A Legal Examination of Recent Extradition Proceedings about Turkish Citizens Abroad

With a focus on the UK and UK laws

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LONDON ADVOCACY

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Foreword

London Advocacy ('LA') is a non-profit company that does advocacy work on human rights education and tries to raise awareness on human rights violations worldwide.
LA also provides a range of services to support refugees and asylum seekers including journalists, academics, lawyers, artists and intellectuals who are exiled, persecuted or face the risk of persecution in their home countries.

In recent years, actions of transnational repression of authoritarian regimes ramped up. Abuse of the extradition mechanism is one of the tools deployed for this purpose.

Turkey is one of those countries. In so much that since 2016 Turkey has sent at least 1133 extradition requests to 110 countries. Of those, 202 were sent to the United States and 361 to European Union countries.

Although the majority of countries have not referred these requests to their judicial authorities, the United Kingdom is one of the couple of countries which did certify the requests for a judicial proceeding.

LA believes that a report to help victims of the Turkish government's transnational repression policies and their lawyers is immediately needed. We, therefore, with the help of experts prepared a report that while keeping our scope limited with the extradition matters in the UK we seek to evaluate whether the extradition of individuals who are perceived as a member of the Gülen Movement would be legal under the UK and international law; examining whether individuals would have the right to a fair trial and defence and whether they would have any safeguards against torture or ill-treatment.

INTRODUCTION

1. After 2016's failed coup attempt, the Turkish Government declared a state of emergency and, during the emergency rule, enacted 32 decrees which dramatically curtailed fundamental rights and freedoms. The Turkish Parliament approved all of these emergency decree laws, and thus all of them have become permanent laws. According to official statements, during emergency rule (2016-2018), the Turkish Government enacted 32 emergency decrees, under which 125,678 individuals including judges, teachers, academics, doctors, police officers and others were dismissed from public service.[1] Besides, more than 1.5 million individuals have been scrutinized for criminal investigation. 622,646 people have been subjected to criminal investigation over alleged membership in an armed terrorist organisation[2] and 332,884 of these have been arrested by the police.[3]

2. Erdoğan's foes, or political dissenters who live abroad, have been facing judicial harassment risks, albeit to a lesser extent than those who are in Turkey. Getting them extradited to Turkey is at the top of the agenda of the Erdoğan Regime's international policy. Turkey has sent at least 1133 extradition requests to 110 countries.[4] [5] Of those, 202 were sent to the United States and 361 to European Union countries.

3. Although these requests have been repeatedly dismissed by judicial authorities and governments of respective countries, according to its own official statements Turkey has forcibly brought back 121 Turkish citizens from 28 countries through extra-judicial renditions.[6]

4. Since 2016, the courts in Greece, Germany, the United Kingdom, Brazil, Romania, Bosnia, Poland and Montenegro, have refused extradition requests sent by the Turkish authorities. Due to the political nature of the accusations, their failure to pass a dual criminality test, or the risk of being subjected to torture or ill-treatment in Turkey.[7]

5. Moreover, the UN Committee Against Torture decided on three cases that were filed against Morocco: that the possible extradition of three Turkish citizens from Morocco to Turkey would violate Morocco's obligation under the UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatments or Punishment.[8]

6. While keeping our scope limited with the extradition matters in the UK we seek to evaluate whether the extradition of individuals who are perceived as a member of the Gülen Movement would be legal under the UK and international law; examining whether individuals would have the right to a fair trial and defence, and whether they would have any safeguards against torture or ill-treatment.

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[1] https://soe.tccb.gov.tr/Docs/OHAL_Report_2019.pdf
[2] Anadolu Ajansı, https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784
[3] TRT, https://www.trthaber.com/haber/gundem/bakan-soylu-fetoden-332-bin-884-kisi-gozaltina-alindi-692917.html
[4] https://www.aa.com.tr/tr/15-temmuz-darbe-girisimi/firari-fetoculer-icin-109-ulkeyle-iade-trafigi-yurutuldu/2303943
[5] https://basin.adalet.gov.tr/bakan-bozdag-darbe-girisiminde-yasadiklarini-ve-feto-ile-mucadeleyi-anlatti_67968
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[7] https://www.turkishminute.com/2022/04/13/ion-out-of-sight-not-out-of-reach/
https://www.reuters.com/world/middle-east/brazil-denies-extradition-opponent-sought-by-turkeys-erdogan-2022-04-05/
https://www.theguardian.com/law/2019/apr/09/turkey-fails-to-extradite-hamdi-akin-ipek
[8] Mustafa Onder, Ferhat Erdoğan, Elmas Ayden vs Morocco, 845/2017, 846/2017, 827/2017,
https://arrestedlawyers.org/2019/12/05/the-un-committee-against-torture-extradition-to-turkey-would-constitute-a-breach-of-article-3-of-the-convention/

WHAT IS EXTRADITION

7. Extradition is the transfer of a person who is either accused or convicted of a criminal offence between jurisdictions. The individual is returned by the requested state to that jurisdiction (the requesting state) pursuant to the local laws of the state from which the person is requested.

8. The United Kingdom ("**UK**") is part of several international agreements and has the mechanism to extradite a requested person to a requesting state following receipt of an extradition request. The UK may also seek extradition of a requested person from another jurisdiction to stand trial or serve a custodial sentence in the UK. This does not mean that these procedures are straightforward as there are several blockages in the extradition mechanism which the major one being human rights.

THE UK STATUTORY FRAMEWORK

9. The Extradition Act 2003 ("**EA 2003**") governs the law on extradition in the UK. It came into force on 1 January 2004 and applies to all extradition requests received after such date.

10. The extradition treaty between the UK and Turkey is the European Convention on Extradition 1957.[9]

11. The UK has extradition arrangements under multilateral conventions and bilateral extradition treaties with more than 120 territories. The EA 2003 designates 2 different territories as Part 1 and Part 2 and each part has its own procedure for extradition. Part 1 territories are set out in the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003, SI 2003/3333, as amended. Part 1 includes the remaining 27 EU Member States.

12. Part 2 territories are set out in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, SI 2003/3334, as amended. Turkey is included in the regulations as a Part 2 territory.

13. Territories which do not appear as either Part 1 or Part 2 territories can still make an extradition request to the UK, and the request, if accepted, will be dealt with as if it were similar to a Part 2 request. Such arrangement is agreed upon on a case-by-case basis only and is referred to as 'ad hoc' requests.

14. The Interpol 'red notice' system is a separate process from extradition, but it can be used by the 195 Member States of Interpol as an effective tool for the purposes of requesting states to arrest, detain and extradite the subject of the red notice, should the individual be located. In the UK, a red notice does not automatically act as an arrest warrant, but it is a strong indication that the requested person will be subject to an extradition request. In requests by the Turkish Government, even if there is a red notice, the UK authorities must seek an arrest warrant issued by the Magistrates' court.[10]

[9] https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=024

[10] In addition to extradition requests, Turkish Government has also attempted to abuse Interpol's notice mechanism in order to track its dissidents, however, due to the political nature of these requests, Interpol has refused some 800 red notice requests that were submitted by Turkey.
https://www.state.gov/wp-content/uploads/2022/03/313615_TURKEY-2021-HUMAN-RIGHTS-REPORT.pdf
https://stockholmcf.org/interpol-denied-773-red-notice-requests-by-turkish-govt-for-individuals-with-alleged-links-to-gulen-movement/

15. The UK has some special agreements with certain territories for an Interpol red notice to act as an arrest warrant and for the requested person to be directly taken to a UK court without any additional arrest warrant. These are members of the 5 Eyes intelligence agreements including USA, Australia, Canada and New Zealand.

PROCEDURE FOR TURKEY AS A PART 2 TERRITORY

16. The Part 2 territories are countries which the UK has an extradition treaty with. There is no special treatment for Part 2 territories except for Type A category countries which are not required to provide prima facie evidence in support of their requests for extradition. Turkey has currently listed as a Part 2 Type A territory under the EA 2003.

17. The extradition process goes on stage by stage following the below procedure.

	Any request for extradition from a Part 2 territory will be sent to the Home Office of the UK. The Home Secretary or in other words Secretary of State has the right to consider the request for validity. This is generally done by assessing if the extradition is sought for the purpose of prosecuting or punishing the requested person and that the request has been made by a competent authority. If the criteria are satisfied, then the Secretary of State is likely to certify the request. At this stage, the Secretary of State has very limited discretion to refuse the request. The Secretary of State can also refuse if there is a pending asylum claim or asylum has been granted.
	Once the extradition request is certified by the Home Secretary, the request will be sent to the Crown Prosecution Service and the police will be authorised to apply to the Magistrates' court to issue an arrest warrant.
	The District Judge at the Magistrates' court will consider the application on its merits and decide for an arrest warrant. If the judge is satisfied that necessary information has been supplied, an arrest warrant will be issued. Once the individual has been arrested, they must be brought before the court as soon as practicable. The judge also has the authority to refuse the arrest warrant due to a lack of information or other limitations under English law.
	Once the requested person is arrested, the court must decide on granting bail and for a date for having a substantive extradition hearing. The Crown Prosecution Service will represent the requesting state and the court will decide on several issues until a full hearing takes place.
	The Westminster Magistrates' Court in Central London is authorised as the first instance court to consider Part 2 extradition requests. The hearings must always be conducted by a District Judge rather than a bench of lay magistrates.
	At the extradition hearing, the District Judge will consider whether the extradition request relates to an extradition offence and whether any of the bars to extradition apply. If the judge finds that the request is an offence and none of the bars applies, and human rights comply with the individual's case will be sent back to the Secretary of State for a final decision. If the judge finds that their extradition is not for a recognised offence or that one of the bars to extradition applies, they will be discharged. If the judge finds that the individual's extradition would be incompatible with the rights under the ECHR, they will also be discharged.

	Either party can ask the High Court for permission to appeal the District Judge's decision. Appeals under the EA 2003 are heard at the Administrative Court of the Queen's Bench Division of High Court at the Royal Courts of Justice in London. Appeals are heard either by a single judge or by a panel of two or three judges.

BARS TO EXTRADITION

18. There are some statutory bars and procedural bars to extradition under the EA 2003. These bars are the reasons not to extradite someone which are set out in EA 2003. Some of these bars apply to Part 1 territories and some apply to Part 2 territories.

19. The bars more strictly apply to Part 2 territories due to the agreement with the Part 1 countries on arrest warrants. The following are bars to extradition in the UK:

a. The rule against double jeopardy; meaning that the person cannot be tried twice for the same offence.
b. Extraneous considerations: meaning where it is considered that the person is being prosecuted because of their race, religion, nationality, gender, sexual orientation, or political opinions or might be prejudiced in return for one of the protected characteristics.
c. Passage of time: meaning that so much time has passed since the offence was committed that it would be unjust or oppressive for them to be extradited now.
d. Forum: meaning where a significant part of the conduct took place in the UK, and it would not be in the interests of justice for them to be tried abroad for that offence.
e. Hostage-taking considerations: meaning a very narrow ground of refusal arising from the Hostage Taking Convention in cases involving the taking of hostages.

There are also bars based on immigration status, human rights, and abuse of process.

EXTRADITION, HUMAN RIGHTS and NON-REFOULMENT PRINCIPLE

20. Under EA 2003, section 87 (for category 2 territories), the court must discharge a person subject to an extradition request if it decides that extradition would be incompatible with the European Convention on Human Rights (ECHR) within the meaning of the Human Rights Act 1998.

21. Article 3 of the ECHR prohibits torture and inhuman and degrading treatment or punishment. It is unlawful for the court to extradite a person to a country where there are substantial grounds for believing that the person is at real risk of being subjected to torture or inhuman and degrading treatment or punishment.

22. The test under Article 3 is an 'absolute' one. This means that the court cannot balance the risk of ill-treatment against the interests of extradition. The burden under the Article 3 test is on the requested person in an extradition case to show that there are substantial grounds for believing that they if extradited, would face a real risk of being subjected to treatment contrary to the article. The burden is less than proof 'on the balance of probabilities', but the risk must be more than fanciful.[11]

[11] Ahmad and others v United Kingdom (App. No's. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09)

EXTRADITION AND ASYLUM

23. A person who is granted a refugee status in the UK cannot be extradited to his/her country of nationality. Furtherly, a person cannot be extradited while his/her asylum claim remains pending.[12] An outstanding asylum claim may normally cause extradition proceedings to be adjourned to allow a decision on the claim.[13] Accordingly, the EA 2003 provides that if a person whose extradition has been ordered has made an asylum claim, they must not be extradited before that claim is finally determined.[14] These protections apply whether the asylum claim is made before or after the issue of the warrant for extradition, or as the case may be, the extradition request.

24. When a request comes from a category 2 territory [15], the Secretary of State may directly refuse to certify the extradition request if the requested person is granted a refugee status.[16] The Secretary of State may also order the discharge of a person, if the person is a refugee in the UK or has been granted leave to enter or remain in the UK on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove a such person.[17]

25. Under the "extraneous considerations" of the EA 2003, the extradition request to a category 2 territory must be rejected if; the request of such extradition is in fact made for the purpose of prosecuting and punishing a person on account of race, gender, social and political opinion or if such person is extradited, he/she might be prejudiced at his/her trial or punished, detained or restricted in his/her personal liberty by reason of race, gender, social and political opinion.[18] The act also considers the extradition requests in a concept that they may be purported to reach the same conclusion with regard to the person whose extradition is requested.

EXTRADITION AND NATIONALITY

26. The UK has the policy to extradite its own nationals on the request of the other nations if the crime is committed in the requesting country, subject to no bars to extradition apply under such request. The human rights aspect and the bars to extradition become essential on this point, as the main defence for British nationals not to be extradited.

HOME SECRETARY'S ROLE IN EXTRADITION

27. Under the EA 2003, the Home Secretary's role is very minimum covering just the signing of the extradition orders. The Home Secretary is bound by law to sign the order unless one of the following grounds for refusal are met:
    a. Whether the person is at risk of the death penalty.
    b. Whether speciality arrangements are in place (this means that the requesting state can only prosecute the requested person with the charges provided in the extradition request). If there will be additional offences, the requesting state should send a new request with regard to the new charges.

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[12] Extradition Act 2003 (c41), s 121
[13] See R (on the application of Chichvarkin) v Secretary of State for the Home Department [2011] EWCA Civ 91
[14] Extradition Act 2003 ss 39(3), 121(3)
[15] Turkey is a Category 2 Type A territory under the Extradition Act 2003. The practical meaning of this is that Type A countries are not required to provide prima facie evidence (true from its face) in support of their requests for extradition.
[16] Extradition Act 2003 s 70(2)(b)
[17] Extradition Act 2003 s 93 (6A)
[18] Extradition Act 2003 ss 13, 81; and para 632.

c. Whether the person concerned has previously been extradited from another country to the UK and the consent of that country to their onward extradition is required.
d. Whether the person has previously been transferred to the UK by the International Criminal Court.

28. Individuals can submit representations to the Secretary of State on these grounds.

29. If none of the above four tests provides grounds to refuse the request, the Home Secretary must order extradition. The Home Secretary cannot, by law, consider any other grounds.

30. If the Secretary of State orders extradition, the individual has the right to apply to the High Court for leave to appeal against the decisions of both the District Judge and the Secretary of State.

RELEVANT JUDGMENTS OF THE UK COURTS

Buyuk, Celik and Ipek v. R (Government of Turkey) (M.Ct Final Ruling dated 28 November 2018)

31. This case was about three businessmen Mr Buyuk, Mr Celik and Mr Ipek, all residing in the UK on business visas have been requested by the Government of Turkey via the extradition procedure. The Secretary of State issued the certificate for all three extradition requests within 2017. The arrests took place at different times in 2018. The court convened in September and November 2018.

32. The allegations were attempting to violate the Turkish constitution and abolish the Government, espionage, leading an armed terror organisation, conspiracy, fraud, money laundering, blackmail, and terrorism.

33. The court accepted that the extradition requests from Turkey had satisfied all conditions under the Extradition Acts 2003 as Turkey is a Part 2 country under the EA 2003, and no prima facie evidence is needed from Turkey on the guiltiness of the individuals. The court moved forward with the case to consider the extraneous considerations and human rights considerations under the EA 2003.

34. The court considered the right to life, prison conditions, and right to a fair trial under the human rights considerations and if the prosecution was because of political opinion and if there will be any prejudice against the individuals due to their political opinion under the extraneous considerations.

35. The court evaluated all the evidence and refused the extradition of the individuals due to rule of law not being applicable in Turkey putting the individuals at high risk of ill and biased treatment and bad prison conditions in Turkey not being suitable.

36. "The evidence of Professor … and of Witness …, … as well as other supporting written Reports relied upon, satisfies me to the necessary standard that the decision to prosecute of each of the men before this court was politically motivated … contrary to the provisions of s81 (a) and that, furthermore, each defendant will similarly face a real risk of s.81 (b) ill-treatment in the event of return, again by reason of their actual or perceived political opinions, such that extradition must be refused under both limbs." said the district judge.

37. All 3 individuals were accordingly discharged.

38. The request for an appeal from the Turkish Government was refused.

Yesil v. R (Government of Turkey) (M.Ct Final Ruling dated 28 November 2018)

39. Mr Yesil, a businessman residing in the UK has been requested by the Government of Turkey via the extradition procedure. The Secretary of State certified the request in May 2018 and the court convened in November 2018.

40. The allegations were to establish and lead an armed terrorist organisation, attempting the violate the constitution and overtake the Government, espionage, and fraud.

41. The court accepted that the extradition request from Turkey had satisfied all conditions under the Extradition Acts 2003 as Turkey is a Part 2 country under the EA 2003 and no prima facie evidence is needed from Turkey on guiltiness. The court moved forward with the case to consider the extraneous considerations and human rights considerations under the EA 2003.

42. The court considered all the evidence and refused the extradition due to the "dual criminality" test not being satisfied. The court noted that the circumstances described in the request do not constitute a crime in the UK. It also clarified that FETO was not a proscribed organisation in Turkey at that time that the individual was accused to have been a member.

43. The court also found the evidence provided by the Government of Turkey was not sufficient.

44. The District Judge said "Turkish law enables a person said to be a leader of a proscribed organization - such as FETO - to be fixed with criminal liability for offences committed (or said to have been committed) by other alleged FETO members. This is specifically provided for by Article 220/5 of the Turkish Penal Code. (§27) There is no UK equivalent vicarious liability for such conduct, in the circumstances described in the request. The difficulty for the Turkish authorities … is that FETO was not a proscribed organization in Turkey at the time that Mr … is said to have committed the offences in question, thus proscription does not come assist them … (§28)"

45. With regard to the Turkish government's claims that "(i) having had accounts with branches of the Asya Katılım Bankası banking corporation. (ii) having taken out a loan in 2009-2010 from that same banking corporation (iii) having been the recipient of .. transactions into … account with the same banking corporation." proving Mr …'s membership to an armed terrorist organisation; the District Judge said, "In my opinion, looked at individually or together, the conduct set out in (i), (ii) and (iii) come nowhere close to establishing a criminal offence in the UK."

46. While drawing a conclusion in the case, District Judge stated "… I am not satisfied that the Turkish authorities have supplied sufficient evidence that is specific to him and which can be reasonably said to be appropriately particularized as amounting to a criminal act or acts, …. There is a profound lack of necessary detail in relation to each of the charges laid against him. (§23) I am therefore not satisfied that, in relation to the Ankara proceedings, the "dual criminality test is made out against him to the required standard for any of those alleged offences. (§26) Having considered the information relied upon by Turkey in support of charges 5,6 and 7, I remain unpersuaded that any of this conduct amounts to a crime in the UK and accordingly those charges also must fail the dual criminality test. (§32)"

Keles v. R (Government of Turkey) (Preliminary Ruling)

47. Mr Keles, a British barrister, who is of Turkish descent and holds UK citizenship, was arrested in May 2019 following the Secretary of State's decision to certify Turkey's extradition request. Keles, who is working on a PhD in the sociology of human rights at Sussex University, is a non-practising barrister and a member of Gray's Inn. In 2016, as chairman of the Dialogue Society, he gave evidence to parliament's foreign affairs select committee about UK relations with Turkey.[19]

48. The allegations against Mr Keles were terrorism propaganda on his social media account, involvement in NGOs lawfully established in the UK that is allegedly affiliated with the Gülen Movement and making donations to the Gülen Movement. He accordingly was accused of membership in an armed terrorist organization under Article 314 of the Turkish Penal Code.

49. In the preliminary hearings phase, in December 2019, after having evaluated every accusation and evidence presented to support them respectively District Judge ruled that "In my view, this does not provide sufficient details of criminal conduct said to have been committed by the defendant as would satisfy this court to the requisite standard that an extradition offence has been committed by Mr Keles. (§35, 37, 43)', "accordingly I take the view that the provisions of s.78(4) (b) have not been satisfied. (§62)"

Dogan v. R (Government of Turkey)

50. Mr Dogan, a businessman residing in the UK on a business visa has been requested by the Government of Turkey via the extradition procedure. The exact date of the certification by the Secretary of State is unknown due to the case being closed in the early stages.

51. Mr Dogan was accused of being a member of an armed terror organisation. He was set to join a case management hearing on January 2022. However, the CPS withdrew from the case due to insufficient evidence and the dual criminality test not being satisfied. The court acted accordingly and discharged Mr Dogan.

RELEVANT JUDGMENTS OF THE COURTS IN OTHER JURISDICTIONS[20]

52. According to the latest figures published by the Turkish state-run Anadolu news agency, the Turkish government has so far sent 1,022 official extradition requests for perceived Gülenists to 109 countries. Of those, 202 were sent to the United States and 361 to European Union countries.[21]

53. In the vast majority of the cases, the addressee governments have not referred[22] Turkey's requests to their respective judicial authorities due to their failure to pass preliminary reviews either on probable cause or for being prima facie political. Yet in the cases in which a referral was made, the courts of the respective countries have without exception dismissed Turkey's extradition requests. In the most recent example, the

[19] https://www.theguardian.com/law/2019/may/20/british-barrister-facing-extradition-to-turkey-over-tweets
[20] This chapter was taken from an analysis of human rights lawyer Ali Yıldız that was published here: https://www.turkishminute.com/2022/04/13/ion-out-of-sight-not-out-of-reach/
[21] https://www.aa.com.tr/tr/15-temmuz-darbe-girisimi/firari-fetoculer-icin-109-ulkeyle-iade-trafigi-yurutuldu/2303943
[22] https://nordicmonitor.com/2021/10/us-is-not-convinced-of-turkeys-extradition-request-of-a-critical-journalist-asked-for-evidence/

Supreme Court of Brazil unanimously dismissed an extradition request for Mr Sagar, a Turkish businessman living in Brazil since 2016. During the process, the attorney general of Brazil also asked the Supreme Court to dismiss the request because it lacked "precise information about the time, place and circumstances of the alleged occurrence."[23]

54. During the hearing, which was broadcast on the court's YouTube channel, the judge rapporteur explained that Turkey had detained more than 2,700 judges and prosecutors and said, "Clearly, ostensibly and shamefully, the [Turkish] judiciary has come under attack,"[24] and that therefore the defendant could not enjoy a fair trial in Turkey. The reason for dismissal is based not only on the lack of procedural guarantees but also on merit. The judge rapporteur said[25] the Turkish authorities failed to present any incriminating act of Sağar but limited themselves to considering him a terrorist solely for being a member of the Gülen movement, which, the judge rapporteur stressed[26], is not considered a terrorist group by the UN, the US, the EU or Brazil.

55. Indeed, the US Department of State explicitly stated, in its "Country Reports on Terrorism 2019: Turkey," that "FETÖ," a derogatory term coined by the Turkish government to refer to the Gülen movement as a terrorist organization, "is not a designated terrorist organization in the United States."[27] Similarly, the EU's then-counterterrorism coordinator Gilles de Kerchove said in 2017 " … we don't see it [the Gülen movement] as a terrorist organization, and I don't believe the EU is likely to change its position soon."[28] The court finally concluded the accusations of membership in a terrorist organization and financing terrorism against Sağar were politically motivated.

56. In an interview with Turkish Minute, Brazilian lawyer Beto Vasconcelos, who represented Sağar, said, "At the trial, the Supreme Court judges emphatically affirmed the deterioration of the independence and impartiality of the Turkish judiciary, highlighting the dismissal and mass arrest of judges and prosecutors."[29] He also said the unanimous understanding of the Supreme Court was that there was a real risk to the defendant that he would be tried by the special courts that hear cases involving political accusations. [30]

57. It was not the first time that the Supreme Court of Brazil had dismissed an extradition request for a member of the Gülen movement. In 2019 an extradition request for Mr Sipahi, a member of the Gülen movement, was also dismissed for its political nature and lack of assurance that the accused would be ensured an impartial trial by an independent judge in Turkey.[31]

58. In 2020 a Spanish court dismissed an extradition request for a Gülenist who was accused of membership in a terrorist organization for participating in religious gatherings where he read the Holy Quran and other religious books. In the trial, the Spanish prosecutor and the court affirmed that the European Union did not accept the Gülen movement as a criminal or terrorist group. The court also said, "The facts whose commission is attributed to the defendant by the state requesting extradition lack any criminal relevance or entity under our criminal legislation; they cannot be subsumed in any type of crime established in our

[23] http://www.mpf.mp.br/pgr/noticias-pgr/stf-nega-extradicao-de-acusado-de-terrorismo-por-participar-de-grupo-opositor-ao-governo-da-turquia
[24] https://www.migalhas.com.br/quentes/363245/stf-nega-extradicao-de-turco-acusado-de-fazer-oposicao-ao-governo
[25] https://www.jota.info/stf/do-supremo/1a-turma-do-stf-decide-por-unanimidade-nao-extraditar-refugiado-turco-05042022
[26] https://www.jota.info/stf/do-supremo/1a-turma-do-stf-decide-por-unanimidade-nao-extraditar-refugiado-turco-05042022
[27] https://www.state.gov/reports/country-reports-on-terrorism-2019/turkey/
[28] https://www.reuters.com/article/us-eu-turkey-security-idUSKBN1DU0DX
[29] https://www.turkishminute.com/2022/04/13/ion-out-of-sight-not-out-of-reach/
[30] https://www.turkishminute.com/2022/04/13/ion-out-of-sight-not-out-of-reach/
[31] https://stf.jusbrasil.com.br/noticias/741070222/stf-nega-extradicao-de-empresario-turco-naturalizado-brasileiro-ali-sipahi

legal system." Speaking to Turkish Minute, Spanish lawyer and professor of human rights Gonzalo Boye, who represented the accused, said: "The court rebuffed the extradition request for several reasons, including the failure to satisfy the condition of dual criminality and the fact that the EU and Spain do not accept the existence of a terrorist organization called FETÖ/PDY." [32]

59. The Swedish Supreme Court dismissed two similar extradition requests including one for exiled journalist Levent Kenez. The court found that the allegations against Kenez did not contain a criminal element under Swedish law.[33]

60. Since 2016, Finland has refused 14 extradition requests from Turkey about alleged members of the Gulen Movement.[34] The two decisions we examined while preparing this report were about requests for a trial and the execution of a sentence. The Ministry of Justice of Finland concluded that both requests did not pass the double criminality test required by Article 4 of the Law on Extradition[35], and refused them without making a referral to the court. The Ministry concluded that the conduct attributed to the subjects as donating money to an entity affiliated with Gulen Movement or downloading an instant messaging app called Bylock did not constitute a crime in Finland, leaving aside terrorism.

61. In 2018 and 2019, the Bucharest Appeal Court dismissed two similar requests from Turkey for extradition including one for journalist Kamil Demirkaya. The court said in both decisions that "there are serious reasons to believe that extradition is being requested in order to prosecute or punish a person for reasons of political or ideological opinion or for belonging to a certain social group."[36]

62. In 2019 the Bosnian courts dismissed Turkey's extradition request for journalist Mr Ozsaray, formerly the publisher of Sungurlu Gündem, a local newspaper in the Sungurlu district of Turkey's Çorum province. The courts said among other things that Bosnia does not accept the existence of a terrorist group called FETÖ.[37]

RELEVANT JUDGMENTS / OPINIONS OF INTERNATIONAL COURTS AND TRIBUNALS

63. **The UN Committee Against Torture:** On 10th May 2019, The Committee decided in relation to three cases that the possible extradition of three Turkish citizens from Morocco to Turkey would violate Morocco's obligation under the UN Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.[38]

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[32] https://www.turkishminute.com/2022/04/13/ion-out-of-sight-not-out-of-reach/
[33] https://nordicmonitor.com/2021/12/swedish-supreme-court-rejects-turkeys-request/
[34] https://www.reuters.com/world/middle-east/turkey-says-it-will-renew-extradition-requests-finland-sweden-after-nato-deal-2022-06-29/
[35] https://finlex.fi/fi/laki/alkup/1970/19700456
[36] https://balkaninsight.com/2018/12/14/romania-rejects-extradition-of-turkish-journalist-12-14-2018/
[37] https://turkishminute.com/2019/07/31/bosnia-rejects-turkeys-extradition-request-for-journalist-over-gulen-links/
[38] Mustafa Onder, Ferhat Erdoğan, Elmas Ayden vs Morocco, 845/2017, 846/2017, 827/2017
7.6. The Committee .. notes that the successive extensions of the state of emergency in Turkey have led to serious human rights violations against hundreds of thousands of people, including arbitrary deprivation of the right to work and of freedom of movement, torture and ill-treatment, arbitrary detention, and violations of the rights to free association and expression. In this regard, the Committee recalls its concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), in 2016, in which it noted with concern, in paragraph 9, a significant disparity between the high number of allegations of torture reported by non-governmental organizations, and the data provided by the State party in its fourth periodic report (see CAT/C/TUR/4, Paras. 273–276 and Annexes

64. **The UN Human Rights Committee:** The Committee, in the case of İsmet Özçelik, Turgay Karaman et. al. v. Turkey, decided that the detention of applicants who were subject to refoulement (from Malaysia to Turkey), breached Article 9 § 1-3 (the right to the security of liberty) of the International Covenant on Civil and Political Rights.163 The Committee also concluded that the Turkish Constitutional Court did not appear as an effective domestic remedy for the applicants.[39]

1 and 2), suggesting that not all of the allegations of torture had been investigated during the reporting period. In the same concluding observations, the Committee highlighted, in Paragraph 19, its concern about recent amendments to the Code of Criminal Procedure, which gave the police greater powers to detain individuals, without judicial oversight, during police custody. In Paragraph 33, the Committee expressed regret about the lack of complete information on suicides, and other sudden deaths in detention facilities, during the period under review.

7.7 The Committee notes that, according to the complainant, the state of emergency established in Turkey on 20 July 2016, has increased the risk of persons accused of belonging to a terrorist group being subjected to torture while in detention. The Committee also recognizes that the aforementioned concluding observations predated the start of the state of emergency. However, it observes that, according to reports on the human rights situation in Turkey and the prevention of torture published since the imposition of the state of emergency, the concerns raised by the Committee remain pertinent.

7.8 In the present case, the Committee notes that the complainant claims to have been persecuted on account of his political activities, in that he was believed to be a member of the Hizmet movement, which has been deemed responsible for the attempted coup d'état in July 2016. The Committee notes that, according to the report issued in 2018, the Office of the United Nations' High Commissioner for Human Rights had access to reliable information indicating that torture and ill-treatment were used during pretrial detention as the Turkish authorities responded to the attempted coup d'état. In the same report, the Office claims to have documented the use of various forms of torture and ill-treatment in custody, including severe beatings, threats of sexual assault and actual sexual assault, electric shocks and simulated drownings. The aim of these acts of torture was generally to extract confessions, or to elicit denunciations of other persons, as part of the investigations into events surrounding the attempted coup d'état. In his report on his mission to Turkey, the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, notes that the use of torture was widespread in the aftermath of the coup. The Special Rapporteur also notes that "the low number of investigations and prosecutions initiated in response to allegations of torture or ill-treatment seemed grossly disproportionate to the alleged frequency of the violations, indicating insufficient determination on the part of the responsible authorities to take such cases forward".

7.9 With regard to the direct impact of the state of emergency imposed on 20th July,2016, the Committee takes note of the concern raised by the Office of the United Nations High Commissioner for Human Rights about the adverse effects of the resulting measures on safeguards against torture and ill-treatment. In particular, the Office refers to the restrictions that may be imposed on contacts between detainees and their lawyers, the increase in the maximum permitted duration of police custody, the closure of certain independent mechanisms for the prevention of torture and the excessive use of pretrial detention. After successive extensions decreed by the Turkish authorities, the state of emergency officially ended on 19 July 2018. In a letter dated 8 August 2018, the Turkish authorities informed the Council of Europe that the state of emergency had terminated on 19 July, 2018, at the end of the deadline set by Decision No. 1182, and that, accordingly, the Government of the Republic of Turkey had decided to withdraw the notice of derogation from the European Convention on Human Rights. However, a series of legislative measures have been adopted that extend the application of the restrictive measures introduced during the state of emergency, including the possibility of prolonging police custody for up to 12 days.

[39] CCPR/C/125/D/2980/2017, https://ccprcentre.org/decision/17030

DOUBLE CRIMINALITY TEST ON TURKEY'S EXTRADITION REQUESTS ABOUT THE GULEN MOVEMENT MEMBERS

TURKEY'S OVERLY BROAD ANTI-TERRORISM PROVISION THAT LACKS QUALITY OF LAW AND IS UNFORESEEABLE

65. Art. 314 of the Turkish Penal Code is Turkey's primary, and most frequently invoked anti-terrorism provision. Art. 314 §1-2 TPC criminalises the establishment, command or membership of an armed organisation and carries a penalty of up to 22.5 years imprisonment.[40]

66. The provision reads as follows:
(1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years. (2) Any person who becomes a member of the organisation, defined in paragraph one, shall be sentenced to a penalty of imprisonment for a term of five to ten years

67. According to the Turkish Justice Ministry's statistics, there has been a steady increase in the use by public prosecutors of Art. 314 TPC; 8,416 charges were filed under Art. 314 TPC in 2013, 146,731 in 2017, 115,753 in 2018, 54,464 in 2019, 33,885 in 2020 and 30,756 in 2021. These statistics highlight that, in total, Turkish prosecutors filed more than 450,000 charges under Art. 314 TPC between 2013 and 2021 and more than 310,000 individuals were sentenced under the same Article between 2016 and 2021.[41]

68. These statistics correspond with the statements of the Minister of Interior that 622,646 people have been subjected to criminal investigation[42] over alleged membership of an armed terrorist organisation because of their links with GM and 332,884 of these have been arrested by the police (*gözalti* in Turkish).[43]

69. In a third-party intervention[44] to an ECtHR case submitted by a Turkish applicant, the Italian Federation for Human Rights said the following with regard to the **issues concerning the principles of no punishment without law, the prohibition of retrospective punishment, the criterion of foreseeability and the quality of the law:**

> *§12 According to the ECtHR's case-law, Article 7 embodies, inter alia, the principle that only the law can define a crime and prescribe a penalty, as well as the principle that the criminal law must not be extensively construed to an accused's detriment, for instance, by analogy. An offence, and the sanctions provided for it, must be clearly defined in law. An individual can know from the wording of the*

[40] The sentence given under Art, 314 TPC shall be aggravated by half under Art. 5 of the Anti-Terrorism Law (3713).
[41] Turkey abuses anti-terror laws to suppress critics https://arrestedlawyers.org/2022/08/09/turkey-abuses-anti-terror-laws-to-suppress-critics/
[42] Anadolu Ajansı, https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784
[43] TRT, https://www.trthaber.com/haber/gundem/bakan-soylu-fetoden-332-bin-884-kisi-gozaltina-alindi-692917.html
[44] Third party intervention by Italian Federation for Human Rights under Article 36 of the European Convention on Human Rights ('ECHR') Application no. 14894/20, Gültekin Sağlam against Turkey, https://fidu.it/wp-content/uploads/THIRD-PARTY-INTERVENTION-BY-FIDU-logo-12.10.2021-1.pdf

relevant provision and, if needs be, with the assistance of the courts' interpretation of it, what acts, and omissions will make him/her criminally liable.

§13 Having something "prescribed by law" requires foreseeability. In the ECtHR's view, a norm cannot be regarded as a "law", unless it is formulated with enough precision to enable people to regulate their conduct. They must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The quality of the law implies that domestic law must be sufficiently foreseeable in its terms that it can give individuals an adequate indication of the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures that will affect their rights under the Convention. (Güler and Uğurov. Turkey, nos. 31706/10 & 33088/10).[45]

§14 The Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism require lawfulness and a precise definition of anti-terrorist measures and prohibit arbitrariness. [46]

***§15 Lack of legal definition**: Neither Art. 314 TPC, nor any other legal provision, provide a clear definition of the 'membership of an armed terrorist organisation'. As **the Venice Commission ('VC')** reported, the Turkish Court of Cassation sought to adopt criteria through which to establish whether a membership relation has been formed between an individual and the armed organisation in question.*[47] *These criteria are 'continuity, diversity and intensity' and 'participation within the "hierarchical structure" knowingly and wilfully'.*[48] *However, these terms have not yet been clearly defined by either law or any judicial authorities.*

*§20 **Variables used in cases concerning the Gülen Movement ('GM') regarding whether the criteria of 'variety, continuity and intensity' are met:** More than 300,000 individuals have now been arrested by the police, and more than 96,000 of them remanded into pre-trial detention, over alleged links to GM* [49] *and the Applicant is amongst them.*

§21 After the 2016 coup attempt, public prosecutors and courts across the country adopted a list of variables through which to determine whether an individual is a member of GM. Although the wording used in different cases varies, the factors are usually as follows: being a depositor at Bank Asya; *(i)* using or downloading the Bylock messaging application; *(ii)* analysis of social media activity and the websites visited; *(iii)* donations made to relief organisations with alleged GM links, i.e., Kimse Yok Mu; *(iv)* being a resident or student in those schools, universities and dormitories that have been closed under the state of emergency as a result of alleged GM links, or *(v)* sending children to those educational institutions; *(vi)* subscription to GM periodicals; *(vii)* cancelling their subscription to DIGITURK, a satellite television provider, as a result of its decision to end the broadcasting of seven television channels critical of the AKP government; *(viii)* being a shareholder in companies that have been dissolved/seized under the state of emergency as a result of alleged GM links; *(ix)* being a manager, employee, or member of a trade union, association, foundation or company that has been closed/dissolved/seized under the state of emergency as a result of its alleged GM links.

§22 At this point, it is worth noting that all of those conducting such activity as described above where all participating in/transacting with organisations that were, at the material time, legal and operating under government licence/status or authorization: TV channels, Bank Asya [50] [51]*, Kimse Yok Mu* [52]*, schools* [53]*, universities* [54] *and foundations* [55]*, and/or operating under the authorisation and inspection of the Ministry of the Interior or Ministry of Work and Employment. Moreover, most of those organisations had been given special titles and privileges, such as tax exemption* [56]*, public benefit association* [57]*, government subsidy, or an outstanding public service award.*[58] *In other words, this was all lawful activity in the exercise of rights protected by ECHR.*

§26 In the case of Demirtas v. Turkey (2), for example, the European Court of Human Rights (ECtHR) found at §278 that "national courts do not appear to have taken into account the 'continuity, diversity and intensity' of the applicant's acts, nor to have examined

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[45] Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17, §250
[46] Guidelines on Human Rights and the Fight Against Terrorism, https://www.coe.int/t/dlapil/cahdi/Source/Docs2002/H_2002_4E.pdf
[47] Venice Commission Opinion on Articles 216, 299, 301 and 314 of The Penal Code of Turkey (CDL-AD (2016)002).
[48] Ibid.
[49] Anadolu Agency, https://www.aa.com.tr/tr/turkiye/icisleri-bakani-soylu-garaya-giden-hdpli-vekili-acikladi/2151784
[50] Under Turkish law, banks are founded by a special license that is issued by a regulatory public authority.
[51] Asya Finance Kurumu A.S. (Bank Asya Participation Bank) was established with the approval and permission of the Council of Ministers on 11th April, 1996. Its opening ceremony was carried out with the participation of the then Prime Minister, Tansu Çiller, President Recep Tayyip Erdoğan, former President Abdullah Gül, and other members of the political and social elites. It has a license to collect taxes, and other public financial obligations, such as social security premiums, fines, etc. On 3rd May, 2015, the Banking Regulation and Supervision Board (BRSA) decided that 63 percent of the privileged share, which determines the Board of Directors of Bank Asya, would be used by the Saving Deposit Insurance Fund (SDIF), afterwards, with the decision of the funding board's announcement in the Official Gazette, dated 23rd July, 2016, and numbered 29779, the Bank's operating permit was canceled, its operations stopped and the bank closed.
[52] Given by Parliament.
[53] Under Turkish law, private schools are licensed and are inspected by the Ministry of Education.
[54] Under Turkish law, private universities are founded by a law that is enacted by Parliament, and therefore they have the status of being a public entity.
[55] Under Turkish law, foundations are established through an order of authorization that is adopted by a court.
[56] Given by the Cabinet of Ministers.
[57] Given by the Cabinet of Ministers.
[58] Kimse Yok Mu relief organisation was given statuses relating to tax exemption, public benefit associations, and were also give an outstanding public service award by the Turkish Parliament.

whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation". This finding therefore would support our submissions at §§16-18 and §§24-25 that the precedents of the Court of Cassation are not binding upon lower courts and, therefore, cannot ensure the required foreseeability of Art. 314 TPC.

§27 ***Sub-conclusion:*** *(i) The Court of Cassation's judgments are not binding upon lower courts, and it, therefore, does not have the power to remedy the deficiencies of the broad and vague wording of Art. 314 TPC; (ii) In fact, national courts do not effectively take into account the said criterion, namely the 'continuity, diversity and intensity', while applying of Art. 314 TPC; (iii) The never-ending reorganisation of the Court of Cassation prevents the foreseeable and consistent application of Art. 314 TPC.*

The Case of Demirtas v. Turkey (2) Application no. 14305/17 [59]

§28 As mentioned above, in the case of Demirtas v. Turkey (2), ECtHR observed at §278 that the "national courts do not appear to have taken into account the 'continuity, diversity and intensity' of the applicant's acts, nor to have examined whether he had committed offences within the hierarchical structure of the terrorist organisation in question, as required by the case-law of the Court of Cassation.

§29 Subsequently, the Grand Chamber said at §280 that "The range of acts that may have justified the applicant's pre-trial detention in connection with serious offences that are punishable under Article 314 of the Criminal Code, is so broad that the content of that Article, coupled with its interpretation by the domestic courts, does not afford adequate protection against arbitrary interference by the national authorities."

§30 Later, with regard to the right to liberty, the Grand Chamber said at §337 that "… the present case confirms the tendency of the domestic courts to decide on a person's membership of an armed organisation on the basis of very weak evidence." It concluded "… the content of that provision, coupled with its interpretation by the domestic courts, did not afford adequate protection against arbitrary interference by the national authorities." On that account, it found that the terrorism-related offences at issue, as interpreted and applied in the present case, were not properly 'foreseeable'. [60]

70. The evaluations in the above mentioned submission concur with the ECtHR's conclusions in the case of Taner Kilic[61] where the Court found that *subscription to a legal publication at the material time; his sister's marital relationship with the head of such a publication; and the fact that his children attended schools which were legally run at the material time but which were subsequently closed down by decree-law, and using the Bank Asya which was also subsequently closed down by decree-law* cannot reasonably be regarded as constituting a body of evidence showing that the applicant belonged to an illegal organisation (§104); the Court further found there were merely circumstantial elements which did not give rise to a reasonable suspicion that he had committed the offence of membership in an armed terrorist organization. The Court continued that those acts indeed enjoyed the presumption of legality in the absence of any other element capable of justifying the suspicions in question, such as an intellectual link indicating an element of responsibility for the suspect's conduct. Thus, there can clearly be no reasonable suspicion if the acts or deeds held against a detainee did not constitute a crime at the time they occurred.

71. Another aspect of the problem around the prohibition of retrospective punishment is that the Turkish authorities constantly prosecute conducts dated before the coup attempt of 2016's July that at the Turkish government claims the Gülen Movement orchestrated. However, for the first time in May 2016, National Security Council called the Gülen Movement as a terrorist organization. Yet, the Law on the National Security Council (NSC) (Law no. 2945, Art.3) does not empower the NSC to designate a group as a terrorist organization, nor as a group performing activities against the national security of the State. The authority to designate an organization, a structure, a body, etc., as a terrorist organization, is exclusively vested in the judiciary by Article 138 of the Constitution. Even if it is assumed that the NSC has the authority to make such a designation, May 2016's public announcement was quite implicitly pointed to the Gülen Movement. As the decisions of the NSC are classified, there is no way an ordinary person can grasp the meaning of the NSC's concerned public announcement and adjust his/her conduct accordingly. The NSC's explicit announcement calling the Gülen Movement a terrorist organization came after the coup attempt of July 15, 2016. And the final judgment that characterizes the Gülen Movement as a terrorist organization, under the

[59] Selahattin Demirtaş v. Turkey (No. 2), Application no. 14305/17, http://hudoc.echr.coe.int/fre?i=001-207173
[60] Ibid.
[61] Taner Kılıç v. Turkey (No. 2), 208/18, https://hudoc.echr.coe.int/fre?i=001-217722

name of the Fetullahist Terrorist Organization (FETO/PDY), was rendered on 26 September 2017, by the General Chamber of the Court of Cassation (Yargıtay).[62]

72. In the proceeding against Mr Dogan mentioned at § …, the CPS underlined those conducts imputed to Mr Dogan dated before 2016's coup attempt and therefore they were not a crime even in Turkey, therefore concluded the request of Turkey failed to pass the double criminality test.

GENERIC AND UNSPECIFIED ACCUSATIONS THAT MAKE APPLYING THE DOUBLE CRIMINALITY TEST IMPOSSIBLE

73. It is a well-established principle that it is the duty of the requesting government to present the imputed conduct, accusation and underlying facts in precision and clarity that will ensure the judicial authority of the addressee government can carry out a proper review of the request and apply the double criminality test adequately. [63] [64]

74. There is a pattern that the Turkish government's requests profoundly lack necessary details in relation to charges laid against the defendants and are excessively generic.

75. This pattern coupled with the overly broad Turkish anti-terrorism laws makes it gruelling for the prosecutors of the requested states to carry out the dual criminality test. In almost all cases, the prosecutors were not able to match the offences under the extradition requests with crimes under their local law for the test to be satisfied. In a recent case in the UK, the crown prosecution service found the offences described in the extradition request unclear and broad in scope, which resulted in the prosecution withdrawing from the case due to dual criminality not being satisfied.

[62] On 26 May 2016, the NSC characterized the Gulen Movement/Network as a terrorist organization, without explicitly mentioning its name. See, Press Statement on the NSC meeting dated 26 May 2016. accessed 14 April 2019. 255 General Chamber of the Court of Cassation (Yargıtay), Decision No: 2017/370
Yildiz, Ali, Turkey's Recent Emergency Rule (2016-2018) and its Legality Under the European Convention on Human Rights and the International Covenant on Civil and Political Rights (April 29, 2019). Institute for European Studies, 2019, Available at SSRN: https://ssrn.com/abstract=3567095 or http://dx.doi.org/10.2139/ssrn.3567095

[63] Council of Europe, Guidelines and model request for extradition, "From the onset, the requesting State should provide sufficient details on the course of the trial."
https://rm.coe.int/pc-oc-2021-04rev-guidelines-and-model-request-for-extradition/1680a29fbe

[64] In Shlesinger, the court went on to note that the ruling in Murua v Spain (2010) EWHC 2609 (Muma') confirmed the earlier decision in Castillo v Spain (2004) EWHC 1676 (Admin) and it went on to refine the duty on the requesting state to fairly, properly and accurately describe the conduct.

BARS TO EXTRADITION RELEVANT TO TURKEY'S EXTRADITION REQUESTS ABOUT THE GULEN MOVEMENT MEMBERS

INGRAINED IMPUNITY PRACTICE OF TURKEY

76. The very first Emergency Decree (no. 667, Art. 9 § 1) adopted after the declaration of the state of emergency following the coup attempt of 2016's July stipulated that "legal, administrative, financial and criminal liabilities shall not arise in respect of those persons who have adopted decisions and who fulfil their duties within the scope of this Decree-Law".

77. Emergency Decree no. 668 (Art. 37) has further expanded this principle of impunity, specifying that there will be no criminal, legal, administrative or financial responsibility for those making decisions, implementing actions or measures, or assuming duties as per judiciary or administrative measures for suppressing coup attempts or terror incidents, as well as individuals taking decisions or fulfilling duties as per the State of Emergency Executive Decrees.

78. By Emergency Decree no. 696 (Art. 121), the impunity provided to public servants under Emergency Decrees nos. 667-668, was also extended to civilians. More precisely, it was stipulated that those civilians acting to suppress the coup attempt of 15/7/2016, and the ensuing events, will have no legal, administrative, financial or criminal responsibility. What is more, all these three decrees were approved by the Turkish Parliament and have become ordinary laws (Law Nos. 6749, 6755 and 7079).

79. Under these provisions, public prosecutors have given non-prosecution decisions on criminal complaints that were filed for alleged murder and torture incidents. The Trabzon Prosecutors Office gave a non-prosecution decision under Art. 9 of Emergency Decree no. 667 regarding a complaint filed by an alleged torture victim. Likewise, the Istanbul Prosecutorial Office gave a non-prosecution decision on a complaint that was filed by the family members of a military cadet who was tortured and murdered by civilians during the coup attempt.

80. The report published by the Italian Federation for Human Rights, The Arrested Lawyers Initiative, and the Human Rights Defenders e.V, concludes that "in Turkey impunity is not an aberration, but, rather, it is the norm when a rights violation is committed against individuals by state officials."[65] According to the report, Turkey's impunity policy has three pillars, which are:
    i. the moral legitimization of the unlawful acts of state officials,
    ii. the protection provided for perpetrators by administrative and judicial authorities,
    iii. the legal regulations either constitute obstacles for investigation and prosecution or provide for explicit impunity for perpetrators.

WIDESPREAD TORTURE and ILL-TREATMENT

81. Since 2016, torture and ill-treatment have been widespread across Turkey. Those accused of terrorism-related charges, particularly perceived Gülenists and Kurdish people are at risk. Reports of the UN and the

[65] https://arrestedlawyers.org/2020/06/19/joint-report-impunity-an-unchanging-rule-in-turkey/

Council of Europe experts, the European Commission, Western countries, and human rights NGOs manifest systemic torture and ill-treatment.

82. In the report by the United Nations Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, dated 18 December 2017, the followings are read:

> *"The Special Rapporteur notes with concern that there seemed to be a serious disconnect between declared government policy and its implementation in practice… Most notably, despite persistent allegations of widespread torture and other forms of ill-treatment, made in relation both to the immediate aftermath of the failed coup of 15 July 2016 and to the escalating violence in the south-east of the country, formal investigations and prosecutions in respect of such allegations appear to be extremely rare, thus creating a strong perception of de facto impunity for acts of torture and other forms of ill-treatment… According to numerous consistent allegations received by the Special Rapporteur, in the immediate aftermath of the failed coup, torture and other forms of ill-treatment were widespread, particularly at the time of arrest and during the subsequent detention in police or gendarmerie lock-ups as well as in improvised unofficial detention locations such as sports centres, stables and the corridors of courthouses… More specifically, the Special Rapporteur heard persistent reports of severe beatings, punches and kicking, blows with objects, falaqa, threats and verbal abuse, being forced to strip naked, rape with objects and other sexual violence or threats thereof, sleep deprivation, stress positions, and extended blindfolding and/or handcuffing for several days. Many places of detention were allegedly severely overcrowded, and did not have adequate access to food, water or medical treatment. Also, both current and former detainees alleged that they had been held incommunicado, without access to lawyers or relatives, and without being formally charged, for extended periods lasting up to 30 days… The Special Rapporteur heard numerous allegations that a great number of high- ranking military officers, Supreme Court judges, prosecutors, and other civil servants arrested for reasons related to the failed coup, as well as high-ranking members of pro-Kurdish political parties, had been held in prolonged solitary confinement… The Special Rapporteur was unable to confirm those allegations due to the time constraints imposed on his visit. Nevertheless, he wishes to recall that prolonged (of more than 15 days) or indefinite solitary confinement contravenes the absolute prohibition of torture and other cruel, inhumane or degrading treatment or punishment. Moreover, because of the prisoner's inability to communicate with the outside world, solitary confinement also gives rise to situations conducive to other acts of torture or ill-treatment." —reported by Nils Melzer, who is the UN Nations Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment.* [66]

83. The Office of the United Nations High Commissioner for Human Rights: In the report dated 12th November 2019, we read the following:[67]

- Several stakeholders observed an escalation of torture and violence towards detainees while, at the same time, security personnel who may have committed crimes on behalf of the government, enjoyed immunity from prosecution during and after the attempted coup.
- They recommended abrogating 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 Emergency Decree-Laws Nos. (667, art. 9(1), 2016), (668 art. 37) and (696 art. 121), and related Articles of the Law No. 4483.
- The Commissioner urged Turkey to tackle the numerous root causes of impunity in Turkey.
- Many stakeholders observed an extension of executive control over the judiciary. The justice system lacked any meaningful independence or impartiality

[66] Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment on his mission to Turkey, Distribution date: 18 December 2017, https://www.ohchr.org/en/documents/country-reports/ahrc3750add1-report-special-rapporteur-torture-and-other-cruel-inhuman-or; https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/362/52/PDF/G1736252.pdf?OpenElement

[67] Report of the Office of the United Nations High Commissioner for Human Rights, Summary of Stakeholders' submissions on Turkey, https://undocs.org/A/HRC/WG.6/35/TUR/3, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/322/40/PDF/G1932240.pdf?OpenElement

84. In the report of the Office of the United Nations High Commissioner for Human Rights dated March 2018, we see the following:[68]

- OHCHR received credible reports that a number of police officers who refused to participate in arbitrary arrests, torture and other repressive acts under the State of Emergency were dismissed and/or arrested on charges of supporting terrorism.
- OHCHR documented the use of different forms of torture and ill-treatment in custody, including severe beatings, threats of sexual assault and actual sexual assault, electric shocks and waterboarding. Based on accounts collected by the OHCHR, the acts of torture and ill-treatment generally appeared to be aimed at extracting confessions or forcing detainees to denounce other individuals. It was also reported that many of the detainees retracted forced confessions during subsequent court appearances.
- On the basis of numerous interviews and reports, OHCHR documented the emergence of a pattern of detaining women just before, during or immediately after giving birth. In almost all cases, the women were arrested as associates of their husbands, who were the Government's primary suspects in relation to connections to terrorist organizations, without separate evidence supporting charges against them. OHCHR found that the perpetrators of ill-treatment and torture included members of the police, gendarmerie, military police and security forces.
- The United Nations Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment visited Turkey in November 2016 and found that torture was widespread following the failed coup, particularly at the time of arrest and subsequent detention. He further found that the number of investigations reportedly carried out into allegations of torture was "grossly disproportionate to the alleged frequency of violations.

85. In the United Kingdom's Home Office Report titled 'Country Policy and Information Note Turkey: Gülenist movement'[69], the followings are read:

[68] Office of the United Nations High Commissioner for Human Rights Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East January – December 2017
https://www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf
[69] Home Office, Country Policy and Information Note Turkey: Gülenist movement;
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052283/TUR_CPIN_G%C3%BClenist_movement.pdf

2.4.22 Between 2016 and the end of 2020, there had been about 24 cases of enforced disappearance. 2 men who reappeared in police custody in Ankara testified to having been abduced, tortured and forced to sign statement confessing to links with the Gulenist movement. There have been no investigations into these cases and the police deny the claims
2.4.26 Following a visit to Turkey in May 2019 by the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the CPT had the impression that the severity of alleged ill-treatment of detainees had decreased compared with findings of 2017, but nevertheless, the frequency of allegations remained 'at a worrying level'.
2.4.27 There were reports that those with alleged affiliation to the Gulenist movement were more likely to be subjected to mistreatment in detention, including long periods of solitary confinement, unnecessary strip searches, severe limitations on outdoor/out-of-cell activity, denial of access to prison libraries and slow/no access to medical treatment. Visitors of those accused of terror-related crimes were also subjected to abuse, including limited access to family and degrading treatment by prison guards, such as strip searches. There were credible reports of torture of former employees of the Ministry of Foreign Affairs, which the police denied.
2.4.28 There were reports that Prosecutors do not always conduct meaningful investigations into allegations of torture and ill-treatment in detention and that there is a culture of impunity for members of the security forces and public officials involved. In 2019, the government opened 2,767 investigations into allegations of torture and mistreatment. Of those, 1,372 resulted in no action being taken by prosecutors, 933 resulted in criminal cases, and 462 in other decisions. The government did not release data on its investigations into alleged torture. The Human Rights Association received 573 complaints of torture from people while in police custody or in extracustodial locations from January to November 2020. In June 2020, the Minister of Interior reported that the ministry had received 396 complaints of torture and maltreatment since October 2019. CHP, an opposition party, alleged that 223 persons reported torture or inhuman treatment from May to August 2020.
5.1.2 In the Turkey 2020 Report, published in October 2020, the European Commission noted: 'The damage caused by the state of emergency on the fundamental rights and the related legislation adopted was not remedied and there was further backsliding on the outstanding issues identified in previous [European Commission] reports, most notably on the right to a fair trial and procedural rights, freedom of expression, freedom of assembly and association, protection of human rights defenders, freedom from ill-treatment and torture, especially in prison.' (*Turkey 2021 report also underlines similar findings and concerns.)*
8.4.7 In its World Report 2021, Human Rights Watch stated, 'A rise in allegations of torture, ill-treatment, and cruel and inhuman or degrading treatment in police and military custody and prison over the past four years has set back Turkey's earlier progress in this area. Those targeted include people accused of political and common crimes.'

86. The Norwegian Ministry of Justice and Emergency Affairs (UDI): According to UDI, these persons (Gülenists) are at risk of arrest, imprisonment, torture and conviction and therefore have the right to protection under the letter (a) of the first paragraph of Article 28 of the Immigration Act. In some cases, family members of the active members of the "Gülenists" also have the right to protection.[70]

[70] Regjeringen. GI-15/2017 – Instruks om praktisering av utlendingsloven § 28 – asylsøkere som anfører risiko for forfølgelse på grunn av (tillagt) tilknytning til Gülen-nettverket. https://www.regjeringen.no/no/dokumenter/gi-152017--instruks-om-praktisering-av-utlendingsloven-- ENDNOTES 50 28--asylsokere-som-anforer-risiko-for-forfolgelse-pa-grunn-av-tillagt-tilknytning-til-gulennettverket/id2575439/?q=gi-15/2017

87. European Commission[71], The US State Department[72], the Council of Europe Commissioner for Human Rights[73], European Committee for the Prevention of Torture[74] [75], Human Rights Watch[76], and Amnesty International[77] also constantly reported widespread use of torture and impunity.

88. The Bar Associations of Turkey also published several reports on torture across the country.[78] [79]

89. A coalition of NGOs consisting of the Ankara Medical Chamber (ATO), the Human Rights Association, the Lawyers Association for Freedom, the Contemporary Lawyers' Association, the Rights Initiative Association,

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[71] European Commission, 2016 report, http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_turkey.pdf; 2018 report, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf; 2019 report, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf; 2020 report, https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/turkey_report_2020.pdf; 2021 report, https://ec.europa.eu/neighbourhood-enlargement/turkey-report-2021_en

[72] The US State Department, 2016 report, https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/turkey/; 2017 report, https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/turkey/; 2018 report, https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/turkey/; 2019 report, https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/turkey/; 2020 report, https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/turkey/; 2021 report, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/turkey/

[73] Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, dated 7 October, 2016. https://rm.coe.int/16806db6f1

[74] Turkey has not given consent for the publication of reports on the Ad hoc visit of April 2018 and Ad hoc visit August-September 2016, https://www.coe.int/en/web/cpt/turkiye

[75] Report on the visit to Turkey carried from 6 to 17 May 2019: "Overall, the CPT has gained the impression that, compared to the findings of the 2017 visit, the severity of alleged police ill-treatment has diminished. However, the frequency of allegations remains at a worrying level." https://rm.coe.int/16809f20a1

Report on the visit to Turkey carried from 10 to 23 May 2017: "The CPT's delegation received a considerable number of allegations from detained persons (including women and juveniles) of recent physical ill-treatment by police and gendarmerie officers, in particular in the Istanbul area and in south-eastern Turkey. Most of these allegations concerned excessive use of force at the time of or immediately following apprehension (e.g., punches, kicks and blows with a truncheon or butt of a gun after the person concerned had been handcuffed or otherwise brought under control), as well as beatings during transportation to a law enforcement establishment. In addition, many detained persons claimed that they had been physically ill-treated inside law enforcement establishments (in locations which were apparently not covered by CCTV cameras), with a view to extracting a confession or obtaining information or as a punishment. The latter allegations concerned mainly slaps and punches (including to the head and face), as well as blows with a truncheon, hose pipe or other hard object. Some detained persons alleged that electric shocks had been inflicted upon them by police officers with body-contact shock devices. … In Istanbul, the delegation received detailed and consistent accounts from detained persons (including women), interviewed independently of each other, that they had been taken by police officers to a partly derelict building in the city centre, where they were subjected to heavy beatings and severe sexual humiliation, in particular by officers of a mobile intervention unit (so-called "Yunus"). Further, many accounts were received, in particular from detained women, that they had been subjected to psychological ill-treatment (such as threats of beatings, rape or death) and/or severe verbal abuse (often of an explicit sexual nature)." https://rm.coe.int/16809f209e

[76] https://www.hrw.org/world-report/2021/country-chapters/turkey; https://www.hrw.org/report/2016/10/25/blank-check/turkeys-post-coup-suspension-safeguards-against-torture; https://www.hrw.org/report/2017/10/12/custody/police-torture-and-abductions-turkey

[77] https://www.amnesty.org/en/location/europe-and-central-asia/turkey/report-turkey/; https://www.amnesty.org/en/documents/eur44/4815/2021/en/

[78] On 28th May 2019, and 20 December 2019, the Ankara Bar Association published two reports documenting the ongoing torture and sexual abuse of suspects that was taking place in the Ankara Police HQ.
https://twitter.com/ankarabarosuihm/status/1210646342286159872?s=20
https://arrestedlawyers.files.wordpress.com/2020/01/joint-report-ankara-bar-28-may-2019.pdf
https://arrestedlawyers.org/2019/11/25/report-on-criminal-liabilities-with-regard-to-torture-incidenttook-place-in-ankara-police-headquarters-between-20-and-28-may-2019/ https://arrestedlawyers.files.wordpress.com/2020/01/report-by-ankara-bar-association-human-rightscommission-1.pdf

[79] Gaziantep and Sanliurfa Bar Associations, and TOHAV (Society & Law Research Association) have published separate reports documenting torture, sexual abuse and illegal interrogation of individuals detained in the district of Halfeti in the Sanliurfa province.
https://arrestedlawyers.files.wordpress.com/2021/05/sanliurfa-halfeti-report-1.pdf
http://www.tohav.org/Content/UserFiles/ListItem/Docs/katalog1427tohavs-report-on-torture-inurfa.pdf
https://m.bianet.org/english/human-rights/209087-report-on-halfeti-by-urfa-bar-association-thedetained-subjected-to-sexual-torture
https://bianet.org/english/human-rights/209087-report-on-halfeti-by-urfa-bar-association-the-detainedsubjected-to-sexual-torture

the Revolutionary 78'ers Federation, the Human Rights Agenda Association, the SES Ankara Branch, and Human Rights Foundation of Turkey (TIHV), made a joint statement regarding torture and ill-treatment incidents that had taken place in Turkey, and in Ankara, in particular. "There has been an increase in kidnapping, torture and ill-treatment in custody, with the aim of exerting pressure on people, punishing, intimidating and forcing them to confess, which started, in particular, with the State of Emergency process, and which has increased in recent years. In the case of Ankara, these practices have unfortunately become systematic." It said in the statement.[80]

OVERPOPULATION OF PRISONS IN TURKEY

90. According to recent data published by the Turkish Ministry of Justice, there were 314,502 inmates in Turkish prisons as of March 31, meaning that Turkey has the sixth largest prison population in the world, following the US, China, Brazil, India and the Russian Federation.[81]

91. "Overcrowding and deteriorating prison conditions continue to be a source of deep concern. Turkey was the Council of Europe Member State with the highest overcrowding rate (127 inmates per 100 available places). The new human rights action plan includes an overall commitment to improve living conditions in prisons and address the well-being of juveniles. Allegations continued of human rights violations in prisons, including arbitrary restrictions on the rights of detainees, denial of access to medical care and the use of torture, mistreatment, prevention of open visits, and solitary confinement." is said in the European Commission's 2021 report.[82]

92. The UK courts have refused several Turkish extradition requests due to the overcrowded prison population since 2016.[83]

[80] https://hakinisiyatifi.org/torture-is-a-crime-against-humanity-without-exception-and-is-strictlyprohibited.html https://arrestedlawyers.org/2020/01/01/human-rights-ngos-torture-and-ill-treatment-in-custody-havebecome-systematic-practice-of-ankara-police/

[81] Turkey's corrections system is failing https://www.turkishminute.com/2022/04/25/n-turkeys-corrections-system-is-failing/

[82] https://ec.europa.eu/neighbourhood-enlargement/turkey-report-2021_en

[83] UK high court refuses Turkey extradition due to overcrowded prisons https://www.theguardian.com/law/2018/feb/15/uk-high-court-refuses-turkey-extradition-due-to-overcrowded-prisons
[2018] EWHC 210 (Admin), [2019] EWHC 1939 (Admin)

TURKISH JUDICIARY, INDEPENDENCE, IMPARTIALITY AND THE RIGHT TO A FAIR TRIAL

PURGE OF TURKISH JUDGES AND PROSECUTORS

93. In the wake of July 2016, when the soldiers who actually organized, or took part in, the failed coup attempt were yet to be determined, Turkey's top judicial body, the High Boards of Judges and Prosecutors, convened so as to suspend 2,745 judges/prosecutors, including its own members.[84] Later, the number of judges and prosecutors dismissed has exceeded 4,500[85] which, according to a human rights group named "The Free Judges" is 29.8% of the number of judges and prosecutors in the entire judiciary.

94. The 3495 dismissed judges and prosecutors have been prosecuted and at least 2,431 of them were remanded to pretrial detention.[86] As of 7 September 2019, 1344 of those prosecuted have been convicted under Art. 314 of the Turkish Penal Code which stipulates membership of an armed terrorist organisation.[87] 179 supreme appeal courts (*Yargıtay & Danıştay)* have been dismissed and 169 of those have been convicted ranging from 18 months to 18 years under Art. 314 of the Turkish Penal Code.[88]

THE NEW FORMATION OF TURKEY'S TOP JUDICIAL BODY (THE COUNCIL OF JUDGES AND PROSECUTORS - CJP)

95. By a constitutional amendment, dated 16 April 2017, Turkey's top judicial body has been reshaped by the AKP Government. The new structure of the CJP has caused serious concern, in terms of its independence and the impartiality of the judiciary as a whole.

96. The Council of Europe's Human Rights Commissioner, Nils Muiznieks, said on 07.06.2017, "Following the recently adopted constitutional amendments, which changed the system for its formation, Turkey's new Council of Judges and Prosecutors (HSYK) is sworn in today. With four members appointed directly by the President of Turkey, and seven members elected by Parliament without a procedure guaranteeing the involvement of all political parties and interests, I am concerned that the new composition of the HSYK does not offer adequate safeguards for the independence of the judiciary, and it considerably increases the risk of it being subjected to political influence."[89]

97. "The constitutional amendment, which runs the danger of transforming the country into a one-person presidential system, is against a democratic regime that is based on the separation of powers. Considering the chronic concerns, see above, that the Turkish Judiciary is not independent, the judiciary's power to control the executive will further weaken the HSYK, almost half of whose members will be directly appointed by the President… The Commission finds that the proposed composition of the CJP is extremely

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[84] The Free Judges. The Collapse of Turkish Judiciary in Numbers and Principles. https://freejudges.wordpress.com/2017/12/21/%E2%80%8Bopinion-the-collapse-of-turkish-judiciary-in-numeric-and-principle/

[85] Anatolian News Agency. More than 35 judges and prosecutors dismissed in Turkey. http://aa.com.tr/en/turkey/more-than-35-judges-prosecutors-dismissed-in-turkey/928093?amp=1

[86] Infographic on purge of the Turkish Judiciary, https://arrestedlawyers.org/2019/09/07/infographic-on-purge-of-the-turkish-judiciary/

[87] Ibid.

[88] https://www.aa.com.tr/tr/15-temmuz-darbe-girisimi/fetoden-yargilanan-169-eski-yuksek-yargi-uyesi-hapis-cezasina-carptirildi/2132180

[89] https://www.facebook.com/CommissionerHR/posts/806253422883903

problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress, once again, in this respect, that the President will no longer be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the President's party has a three-fifths majority in the Assembly, it will be able to fill all of the positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointments, promotions, transfers, the disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means gaining control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent, and where the transfers of judges are a common practice. In this context, it seems significant that the draft amendments provide for elections to the CJP within 30 days from the entry into force of the amendments, and that the political forces supporting the amendments control more than three-fifths of the seats in the TGNA, enabling them to fill all of the seats in the CJP." was said in the **opinion of the Venice Commission dated 13 March 2017**.[90]

98. The Council of Europe's Human Rights Commissioner, Dunja Mijatovic, after a five-day official visit to Turkey, said on 21 December 2019 followings: "…(T)he independence of the Turkish judiciary has been seriously eroded during this period, including through constitutional changes regarding the Council of Judges and Prosecutors which are in clear contradiction with Council of Europe standards, and the suspension of ordinary safeguards and procedures for the dismissal, recruitment and appointment of judges and prosecutors… **(T)he existing tendency of the Turkish judiciary to put the protection of the state above that of human rights was significantly reinforced, and the criminal process appears to often be reduced to a mere formality, especially in terrorism-related cases**… **(L)aws with an overly broad definition of terrorism and membership of a criminal organisation and the judiciary's tendency to stretch them even further is not a new problem in Turkey, as attested in numerous judgments of the European Court of Human Rights** … **(T)his problem has reached unprecedented levels in recent times**… these proceedings, combined with a wanton use of pre-trial detention, unjustly upend many persons' lives in Turkey, including many human rights defenders. As a result, all of Turkish society is subjected to a profound chilling effect. It is high time to ease the pressure on human rights defenders in Turkey and enable them to work freely and safely… Not only has Turkey taken measures restricting procedural defence rights and hampering lawyers' ability to defend their clients, but it has come to my attention that lawyers are also increasingly being targeted through judicial actions for bringing cases alleging human rights violations, or as guilty by association with their clients."[91]

JUDGES AND PROSECUTORS ARE OFTEN REASSIGNED AS A RESULT OF THEIR DECISIONS

99. Turkey's Council of Judges and Prosecutors has not only dismissed thousands of judges and prosecutors but has also continuously intervened in the course of justice by the use of resolutions of appointment, which it has issued on almost a daily basis. Since 2014, hundreds of judges and prosecutors have been reassigned because of the decisions they given, which were somehow displeasing to the government.[92]

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[90] The Venice Commission. Opinion on The Amendments To The Constitution Adopted By The Grand National Assembly On 21st January, 2017, And To Be Submitted To A National Referendum On 16 April, 2017.
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e

[91] Turkey needs to put an end to arbitrariness in the judiciary and to protect human rights defenders,
https://www.coe.int/en/web/commissioner/-/turkey-needs-to-put-an-end-to-arbitrariness-in-the-judiciary-and-to-protect-human-rights-defenders

[92] Ibid.

THE DECISIONS TO RELEASE ARE INEFFECTIVE

100. In addition to arbitrary mass arrests of dissidents, orders which courts seldom give for their release, are constantly being cancelled by direct political intervention. In one of the many instances, Taner Kılıç, who is the Chair of Amnesty International's Turkey Branch, was re-detained even before his release from Izmir Sakran Prison, and was then rearrested by the same court which had decided to release him. Taner Kılıç was taken into custody on 6th June, 2017, and was subsequently arrested by the Izmir Peace Criminal Judgeship on 9th June, 2017. On 31st January, 2018, the Istanbul 35th High Penal Court decided to release him at the trial's third hearing. However, after the prosecutor's appeal against the court's decision, his release procedure was frozen, and Mr Kılıç was re-detained by prison guards, taken into the courthouse, and re-arrested by the same court that had decided to release him only hours previously.[93] Similarly, the İstanbul 37th High Assize Court, which had ruled for the release of the lawyers at the first hearing of the trial of 20 lawyers on Friday, ruled to re-detain 12 of them, including the Association of Progressive Lawyers' (ÇHD) Chairman, Selçuk Kozağaçlı.[94] Last but not the least, Ahmet Altan, a Turkish journalist and author, was detained a week after the Istanbul Regional Appeal Court released him.[95]

THE TURKISH CONSTITUTIONAL COURT'S DECISIONS ARE INEFFECTIVE:

101. **The Altan and Alpay Cases:** The journalists, Şahin Alpay and Mehmet Altan, who have been under arrest, respectively, since 31st July 2016, and 22nd September 2016, were not released, despite the Turkish Constitutional Court having ruled that decisions to arrest them were unlawful.

102. As per Article 153 of the Constitution, and Article 66/1 of the Law on the Establishment and Rules of Procedures of the Constitutional Court, Code No: 6216, "The decisions of the Constitutional Court are final. The decisions of the court are binding for the legislative, executive and judicial organs of the state, administrative offices, real and legal persons."

103. On 11th January 2018, the Turkish Constitutional Court decided that the decisions to arrest relating to the journalists, Şahin Alpay and Mehmet Altan, are unlawful and constituted a violation of rights that is envisaged by the Turkish Constitution and the European Convention on Human Rights. On the same day, the Istanbul 13rd and 26th High Penal Courts refused to release Altan and Alpay, on the grounds that the decisions (of the TCC) had not yet been published in the Official Gazette. On 14th January 2018, the Istanbul 13th and 26th High Penal Courts refused to release Altan and Alpay again, on the grounds that the TCC had exceeded its authority, which was drawn from the Constitution. On 15th January 2018, the Istanbul 14th and 27th High Penal Courts refused the objections of Altan and Alpay's lawyers.[96]

104. For the first time in Turkey's legal history, the constitutional authority of the Turkish Constitutional Court was thus ignored in seven separate court decisions.

105. What is worse, on May 30, 2022, the Council of Judges and Prosecutors (HSK) notified Altan`s lawyer that it had decided that it would not take action against the judges Selçuk Yalçın, Mehmet Akif Ayaz, Orkun Dağ

[93] Amnesty International. The legal process after the release of Taner Kilic. https://www.amnesty.org.tr/icerik/taner-kilicin-tahliye-kararinin-ardindan-gerceklesen-hukuki-surec
[94] https://arrestedlawyers.org/2018/09/16/turkey-rearrests-12-lawyers-a-day-after-their-release/
[95] https://ahvalnews.com/turkish-courts/turkish-journalist-ahmet-altan-detained-days-after-release
[96] The Arrested Lawyers Initiative. Lawyers to Alpay and Altan say Constitutional Court rulings are binding on all. https://arrestedlawyers.org/2018/01/16/lawyers-to-alpay-altan-say-constitutional-court-rulings-are-binding-on-all/

and Seval Alaçam Sağlam who defied the judgment of the Constitutional Court dated January 2018 ordering the release of writer Mehmet Altan that causing him to spend an extra 5 months in prison.[97]

106. Professor of human rights law Kerem Altıparmak reacted to the decision saying "The HSK decision essentially declares that there is no rule of law in Turkey. Because what distinguishes the rule of law from other normative systems is that if a rule is violated, it faces a sanction of state power. When it is not met with sanctions and the violation is not remedied, it is not a law, but it is only a wish. The judge has to act in accordance with the Constitution on paper. But if a judge acts unlawfully, this behaviour should meet with a sanction, and the consequences of the violation should be remedied for the victims. Otherwise, the rule requiring acting in accordance with the Constitution will be nothing more than a wish."[98]

THE EUROPEAN COURT OF HUMAN RIGHTS' DECISIONS ARE INEFFECTIVE:

107. **The Case of Osman Kavala:** Osman Kavala, a prominent civil society leader, was detained on 1 November 2017 over the accusation that he orchestrated 2013's Gezi Park protests to overthrow the AKP government. On 10th December 2019, the ECtHR decided that Kavala's detention was a breach of Article 18 of the Convention, in conjunction with Article 5 § 3.[99] However, on 24th December 2019, and 28th January, 2020, the trial court (the Istanbul 30th Heavy Penal Court) refused to release Mr Kavala.[100]

108. Eventually, on 18 February 2020, the Istanbul 30th Assize Court acquitted him of all charges and ordered his release, however, before he was discharged from prison, then Istanbul Prosecutor, incumbent Deputy Minister of Justice Hasan Yilmaz ordered his arrest for the very same charges that eventually led his imprisonment for life by the Istanbul 13th Assize Court.[101] [102]

109. The Council of Europe, therefore, initiated an infringement procedure against Turkey under Article 46 of the Convention for its non-compliance with the ECtHR's judgment dated 10th December 2019. [103] [104]

110. On 11th July 2022, the Grand Chamber of the ECtHR found that Turkey breached Article 46 of the Convention by failing to comply with the Court's judgment dated ordering Kavala's release.[105]

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[97] https://arrestedlawyers.org/2022/06/07/top-turkish-judicial-body-wont-punish-judges-who-defy-the-constitutional-court-judgments/
[98] https://twitter.com/KeremALTIPARMAK/status/1534068499668156417
[99] Kavala v. Turkey, Application no. 28749/18, http://hudoc.echr.coe.int/eng?i=001-199515,
[100] https://www.reuters.com/article/us-turkey-security-gezi/turkey-keeps-businessman-in-jail-despite-european-court-release-call-idUSKBN1YS001
[101] https://www.article19.org/resources/turkey-end-judicial-harassment-of-osman-kavala-and-his-co-defendants/
[102] https://www.hrw.org/news/2022/04/26/turkey-life-sentence-rights-defender-osman-kavala#:~:text=The%20Istanbul%2013th%20Assize%20Court,began%20in%20Istanbul's%20Gezi%20Park.
[103] Kavala v. Turkey, Application no. 28749/18, http://hudoc.echr.coe.int/eng?i=001-199515,
[104] https://www.icj.org/turkey-council-of-europe-triggers-infringement-process-against-turkey-for-failure-to-free-osman-kavala https://rm.coe.int/0900001680a4b3d4
[105] The Court, therefore, concluded that neither the decisions on Mr Kavala's detention nor the bill of indictment contained any substantially new facts capable of justifying this new suspicion. As during Mr Kavala's initial detention, the investigating authorities had once again referred to numerous acts which were carried out entirely lawfully to justify his continued pre-trial detention, notwithstanding the constitutional guarantees against arbitrary detention.
The whole structure of the Convention rested on the general assumption that public authorities in the member States acted in good faith. Failure to implement a final, binding judicial decision would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States had undertaken to respect when they ratified the Convention.
The Court noted that Turkey had taken some steps towards executing the Chamber judgment and had also presented several Action Plans. It noted, however, that on the date on which the Committee of Ministers had referred the matter to it, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days.

111. The Grand Chamber found that the second indictment and detention were carried out to create a pretext for the ongoing detention of Kavala. The Grand Chamber then said, "In response to the question referred to it by the Committee of Ministers, the Court concluded that Turkey had failed to fulfil its obligation under Article 46 § 1 to comply with the Kavala v. Turkey judgment of 10 December 2019."[106]

112. **The case of Alparslan Altan:** Alparslan Altan, who was the Deputy Chief Justice of the Turkish Constitutional Court, was detained hours after the coup attempt, and he was subsequently arrested by the Ankara Criminal Peace Judgeship. The European Court of Human Rights, on 16th April, 2019, decided that his detention was unlawful.[107] However, since then he has not been released and, on the contrary, he has been sentenced to eleven years in prison.[108]

113. **The Case of Selahattin Demirtas:** Selahattin Demirtas, who was the Co-Chair of the pro-Kurdish Party, HDP, was detained on 4th November, 2016. On 20th November, 2018, the ECtHR decided that Turkey had violated Article 18 of the Convention, in conjunction with Article 5 § 3, and therefore the detention was unlawful.[109] However, Mr Demirtas has not been released.

THE UN HUMAN RIGHTS COMMITTEE'S DECISIONS ARE INEFFECTIVE

114. On 26th March, 2019, the UN Human Rights Committee, in the case of İsmet Özçelik, Turgay Karaman and I.A v. Turkey, decided that the detention of applicants who were subject to refoulement (from Malaysia to

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The Court considered that the measures indicated by Turkey did not permit it to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the Kavala judgment, or in a way that would have made practical and effective the protection of the Convention rights which the Court had found to have been violated in that judgment.
In response to the question referred to it by the Committee of Ministers, the Court concluded that Turkey had failed to fulfil its obligation under Article 46 § 1 to comply with the Kavala v. Turkey judgment of 10 December 2019.

[106] Kavala v. Turkey[GC] - 28749/18, Judgment 11.7.2022 [GC], https://hudoc.echr.coe.int/eng/?i=002-13743
In conclusion, although Turkey had taken some steps towards executing the Kavala judgment, on the date on which the Committee of Ministers had referred the matter to the Court, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days, on the basis of facts which, in its initial judgment, it had held to be insufficient to justify the suspicion that he had committed "any criminal offence" and which had been "largely related to the exercise of Convention rights". These considerations were crucial in the present case, particularly since, on 25 April 2022, Mr Kavala had been acquitted of the charge of military or political espionage under Article 328, but convicted of the charge under Article 312 and sentenced to the heaviest penalty under Turkish criminal law; that conviction had been based on facts primarily related to the 2013 mass protests, which the Court had scrutinised with particular care in its initial judgment on account of the clear absence of reasonable suspicion; the conviction had moreover been vitiated by the finding of a breach of Article 18.
Accordingly, the Court was unable to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the Kavala judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in that judgment. Turkey had therefore failed to fulfil its obligation under Article 46 § 1 to abide by the Kavala v. Turkey judgment of 10 December 2019.
Conclusion: violation (sixteen votes to one) with regard to Mr Kavala's additional requests the Court noted that, as indicated in the Explanatory Report to Protocol No. 14, the infringement procedure did not aim to reopen before the Court the question of a violation already decided in its first judgment. Nor did it provide for payment of a financial penalty by a High Contracting Party found to be in violation of Article 46 § 1. The Court was thus not competent to find a further violation of Articles 5 and 18. The finding of a violation of Article 46 § 1 meant that the primary obligation resulting from the Court's initial judgment, namely restitutio in integrum, with all the ensuing consequences, continued to exist, and that it was for the Committee of Ministers to continue to supervise the execution of the Court's initial judgment.

[107] Alparslan Altan v. Turkey - 12778/17, http://hudoc.echr.coe.int/eng?i=002-12446

[108] https://www.turkishminute.com/2019/03/06/former-deputy-chief-justice-given-11-year-jail-sentence-over-gulen-links/

[109] Demirtas v Turkey, Application no. 14305/17, http://hudoc.echr.coe.int/eng?i=001-187961

Turkey), breached Article 9 § 1-3 (the right to the security of liberty) of the International Covenant on Civil and Political Rights.[110] However, Turkey has ignored the UN Human Rights Committee's decision.

THE UN WORKING GROUP ON ARBITRARY DETENTION DECISIONS IS INEFFECTIVE

115. Since 2016, Human Rights Committee and UN WGAD have considered a total of 18 cases filed by those detained as a result of their alleged links with the Gülen Movement. In 16 of those cases, WGAD found, inter alia, a Category V violation - a violation of the right to liberty on the grounds of discrimination that is based on nationality, religion, ethnic or social origin, political or other opinions, or any other status).[111] Turkey has ignored all nine decisions and has not released any of the applicants.

116. In the two most recent cases, UN WGAD said: "The Working Group notes that the present case is the most recent concerning individuals with alleged links to the Fethullah Terrorist Organisation/the Parallel State Structure (the Hizmet Movement) that have come before the Working Group in the past three years. In all these cases, the Working Group has found that the detention of the individuals concerned was arbitrary. It notes a pattern of targeting those with alleged links to the Fethullah Terrorist Organisation/Parallel State Structure (the Hizmet Movement) on the discriminatory basis of their political or other opinions." [112] And "A pattern is emerging whereby those with alleged links to the Hizmet Movement are being targeted on the basis of their political or other opinions, in violation of Article 26 of the Covenant."[113]

117. In these two cases, WGAD expressed its concern that these cases may establish a pattern amounting to crimes against humanity. The WGAD said the following: "The Working Group expresses its concern over the pattern that all these cases follow and recalls that, under certain circumstances, widespread or systematic imprisonment, or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity."[114]

THE DEFENDANTS ARE DENIED THE RIGHT TO DEFENCE[115]

118. Since the failed coup of July 2016, there has been a relentless campaign of arrests against Turkish lawyers. In 77 of Turkey's 81 provinces, lawyers have been detained and arrested on trumped-up charges, as part of criminal investigations orchestrated by the political authorities and conducted by provincial public prosecutors. As of December 2021, **more than 1,600 lawyers have been arrested and prosecuted while 615 lawyers have been remanded to pretrial detention. Subsequently, 474 lawyers have been sentenced to a total of 2,966 years in prison on the grounds of membership in an armed terrorist organization (Art. 314 of Penal Code) or of spreading terrorist propaganda.** [116] 15 of the detained or arrested lawyers are the Presidents or former Presidents of provincial bar associations. All of the prosecuted lawyers are being charged with terrorism that is related to offences such as being a member of an armed terrorist organization, or of running such an organization. Pursuant to the Turkish Penal Code, these two offences attract from 7.5 to 22.5 years in prison. The Turkish government has also targeted Turkish lawyers' right of association. 34 different lawyers' societies or associations have been shut down since the declaration of

[110] İsmet Özçelik et. al. , CCPR/C/125/D/2980/2017
[111] Opinions Nos. 53/2019, 10, 2019, 78/2018, 42/2018, 43/2018, 44/2018, 11/2018
[112] Osman Karaca v. Cambodia and Turkey, A/HRC/WGAD/2020/84
[113] Levent Kart v. Turkey, A/HRC/WGAD/2020/66
[114] 36 Osman Karaca v. Cambodia and Turkey, A/HRC/WGAD/2020/84, Levent Kart v. Turkey, A/HRC/WGAD/2020/66.
[115] The Arrested Lawyers Initiative. Report: The Right to Defence Under Turkey's State of Emergency Rule. https://arrestedlawyers.org/2018/01/29/report-the-right-to-defence-under-turkeys-state-of-emergency-rule/
[116] The Arrested Lawyers Initiative. https://arrestedlawyers.org/2021/12/10/new-report-the-crackdown-against-lawyers-in-turkey/

the state of emergency. After they were closed down by government decrees, all of their assets were also confiscated without compensation.[117] [118]

119. Human Rights Watch has also documented the mass prosecution of lawyers as a reprisal for their legal actions in a professional capacity.[119]

CONCLUSION

120. Extradition to Turkey from the UK presents serious issues under the rule of law in both international and domestic contexts. Turkey has no shame in requesting extradition for political offences. Not as a one-off but in a systematic attempt to persecute and terrify individuals who are perceived to be associated with the Gülen movement that is called as FETÖ by the Turkish government. The crushing of civil society under Erdogan is criticized by all human rights bodies but Turkey's strategic importance to Europe and America means that criticism is often muted or balanced against the role Turkey plays in Syria and as a buffer from Russia.

121. The UK Courts is alive to the issues of political corruption and the manipulation of the extradition process to attack Erdogan's critics. They have discharged individuals on politically motivated extradition requests but have shied away from analysing in any real depth the decimation of the rule of law in Turkey. The Court system has been eviscerated by the purge of civil society post-2016. Judges are no longer independent of the executive. Lawyers are unable to properly represent clients without fear of reprisal. Reprisal means imprisonment, ill-treatment, and removal from the practice. The rule of law no longer really operates in criminal or human rights cases. The UK courts have not needed to analyse the fairness of the courts in any depth because of the political issues that are present and obvious in many cases. There remains, however, a real disconnect between cases where the political influence is clear and cases where it is not. The problems of rule of law in Turkey are not easy to remedy without regime change.

122. Turkey continues to pursue individuals and abuse Interpol, in particular the recent devious practice of reporting suspected Gülenists' passports as stolen leading to arrest and a risk that they will be sent to Turkey without any formal extradition process. Once there they are highly likely to be imprisoned, tortured and subject to unfair trial procedures. This circumvents extradition and often the rule of law in many states and places many individuals at great risk.

123. Turkey seems impervious to international criticism. Despite the UN and ECtHR issuing substantial criticism over a long period of time, there has been no discernible improvement in the rule of law. The continued attack on individuals without evidence is something the UK must guard against.

[117] The Arrested Lawyers Initiative. https://arrestedlawyers.org/2021/12/10/new-report-the-crackdown-against-lawyers-in-turkey/
[118] Joint Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review, http://www.barhumanrights.org.uk/wp-content/uploads/2019/07/UPR-Turkey-Combined.pdf
[119] Lawyers on Trial, https://www.hrw.org/sites/default/files/report_pdf/turkey0419_web.pdf