



PERMANENT MISSION OF THE REPUBLIC OF TURKEY  
TO THE UNITED NATIONS OFFICE IN GENEVA

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-URGENT-

The Permanent Mission of the Republic of Turkey to the United Nations Office at Geneva and other international organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human Rights and with reference to the joint urgent appeal letter by Ms. Elina Steinerte, Chair of the Working Group on Arbitrary Detention, Ms. Annalisa Ciampi, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Michel Forst, Special Rapporteur on the situation of human rights defenders and Mr. Diego Garcia Sayan, Special Rapporteur on the independence of judges and lawyers dated 4 July 2017 (Ref: UA TUR 7/2017) and to its Verbal Note dated 14 August 2017 (Reference no: 12716610), has the honour to enclose herewith an information note and its attachment, comprising the response of the Government of the Republic of Turkey.

The Permanent Mission of the Republic of Turkey avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 3 October 2017

Encl: As stated



Office of the High Commissioner for Human Rights  
Special Procedures Branch  
Geneva

## **OBSERVATIONS REGARDING THE JOINT URGENT APPEAL FROM SPECIAL PROCEDURES**

**(REFERENCE: UA TUR 7/2017)**

The Government would like to present its observations herein under in respect of the Joint Urgent Appeal of the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the independence of judges and lawyers dated 4 July 2017.

The Government is of the opinion that the allegations raised in the Joint Urgent Appeal should be better assessed by giving due consideration to the scope and the necessity of measures taken in Turkey with respect to severe and multiple terrorist threats that it continues to face pursuant to July 15 terrorist coup attempt. Therefore, the Government would like to briefly point out the general context under which the investigations conducted against the persons in question take place, prior to submitting the information on the points raised in the Communication.

### **A. GENERAL CONTEXT**

The Republic of Turkey, founding member of the United Nations and of the Council of Europe, having adhered to the protection and promotion of human rights, the rule of law and democracy, maintains its fight against terrorist organizations within the limits of the Constitution and laws, in line with the basic principles of a democratic state and universal law, in observance of its international obligations, deriving from the conventions that it is a party to. Utmost care is displayed on this matter.

The Government wishes to highlight that the claims regarding SoE measures in Turkey cannot be properly assessed without giving due consideration to the terrorism threat faced by Turkey in recent years emanating from terrorist organizations such as Fetullahist Terrorist Organization/Parallel State Structure (Hereinafter referred to as FETO/PDY), PKK, DAESH and DHKP-C. With a view to giving an insight into the grave threats posed to Turkey during July 15 terrorist coup attempt, as well as elaborating on the nature of terrorist organization FETO/PDY, who was behind the attempt, an Information Note is attached herewith.

It is unequivocal that ensuring terrorist coup plotters are brought to justice, holding them accountable and eliminating the existing threat of a coup is among the positive obligations of any state. To this end, taking the necessary steps to prevent future terrorist attacks is also a responsibility of the state.

#### **i) State of Emergency (“SoE”)**

In Turkey, two types of emergency rule procedures have been defined in the Constitution, characterized by the reason of their declaration. The emergency rule defined in Article 119 of the Constitution is based on a “natural disaster, dangerous epidemic diseases or a serious economic crisis”, whereas the emergency rule defined in Article 120 shall be declared “in the event of serious indications of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms, or

serious deterioration of public order because of acts of violence”. Moreover, how these powers shall be used are laid down in detail in the State of Emergency Law (no. 2935), adopted based on the powers conferred by the Constitution.

Also, in a number of international human rights instruments, states are allowed in time of war or other public emergency threatening the life of the nation, to take measures derogating from their obligations relating to fundamental rights and freedoms, consistent with international law. This circumstance has been laid down in Article 4 of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 15 of the European Convention on Human Rights (“ECHR”).

In this context, taking into account the extent of the threat posed to democratic constitutional order by July 15 terrorist coup attempt, the restrictions imposed on fundamental rights and freedoms are in line with the Constitution and international obligations.

Indeed, the Constitutional Court has ruled in the individual application *Aydin Yavuz and Others* (no. 2016/22169, 20 June 2017) and in another application for the annulment of SoE Decree-Laws on unconstitutionality (2016/177 E, 2016/160 K) that SoE was constitutional and legal, that actions were taken in conformity with the powers conferred in the Constitution and dismissed allegations of unconstitutionality. The said judgments have been published in the Official Gazette of Turkey and are also available at the website of the Court.

## **ii) Notices of derogation under Article 4 of the ICCPR and Article 15 of the ECHR**

Within the context of the SoE, declared in conformity with the Constitution and international law, Turkey has made notices of derogation under Article 4 of the ICCPR and Article 15 of the ECHR regarding obligations of protecting rights and freedoms emanating from these conventions.

The notice of derogation based on Article 4 of the ICCPR was submitted to the Secretariat-General of the United Nations on 2 August 2016 and renewed upon extensions of the SoE. The articles that would be subject to derogation were specified clearly in the notification. Therefore, there exists a notice of derogation duly put into effect, which is applicable in the present case.

To shed light on the issue and provide a comparative view, the case law of the European Court of Human Rights (“ECtHR”) and practices should be noted as regards the implementation of Article 15 of the ECHR. For example, according to ECtHR, in an emergency, an extended interference with freedom of expression as compared to normal periods for the protection of public order might be “necessary in a democratic society” (*Brind v. United Kingdom*, no. 18714/91). A similar conclusion can be made when a need arises to secretly monitor terror suspects, certain restrictions may be brought on the right to private life (*Klass and others v. Germany*, Series A, no. 28). More importantly, the Court acknowledged that following a notice of derogation by the UK Government with respect to IRA activities in Northern Ireland, normal legislation offered insufficient resources for the campaign against the massive wave of violence and intimidation by the IRA and that recourse to measures outside the scope of the ordinary law proved necessary. In this context, the ECtHR did *not* find it established that derogations from paragraphs 1 to 4 of Article 5 (extrajudicial deprivation of liberty in breach of Art. 5 § 1 and deprivation of liberty in breach of Art. 5 § 4) exceeded the extent strictly required by the exigencies of the situation, for coping with the

public emergency (*Ireland v. the United Kingdom*, no. 5310/71, 18 January 1978). How the administration shall act in such circumstances are laid down clearly in Article 15 of the Constitution, similar to Article 4 of the ICCPR and Article 15 of the ECHR. In accordance with these provisions, the principles of “absolute necessity” and “proportionality” are diligently followed in the measures taken during the post-coup State of Emergency.

## **B. STEPS TAKEN ON ALIGNING SoE MEASURES WITH TURKEY’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS, THE PROTECTION OF PERSONS FROM THE IMPACT OF STATE OF EMERGENCY AND REVIEWING MECHANISMS FOR THE SoE MEASURES.**

In Turkey, the measures taken during the SoE have not caused any major changes in daily life. No restrictions are imposed on fundamental rights and freedoms which would affect the daily lives of people. The measures taken have remained limited to the issues required by the SoE. SoE was not declared to restrict the rights and freedoms of individuals but to ensure a prompt and effective response by the State in the fight against FETO/PDY and other terrorist organizations whose acts pose existential threats and affect the exercise of fundamental rights of the citizens. It is a natural right by the State to use its legal powers to protect democracy and to take necessary measures to maintain the safe environment for the exercise of fundamental rights and the freedoms.

Following July 15 coup attempt, Decree-Laws were issued in order to promptly initiate necessary proceedings for the persons in public institutions who have a membership, affiliation or connection to FETO/PDY and other terrorist organizations. During this process, legal principles are followed and each case is assessed with utmost care.

There are mechanisms in place to review the measures for those who claim violations of their rights. Through the administrative boards of review, more than 35 thousand public employees have been reinstated to date. Nearly 350 institutions have also been reopened. Moreover, an Inquiry Commission on the State of Emergency Measures has been established as an effective domestic legal remedy. This Commission is entitled to take binding decisions with due process. Its decisions are also open to judicial control.

SoE measures are regularly monitored in line with changing conditions. Issues raised within the context of the Experts Dialogue established between Turkey and the Council of Europe (CoE) and recommendations by UN mechanisms and other CoE organs, especially the Venice Commission, the European Committee for the Prevention of Torture (CPT) are considered. In that regard, a number of improvements have been made in terms of SoE measures.

Accordingly, the upper limit of 30 days for police custody in terror and collective crimes, which had not been actually implemented, was limited to 7 days in conformity with the case-law of the ECtHR, ensuring compliance with the judgments of *Aksoy v. Turkey*, *Lawless v. the United Kingdom* and *Demirel* group of cases by the Court. Custody period may be prolonged only once for utmost 7 days. It is worth noting that, for the remaining types of offenses and for the said offenses after the end of the SoE, the maximum period of detention in police custody shall be one day under general provisions, which can be extended to four days in compelling cases.

In addition, the provision which enabled the public prosecutor to restrict the suspect’s right to meet a defense lawyer for five days during a SoE, is now repealed. On this matter, the general

investigation provisions laid down in Article 154 § 2 of the Code of Criminal Procedure (“CCP”) apply. Accordingly, a suspect’s right to meet a defense lawyer may be restricted for 24 hours at the request of the public prosecutor, during which period no statement shall be taken. It should be underlined that, the mentioned provision has been brought in line with the judgments of *Ibrahim v. the UK*, *Simeonovi v. Bulgaria* and *Salduz v. Turkey* group of cases by the ECtHR.

With reviewing mechanisms of SoE measures, whether its administral or judicial, public authorities made considerable changes in the measures they took following the declaration of the SoE. Many detainees were released by court decisions within this framework; numerous parts of measures were amended such as dismissals from offices or public service as well as discharges regarding some students and closures regarding institutions.

Moreover, in addition to already existing national remedies, be they judicial or administrative, an Inquiry Commission on the SoE Measures (“the Commission”) was established as an effective domestic legal remedy pursuant to Decree-Law no. 685.

The Commission has been established in order to carry out an assessment of and render a decision on applications related to certain measures directly conducted by virtue of the Decree-Laws on account of having membership, affiliation or connection with terrorist organizations. The Commission has the authority to conduct an examination as to the measures concerning the dismissal or discharge from public service, profession or organization in which the persons held office, the dismissal from studentship, the closure of institutions and organizations and the revocation of the ranks of retired personnel.

Moreover, decisions of he Commission may be appealed. Applicants having legal interest shall be entitled to file bring an action against the decisions of the Commission with the administrative courts of Ankara which will be determined by the Council of Judges and Prosecutors (“CJP”).

The fact that a judicial remedy has been introduced against the decisions of the Commission is to provide the persons dismissed or discharged from public service, profession or organization in which they held office or closed institutions and organisations with the opportunity to raise their requests before the independent judiciary. Besides, individual applications can be lodged with the Constitutional Court.

The members of the Commission were appointed on 16 May 2017, the Commission commenced functioning on 22 May 2017. The Commission started to receive applications beginning from 17 July 2017. As regards the related provisions of Decree-Law No. 685, applications could be lodged within 60 days as of 17 July when the Commission began to receive applications, through the Governors’ Office or through the institution in which the related persons lastly held office. Within the scope of the Decree-Laws issued after 17 July 2017, the applications may be lodged within 60 days as of the date of publication of the relevant Decree-Law.

In compliance with the said Decree-Law, the Commission is composed of seven members, including judges and prosecutors, and the Commission shall take its decisions by majority of votes. The Commission is authorized to ask all information and documents needed from all institutions and organizations.

In *Köksal v. Turkey* decision dated 12 June 2017, the European Court of Human Rights ruled that any complainant must apply to the Inquiry Commission first in order to exhaust domestic remedies. This clearly recognizes the Inquiry Commission as a legal remedy for the measures taken directly as a part of the Decree-Laws.

In fact, following the decision “*Köksal v. Turkey*”, the majority of cases brought to the Court in this context have been started to be struck out of its list as inadmissible, resulting in a great decline in the number of cases against Turkey.

These revisions demonstrate the determination of Turkish Government to follow the principles of necessity and proportionality in SoE measures.

Furthermore, it was stated in the Decree-Law No. 685 that the members of the judiciary who were decided to be dismissed from Office and the ones who are considered to be of this profession could file to Council of State in sixty days from the finalization of the decision (see Murat Hikmet Çakmakcı, B. No: 2016/35094, 15/02/2017, §§ 27-28; Hacı Osman Kaya, B. No: 2016/41934, 16/02/2017, §§ 28-29).

Turkey is determined to resolve its problems pursuant to the principles democracy and the rule of law. The right to legal remedies and the right to access to court are fundamental rights and freedoms guaranteed both in the Turkish Constitution and in the human rights conventions to Turkey is a party. In this regard, everyone has the right to legal remedies in Turkey and can resort to administrative and judicial mechanisms against all the processes and actions that bear legal consequences about the rights of individuals and organizations. The measures introduced after July 15 terrorist coup attempt are proportional to the current situation and as stated above, there are mechanisms in place to review measures.

### **C. MEASURES TAKEN FOR HUMAN RIGHTS DEFENDERS TO PERFORM THEIR ACTIVITIES IN A SAFE ENVIRONMENT FREE FROM FEAR, THREATS AND HARASSMENT**

As a founding member of the United Nations and the Council of Europe, Turkey has adopted human rights and the rule of law as one of the basic tenets of the Republic of Turkey and upholds universal principles, values and norms required to be a state of law. Turkey has a legal system which considers the European Convention on Human Rights and the case-law of the European Court of Human Rights as a guide.

Furthermore, Article 90 of Turkish Constitution assures that, international agreements duly put into effect have the force of law and no objection of unconstitutionality shall be raised with regard to these agreements. Moreover, in the case of a conflict between international agreements *on fundamental rights and freedoms* and the laws, due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

In addition, the Constitutional Court also stated in its judgment dated 7 February 2008, that the ECHR has become a part of the domestic law within the framework of Article 90 of our Constitution and the provisions of the Convention have a superior legal value and the judgments of the ECtHR are binding.

Therefore, the ECHR and the ECtHR case-law have been acknowledged as one of the sources of the Turkish legal system, which gained a dynamic structure with the international human rights norms constantly changing and evolving.

Turkey, as a democratic state governed by the rule of law, has put fundamental rights and freedoms under Constitutional protection in accordance with international conventions with the understanding of democratic pluralism. In this regard; all individuals have the equal right to use their fundamental rights and freedoms in accordance with international conventions and national legislation before the law.

Article 10 of the Constitution which regulates the principle of equality before the law is as follows:

*" Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*

*(Additional paragraph: 7/5/2004-5170/1) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Additional sentence: 12/9/2010-5982/1) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality.*

*(Additional paragraph: 12/9/2010-5982/1) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality.*

*No privilege shall be granted to any individual, family, group or class.*

*State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."*

It is a constitutional obligation of the State to protect everyone's freedom of expression without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect and any such grounds.

Moreover, the conditions under which these basic rights and freedoms can be restricted and the scope of restriction is regulated and defined by the Constitution. Article 13 of the Constitution is as follows:

*"II. Restriction of fundamental rights and freedoms*

*Article 13- (Amended: 3/10/2001-4709/2)*

*Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality. "*

The international conventions lay down the rights and the conditions to restrict them. National security, public safety and public order are among the main reasons for restriction both in the OHCHR and the ECHR.

Freedom of expression is also laid down in Article 26 of the Constitution and Article 19 of OHCHR and Article 10 of the ECHR. In accordance with the requirements of the democratic

society order, this right can be restricted by reasons such as national security, public security, public order in accordance with international contracts and legislation.

Republic of Turkey provides an environment that is safe and respectful to fundamental rights and freedoms, not only for the human rights activists but anybody. In this respect, particular arrangements which were made with the Law of Associations no. 5253 dated 04/11/2004 and the Law on Human Rights and Equality Institution of Turkey no. 6701 dated 6/4/2016 provide assistance to those who are active in this field.

Therefore, everyone is under the guarantee of the State in terms of protection of rights and freedoms in accordance with the requirements of democratic society. All kinds of fear, threats and harassment claims are investigated rigorously by the competent judicial authorities within the framework of the principles of the rule of law.

However, as in all modern democratic societies, there is no freedom of committing offense in Turkey. Offenses are investigated by independent and impartial Public Prosecutors and the criminal offenses are tried by independent and impartial courts. No person or group is ever subjected to investigation and prosecution because of their professional activities. However, in criminal law, in the event that investigation or judicial proceedings are conducted against persons about whom there is reasonable suspicion that they have committed offenses, profession or group identity does not grant any privilege or immunity to anybody, except certain procedural rules applied in these matters.

In this vein, Turkish Government attaches utmost importance to the maintenance of vibrant and pluralistic nature of Turkish civil society, as well as to the work of human rights defenders. Comprehensive reform process over the last fifteen years has greatly contributed to the enabling environment for the civil society.

Turkey's determination to this end has not changed, despite the fact that it is faced with serious terrorism threats that call for vigilant security measures. Proceedings against members of certain human rights organizations are not related with their professional activities within these organizations but are conducted in connection with criminal charges against the persons in question due to their links with terrorism.

#### **D. INDEPENDENCE OF LEGAL PROFESSION AND FREE PRACTICE OF ATTORNEYSHIP AT INDIVIDUAL AND CORPORATE LEVEL IN TURKEY:**

In Chapter titled "Provisions on the protection of rights" of the Constitution of the Republic of Turkey, the regulation within the scope of the right to a fair trial as a freedom to claim right is as follows:

*"A. Freedom to claim rights:*

*ARTICLE 36- (As amended on 03/10/2001; Art. 4709/14) Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."*

The right of defence, within the scope of the right to fair trial regulated in Article 14 of the ICCPR and Article 6 of the ECHR is one of the most fundamental human rights. The lawyers taking one of the most crucial tasks within the scope of the right of defence are fundamental and inseparable elements of judicial processes.



In this respect, by virtue of its importance and its characteristics of public service, the attorneyship in the national legislation is independently regulated through the Attorneyship Law No. 1136. Through the Attorneyship Law, many aspects of the attorneyship, such as the nature and aim of attorneyship, acceptance conditions to the profession, the tasks to be carried out by lawyers, law internship, rights and obligations of lawyers, bar associations and the Turkish Union of Bar Associations, disciplinary procedures concerning lawyers, lawyers' relations with their clients are laid down.

In Article 1 of the Attorneyship Law, it is stipulated that attorneyship is a self-employment with the characteristics of public service, and the lawyer freely represents independent defence which is one of the founding elements of the jurisdiction. In this respect, lawyers serve to resolve any judicial issues and disputes in accordance with justice and equity and to contribute to the complete execution of rules of law.

In Article 2 of the Attorneyship Law, the aim of attorneyship is defined as ensuring the regulation of judicial relations, resolution of any judicial issues and disputes in accordance with justice and equity, and complete execution of judicial issues before all kinds of judicial bodies, arbitrators, official and private persons, institutions and organizations. Lawyers allocate their judicial knowledge and experiences to justice service and for the benefit of people. In the Article, it is also regulated that judicial bodies, security authorities, other public institutions and organizations, state economic enterprises, private and public banks, notaries, insurance companies and foundations must help lawyers to fulfill their duties. Without prejudice to the special provisions in the Law, these institutions are obliged to present information and documents that the lawyers may need to examine.

Article 6 of Turkish Penal Code No. 5237, when clarifying those who practise the duties of judiciary, lawyers have been counted, in addition to the members and judges of supreme courts, judicial, administrative and military courts and public prosecutors.

In the practice of this important public service as required, important tasks have been assigned to bar associations and to the Turkish Union of Bar Associations, which are professional organizations of lawyers. In this respect, bar associations are public professional organizations which carry out their works according to democratic principles in order to improve attorneyship profession, ensure honesty and trust in the relations of the members of this profession with each other and clients, defend and maintain professional order, ethics, dignity, rule of law and human rights and meet common needs of lawyers. The Turkish Union of Bar Associations is a public professional organization, which has legal entity and is composed of all bar associations.

There is no legislation provisions which prevent lawyers from freely carrying out their professions, except for certain circumstances, where the measure of prohibition of advocacy duty is applied as stipulated in CCP.

In this regard, it is evident that practice of the attorneyship profession has been regulated in a detailed manner as one of the most crucial elements of right of defence and all necessary measures have been taken for the appropriate execution of this profession.

However, it should not be forgotten that no profession is granted privileges to commit crimes. For example, no professional has the freedom to commit a crime as seen in the case dated 17

May 2006, when a lawyer attacked the Turkish Council of State, resulting in the death of a member of the Council of State and the injury of other persons. In Article 10 of the Constitution, it is laid down that everyone is equal before the law. As a manifestation of this Article, in Article 3 of the Turkish Penal Code, it is also stipulated that discrimination on grounds of race, language, religion, religious sect, nationality, colour, sex, political or other opinion or philosophical beliefs, national or social origin, economic and other social positions is prohibited, and no one can be granted any privilege.

However, it is only natural that certain different provisions were adopted for some professions in the procedural provisions applied during the investigation and prosecution of crimes committed by the practitioners of these professions due to their importance in society. For example, in Article 130 of the Code of Criminal Procedure, special regulations were adopted for the searches and seizures in the lawyer offices. There is also a similar provision in Article 58 of the Attorneyship Law.

With Decree-Laws issued within the period of the SoE; in the context of effectively fighting against the FETO/PDY and other terrorist organizations threatening national security, it has been assessed that the great security risks that the State is facing should be dealt with without delay. In this context, within the scope of the investigations performed under the Decree-Law No. 667 on Measures Taken under the SoE, the defence lawyer selected under Article 149 of the CCP no. 5271 or assigned under Article 150 thereof may be banned from assuming his/her duty if an investigation or a prosecution is being carried out in respect of him/her due to the offenses enumerated under Fourth, Fifth, Sixth and Seventh Sections of Fourth Chapter of Second Volume of the Turkish Penal Code no. 5237, the offenses falling under the Anti-Terror Law no. 3713 and the collective offenses. The decision on banning shall be rendered by the Criminal Magistrates' Office upon the public prosecutor's request without any delay and be immediately served on the suspect and on the relevant Bar Presidency with a view to assigning a new defence lawyer. The measure was taken within the SoE in order to fight terrorism under the positive obligation of the state.

## **E. CIRCUMSTANCES OF THE PRESENT CASE**

### **1. Factual and Legal Basis for the Arrest and Detention of Taner Kılıç**

It was established by the analysis of technical data that Taner Kılıç downloaded on 27 August 2014 the "ByLock" application which the FETÖ / PDY armed terrorist organization used for secret code communication to the phone with "353..." IMEI number and "90 532 ..." GSM line that he clearly accepted that belonged to himself. In addition, Kılıç's other financial and social links to the FETÖ/PDY have been reached during the investigation.

In this context, an investigation was launched by the İzmir Chief Public Prosecutor's Office in respect of Taner Kılıç, concerns the offense of Kılıç's "membership of a terrorist organization" (Article 314/2 of the Turkish Penal Code No. 5237, as per Article 7/1 of the Anti-Terror Law No. 3713).

By the decision of 3<sup>rd</sup> Criminal Magistrates' Office of İzmir dated 5 June 2017, examining the content of the investigation file and taking copies from file were restricted except for documents which the suspect personally involved when they were drawn up, in accordance with Article 153/3 of the CCP. However, as observed from the investigation file, no request of

access to the file and no objection to the decision of restriction was made by Taner Kılıç or his lawyer.

3rd Criminal Magistrates' Office of İzmir issued a search warrant on 5 June 2017 for Taner Kılıç's home and law office to be conducted in the presence of a bar representative. Based on the search warrant, Kılıç's home and law office was searched.

In accordance with the search procedure, the minutes of the searches were drawn up. Upon the request of İzmir Chief Public Prosecutor's Office dated 5th June 2017 and with reference to the decision of the Criminal Magistrates' Office of İzmir, Kılıç was taken into custody on 6 June 2017. The relatives of Taner Kılıç were informed of the custody and he was served information minutes and the form on the rights of the suspect/defendant.

Taner Kılıç gave a statement in the presence of his lawyers in İzmir Police Headquarters on 7 June 2017. During custody, Kılıç was informed of the charges and his rights in accordance with the current legislation. Taner Kılıç did not accept the accusations in his statement. No objections were raised by Kılıç to the custody procedure and the search made. Necessary judicial reports were drawn up at the entry and exit of Kılıç to the custody process. In these reports, it was stated that there were no signs of assault and use of force against him.

On 9 June 2017, Taner Kılıç was released from custody and the same day, he gave statement to the Public Prosecutor in the presence of his lawyers. During the statement, the offense attributed to Kılıç has been explained and it was reminded that he has the right to choose a lawyer, he may get benefit from his legal assistance, the lawyer may be present during the statement and he may collect concrete evidences to be able to get rid of the suspicion. In this statement, Kılıç did not accept the accusations, claiming that he was not in contact with the FETÖ / PDY terrorist organization.

On 9 June 2017, Taner Kılıç was sent to the Criminal Magistrates' Office on duty with the demand of detention. On the same day, he was questioned in the presence of his lawyers. During the interrogation he was informed of the crime attributed to the himself and reminded that he had the right to choose a lawyer, he might seek his legal assistance and that the lawyer could be present at the time of statement taking and that he could demand collection of concrete evidences to get rid of the suspicion. He was detained on remand on 10 June 2017 on charges of membership to the FETÖ / PDY armed terrorist organization by the 3rd Criminal Magistrates' Office of İzmir.

In the detention on remand decision, along with other evidence, qualification and nature of the offense of membership to the terrorist organization, the status of existing evidence, as well as a report indicating the fact that the suspect downloaded and used the program named "ByLock", which was downloaded and used by the members of the FETÖ / PDY armed terrorist organization were taken into consideration. The decision also included a reasoning referring to the existence of a strong suspicion that Kılıç committed the attributed offense, the contents of the file, the fact that all evidence had not yet been collected, the existence of a reason for the arrest mentioned in the law that due to the criminal charge's availability in the catalogue crimes under CCP 100/3-a and therefore the existence of the possibility of escape when taking into account the amount of penalty for the crime. Taking these all into consideration, the detention on remand decision included the reasoning that the detention was proportional and the aimed judicial target could not have been attained through solely applying judicial control measures.

The lawyer of Taner Kılıç objected to the arrest decision. On June 19, 2013, the 3rd Criminal Magistrates' Office of İzmir ruled that there was no need for amendment of its decision and sent the file to the 4th Criminal Magistrates' Office of İzmir for further examination of the objection. On 23 June 2017, the 4th Criminal Magistrates' Office of İzmir refused Taner Kılıç's appeal and decided the continuation of the detention of Kılıç.

On 5th July 2017, the investigation file was sent to 1st Criminal Magistrates' Office of İzmir for revising Taner Kılıç's detention according to Article 108/1 of the CCP. Meanwhile continuation of detention was requested. On 6 July 2017, the 1st Criminal Magistrates' Office of İzmir decided the continuation of the detention of Taner Kılıç.

The lawyers of Taner Kılıç objected to this decision again on 24<sup>th</sup> July 2017.

Meanwhile, the necessary evidence was gathered regarding the investigation file (HTS-Historical Traffic Search logs, inquiry on financial situation)

On 9 August 2017, an indictment was drawn up regarding Taner Kılıç with the suspicion of being a member of armed terrorist organization. Upon the approval of the indictment, it was decided that the trial would take place on 26th October 2017 at 16th Assize Court of İzmir. It is asserted in the indictment that "Taner Kılıç was a user of the ByLock, the encrypted organizational communication tool of FETO/PDY, and that ByLock was downloaded to the mobile phone belonging to Kılıç with IMEI number "353..." and GSM number "0 532 ..." on 27th August 2014, and it was established that he communicated with other members of FETO/PDY through this phone and that he admitted having used this phone for twenty years. It was also indicated in the indictment that "other evidences are also available including those in connection with the financial expert reports and that the analysis of the contents of Kılıç's ByLock conversations have not been completed yet".

## **2. Information on the ByLock Application**

In this scope, it will be convenient to submit information about the "ByLock" application and the intensive use of this application as a communication tool by the members of the terrorist organization. Accordingly, verdicts, ruled by the national courts such as the Court of Cassation and the Constitutional Court, should be taken into account. These findings and assessments could be summarized as follows:

- ByLock is an application exclusively designed for the FETÖ/PDY terrorist organization under the disguise of a global smart phone application.
- ByLock application was assessed through technical works such as reverse engineering, analysis of encryption, analysis of network behaviour and the codes of the servers connected.
- It was observed that ByLock application had a design encrypting each message sent with a different encryption in order to ensure the communication with a strong encryption system via Internet connection.

- ByLock is a program having more than two hundred thousand users and created to communicate through the Internet. The application has Turkish expressions among its source codes. A great majority of user names, group names, broken ciphers and almost all analysed contents of the application are in Turkish. However, ByLock was known by neither Turkish public nor foreign people before July 15 terrorist coup attempt in Turkey.
- It was determined that, payments regarding works and proceedings of the application that was put into use by hiring a server in another country (such as hiring servers and IP) were made through anonymous methods. Furthermore, there is no any reference regarding the previous works of the person who developed the application and put it into use. No attempts were made for the promotion and publicity of the application. Consequently, the application has no corporate and commercial nature.
- The application could only be used if the users download it to their phones manually. In order for the application to be used after it is downloaded on smart phones, user name/code and password and a dedicated cipher should be designated and these information should be forwarded to the application server through cryptos. The aim is to protect user information and communication confidentiality.
- Private information (phone number, identity number, e-mail address) is not demanded during the formation of user account regarding "ByLock". There is no any procedure to verify the user account (SMS cipher verification, e-mail verification, etc) as in other similar global and commercial applications. These are measures taken to make the identification of users difficult.
- The registration procedure is not sufficient to communicate with the users registered in the system. Both sides should add user names/codes acquired face-to-face or through an intermediary (delivery person, present "ByLock" user etc) so that the users could communicate one another. Messaging could be initiated after both sides add each other. Accordingly, the application has been designed so that communication could be made solely in accordance with the cell type that was formed.
- It is possible to send written texts, e-mails and make file transfer through the application. In this way, it has been enabled that the users make their organisational communications without using another communication tool. It has also been made possible that the users make all their communication through "ByLock" server, and the groups and content of communications are kept under the control of the application manager.
- Communication through "ByLock" is automatically deleted from the device within a certain time without the need to delete them manually. Even if the users forget to delete the data, they are deleted for the confidentiality of communication. Therefore, if the device is seized as a result of a potential judicial proceedings, access is denied to the other users in the list of users as well as to historical data regarding the communication through the application.
- Server and communication data regarding the application are maintained in the data basis of the application as cryptos. These are additional safety measures taken to prevent the identification of users and protect the communication confidentiality.

- ByLock users also took some measures to conceal themselves. Users, communicated through code names that are given within the organisation instead of revealing real information about people in the content of communication and friend lists.
- The deciphered content of the communication made through "ByLock" is all about the organisational contacts and activities of FETO/PDY factors. It has been considered that organisational messages had been disseminated with the aim of “changing the meeting addresses, informing the police operations to be made beforehand, accommodating the organisation members at certain places in Turkey, arranging the escape of FETO/PDY members’ from Turkey, providing money to suspended or dismissed organisation members, sharing the instructions and opinions of Fethullah Gülen, sharing certain internet addresses that contain black propaganda against Turkey and supporting the questionnaires on these sites, supporting the release of the suspects and the accused in the investigations and prosecutions against FETO/PDY, providing defense counsels for organisation members, sharing the information regarding the organisation members against whom operations were conducted and identified organisation members, clearing beforehand the digital proofs in houses or places where the FETO/PDY members could be arrested in case police operations are conducted, keeping lists and records of people expressing opinions against FETO/PDY in public institutions, dissemination of pre-notifications that “ByLock” will be terminated and alternative programs will be used (Eagle, Dingdong, Tango etc) incase of decoding, preparing legal texts so that organisation members could use during their defence”.
- The names of groups using the application are in accordance with the specific literature of the organisation and the cell type hierarchical structure (Bölge Bayan, Etütçüler, Ev abileri, İmamlarım, Okulcular, 8 abiler, 8 birimciler, 8 büyük bölge, Bölgeciler, II Mezuncular, Talebeciler, Üniversiteciler, Zaman Gönüllüler, Mesul, Mesuller, İzdivaç).
- Some suspects whose statements were taken after the coup attempt of July 15 confessed that ByLock had been used by FETO/PDY members since the beginning of 2014 as the organisational communication tool.
- The 16<sup>th</sup> Criminal Chamber of the Court of Cassation ruled that *when it is proven without any doubt with relevant technical data that ByLock was downloaded in accordance with the instruction of the FETÖ/PDY and used for intra-organizational communication, the existence of the application in a device will be considered as a proof of connection with the terrorist FETÖ/PDY*. This judgment was recently upheld by the Plenary Court of Cassation.
- In the judgment of Yavuz a.o., it has been established that the applicants Burhan Güneş and Aydın Yavuz are the users of ByLock application enabling communication among the members of FETO/PDY (see §§ 98, 103). When the findings and evaluations (see. p. 106) made by the investigation and prosecution authorities regarding this application are considered, it is possible that the usage and download of this application by any people to their electronic/mobile devices should be evaluated by the investigation authorities as a proof of link to FETO/PDY. The validity of this presumption might change from case to case depending on whether the application

was actually used by the relevant person, the way that it was used, frequency of usage, with whom the communication was made and their position and significance within FETO/PDY and content of communication. In investigations conducted regarding the coup attempt of FETO/PDY, the consideration by the investigation authorities or the courts that the usage or download of ByLock as a “strong indication” that the suspected crime was committed *could not be evaluated as an ungrounded and arbitrary attitude given the nature of the ByLock application.*

- Furthermore, the Turkish Constitutional Court made the following evaluation in its Selçuk Özdemir (B. No: 2016/49158, 26 July 2017) decision:

*“ The Constitutional Court stated in its decision Aydın Yavuz and Others that the use or download of "ByLock" to their electronic/mobile devices could be evaluated by the investigation authorities as an indicator of a link to FETO/PDY (Aydın Yavuz ve Diğerleri, p. 267) when it was taken into consideration that “the application does not have a corporate and commercial nature, the deciphered content of the communication made via the application is regarding the organisational contacts and activities of FETO/PDY factors, internet broadcasting regarding the application is usually made by using fake accounts and sharings are made in favour of FETO/PDY, the application having a large user group was not known by others before July 15 coup attempt, it has an extraordinary functioning and ciphering system to prevent the users from being identified, it could only be used with the approval of another user, it is convenient for cell type organisation from this aspect, and its communication content is erased automatically after a while” (Aydın Yavuz and Others, § 106). The consideration by the investigation authorities or the courts who took the decision of arrest that the usage or download of ByLock constitute a “strong indication” that the suspected crime was committed by the applicant who was charged with being a member of FETO/PDY could not be evaluated as an ungrounded and arbitrary attitude given the nature of the ByLock application.”*

- Therefore, in the light of evaluations and decisions of Turkish Supreme Courts, being a user of “ByLock” is considered as a strong and concrete suspicion in determining the membership of terrorist organisation.
- In the present event, Criminal Magistrates’ Office of İzmir evaluated Taner Kılıç’s being a ByLock user as a strong suspicion in determining his membership of the terrorist organisation.
- Within the scope of the above explanations, the Government is of the opinion that the arrest and detention of Taner Kılıç do not constitute a violation of ICCPR.

### **3. Domestic Remedies Available and Non-exhaustion of the Remedies in the Present Case**

#### **a. Reviewing Mechanisms in Articles 91 and 104 of the CCP**

There has been no record of an objection to the arrest and taking into custody orders. However, the fifth paragraph of Article 91 of the Code of Criminal Procedure No. 5271 is as follows;

*"... (5) Against the written order of the public prosecutor for detention and prolongation of detention, the arrested person, the defender or his legal representative, the spouse or blood relatives on the first or second occasion may apply to the Criminal Magistrate to ensure immediate release. The Criminal Magistrate concludes the examination on the basis of the documents immediately and not later than twenty four hours. If it is deemed that the arrest or detention or the extension of the period of detention is legitimate, the application shall be rejected or it shall be decided that the arrested person shall be present at the public prosecutor's office with the immediate investigation document.... "*

Furthermore, within the scope of Article 104 of the CCP, the suspect, defendant and defenders have the right to appeal the decision of detention at every stage of further investigation and prosecution.

The relevant article of CCP is as follows:

*"Release requests of the suspect and defendant*

*Article 104 - (1) At any stage of the investigation and prosecution stages, the suspect or defendant may request his/her release.*

*(2) The judge or the court decides whether the suspect or the defendant shall continue to be detained or shall be released. The refusal decision may be objected."*

In this respect, the detention of Taner Kılıç was objected by his lawyer and the objections have been evaluated by the Criminal Magistrates' Office.

#### **b. Compensation Claim under 141. and Following Articles of the CCP**

Complaints regarding claims of arbitrary detention and arrest of Taner Kılıç can be evaluated by first instance courts in domestic law.

The relevant provisions of Article 141 of the CCP, entitled "Claims for compensation", are as follows:

*"Article 141 - (1) During the investigation or prosecution of the crime, those;*

*a) Who are arrested, detained or decided to continue detention except the conditions specified in the Act*

*b) Who have not been brought before a judge within the statutory period of detention,*

*c) Who have been arrested without being reminded of their legal rights or without being fulfilled the request to benefit from their reminded rights,*

*d) Who have been detained in accordance with law but have not been judged and brought before the trial authority within a reasonable period of time,*

*e) Who have been decided that there is no room for prosecution or acquitted after they have been apprehended or arrested in accordance with the law,*

*g) Who have not been informed in written or spoken, if the written is not possible at once, about the reasons for arrest or detention and the charges against them,*

*h) Whose relatives have not been notified about their arrest or detention*

*i) Who have been detained in a disproportionate manner,*

*j) Whose property or other property values have been confiscated in the absence of circumstances or the necessary precautions have not been taken to protect them or whose property or other property values are misused or not returned on time,*



k) *(Supplementary Item: Art. No. 11/4/2013-6459/17) Who have not benefited from the application possibilities provided in the Law against arrest or detention, May seek any material and spiritual damages from the State.*

On the other hand, there is no record of a compensation claim filed by Taner Kılıç before national courts in accordance with Article 141 of the CCP and the subsequent Articles.

Whereas, on the judgement of the ECtHR on 13 September 2016, regarding the application no. 58271/10; *S. v. Turkey* t. although the actual case on which the applicant was tried had not been finalized, the Court accepted the Government's inadmissibility objection based on the argument that the applicant who complained of long detention period should first file a compensation claim in accordance with Article 141 of the CCP. Indeed, the Court of Cassation in its two decisions of June 16, 2015 (E.2014/21585-K.2015/10868, E. 2014/6167-K.2015/10867) has ruled pursuant to the provision of CCP 141/1.d. that there is no need for the finalization of the original case so that a compensation claim can be filed.

### **c. Individual Application to the Constitutional Court**

The requirement of exhaustion of domestic remedies is generally a recognized rule in international law, as laid down in Article 41 § 1-c of the ICCPR and Article 35 of the ECHR. The obligation to exhaust domestic remedies is part of international customary law, as it is accepted in the case-law of the International Court of Justice (see *Interhandel* case (United States of America / Switzerland) dated 21 March 1959). This rule also appear in other international human rights conventions such as the Optional Protocol to the ICCPR (Articles 2 and 5/2-b), the American Convention on Human Rights (Article 46) and the African Charter of Human and Peoples' Rights (Articles 50 and 56/5).

International protection mechanisms generally provide a subsidiary protection. In this respect, it is essential that the rights and freedoms firstly be protected at the national level, and not resorting to international mechanisms without resorting to the national level of appeals is one of the fundamental principles of human rights law. In this respect, there are domestic remedies that Taner Kılıç should have exhausted first.

Within the framework of the subsidiarity principle, which is the basic principle of the ICCPR and the ECHR, the individual application procedure to the Constitutional Court ("CC"), which is an innovation that can be considered as a milestone in terms of the protection and development of human rights in Turkey started to be implemented as of 24 September 2012 with the enactment of the Constitutional amendment and the Law on the Establishment and Judgement Procedures of the Constitutional Court No. 6216

According to provisions of Law No. 6216, the Constitutional Court receive applications for the allegations that any of the fundamental rights and freedoms guaranteed by the Constitution within the framework of the European Convention on Human Rights and additional protocols to which Turkey is a party is violated by the public authorities.

The ECHR also noted in its many recent resolutions that the individual application to the Constitutional Court is an effective way of domestic law that must be exhausted before its examination in respect of applicants who claim that their fundamental rights and freedoms are violated in the legal process after July 15 coup attempt. (See *Mercan v. Turkey*, No.

56511/2016, November 8, 2016, Bidik v. Turkey, No. 45222/15, November 22, 2016, Zihni v. Turkey, No. 59061/2016, November 29, 2016).

However, Taner Kılıç did not lodge an individual application with the Constitutional Court as of 7 August 2017 regarding all allegations and complaints, including allegations of unjust arrest and detention.

It should be noted that the complaints and claims communicated to the special procedures were forwarded directly without being submitted at the national level.

Taner Kılıç has not filed a compensation action under Article 141 and subsequent articles of CCP relating to the lawfulness of detention and imprisonment, and also the conditions of detention.

#### **4. Proportionality of the SoE Measures and Their Conformity with International Law**

Taner Kılıç had been under custody for four (4) days between 6-9 June 2017. Accordingly, a shorter custody period was executed by taking specific conditions into consideration although the custody period was designated as 7 days with the relevant Decree-Law. Nevertheless, there is not a record indicating that Taner Kılıç lodged an appeal, despite the fact that he had the right to appeal before the judge against the custody. Considering the fact that there is a large number of people from FETO/PDY terrorist organisation against whom investigations have been conducted, many people were taken under custody within the same investigation, the scope of investigation, seriousness and complex natures of the offenses charged, it is assessed that the period of custody is proportional and in accordance with international conventions.

Taner Kılıç was informed on the charges against him. He gave his statement while accompanied by his lawyer. In this context, all decisions of arrest, custody and detention on remand regarding Kılıç were given with reasoning by independent judges. These decisions are not arbitrary and do not contain any explicit failures of assessment. Taner Kılıç had the right to appeal against these decisions. Furthermore, Kılıç had efficient domestic remedies to claim the compensation of losses he incurred. Considering the seriousness of danger and judicial guarantees provided, the temporary injunctions given regarding Kılıç are in accordance with international liabilities and not contrary to the principle of proportionality.

In Articles 9, 10 and 14 of ICCPR, the right of freedom and security, rights of the detainees and right to fair trial were guaranteed and the scope of these rights was determined. On the other hand, pursuant to the decision of the ECtHR, there should be a reasonable suspicion or *raisons plausibles* indicating that the relevant person committed the charged offense so that this person could be deprived of his freedom, this requirement is an essential condition for the detention. This condition should prevail in every stage during the detention period and the person should be released as soon as the reasonable suspicion is removed. When the existence of reasonable suspicion, the evidence obtained and specific conditions of the concrete event are considered, it should be sufficient enough to persuade an entirely objective observer.

The ECtHR states that the initial existence of reasonable suspicion is enough to deprive someone of his freedom under Article 5/1 of ECHR and the existence of reasonable suspicion should be maintained so that his detention could continue. However, the existence of reasonable suspicion is not sufficient for the continuation of detention for a longer period.

There should be a requirement of public interest which will legitimize the deprivation of liberty.

As is stated above, the accusations against Taner Kılıç are based on concrete evidence. Therefore, taking into account of the conditions of the SoE, the requirement of public interest, the declaration of derogations, the scope of the investigation, seriousness and complex natures of the offenses charged, the period in which Taner Kılıç was under custody and detention on remand can not be considered as ungrounded or arbitrary.

Thus, the Government is of the opinion that the said measures are in conformity with the international law and the extent required by the situation, and in accordance with Articles 9, 14 and 19/3 of ICCPR

## **F. CONCLUSION**

As it is the case with all countries which are governed by rule of law, if there is adequate suspicion or evidence that an offense has been committed, it is the prosecutor's responsibility to launch legal proceedings. Neither Human Rights Defenders nor lawyers cannot be expected to use their status as a shield against criminal investigations.

Legal rights of Taner Kılıç are under protection. He continues to benefit from legal assistance and other related defense rights. The process continues in accordance with Turkey's national legislation, in line with the principles of the rule of law and in pursuance of Turkey's international obligations. Legal remedies are available including individual application to the Constitutional Court and the European Court of Human Rights.

Turkey is resolved to protecting its democracy by remaining within democratic rules and solving its problems within rule-of-law principles. It is a country where everyone has the right to apply to administrative and judicial review mechanisms as individuals or organizations and against all acts and measures which bear consequences affecting them. In fact, the measures taken within the SoE against the threat of coups and terrorism have been taken to ensure that Turkey remains such a democratic country.

As a result, the measures introduced are proportionate to the aims pursued and there are mechanisms to review measures by those who allege violation of rights.

## **Enc.1**