 27 July 2017, official translation from Turkey's notification to the Secretary General of the Council of Europe, CoE Doc. Ref J8201C - Tr./005-196.