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

2018/62441669-BMCO DT/14232040 - MOST 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 letter by Ms. Elina Steinerte, Vice-Chair of the Working Group on Arbitrary Detention, Mr. Bernard Duhaime, Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances, Mr. Felipe González Morales, Special Rapporteur on the human rights of migrants, Ms. Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, dated 18 May 2018 (Ref: WGAD/AL TUR 6/2018), has the honour to enclose herewith an information note 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, 17 August 2018

Encl.: as stated.

Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10

INFORMATION NOTE IN REPLY TO THE JOINT COMMUNICATION REGARDING THE ALLEGATIONS OF ARBITRARY ARREST AND DETENTION, ILLEGAL DEPORTATION, AND SHORT-TERM ENFORCED DISAPPEARANCE OF SIX TURKISH NATIONALS DATED 18 MAY 2018

1. With reference to the joint communication dated 18 May 2018, sent by the Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the human rights of migrants; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on the torture and other cruel, inhuman or degrading treatment or punishment, the Government would like to submit its observations herein below.

I. INTRODUCTION

2. Article 19 of the Turkish Constitution regulates personal freedom and security. First sentence of the said article underlines that all shall enjoy personal freedoms and security, and the cases and conditions to deprive a person's freedom are stipulated in the following articles thereof. This provision of the Turkish Constitution guarantees the right to personal liberty and security as a human right.

3. Taking into custody is restraining and impeding the apprehended person's freedom to complete his/her procedures in such a way that will not harm his/her health until releasing him/her or bringing him/her to trial. It is also defined as putting the apprehended person under the supervision of law enforcement since the detention warrant of the public prosecutor is effectual and bears consequences from the moment of apprehension.

4. The person apprehended or taken under custody has rights such as being informed of his/her rights and the accusation against him/her, right to remain silent, benefiting from legal assistance, communication with his/her family, providing evidence in his/her favour and demanding for collection of these, being brought to trial and requesting to see a doctor.

5. The person apprehended, his attorney or his/her legal representative, the spouse or the first or second degree relatives may appeal to ensure immediate release against the written order of the public prosecutor for apprehension, custody and extension of the custody period. The

petition of the apprehended person is delivered to the competent judge in the most immediate manner. The judge's decision to release upon the appeal against the order of the public prosecutor shall be immediately applied.

6. Detention is the limitation, with the judge's decision, of freedom of the suspect or defendant with concrete evidence indicating the existence of a strong criminal suspicion and a reason of detention, while there is no definite verdict on his/her guilt, provided that it will be proportionate with the importance of the work and to the punishment that may be given when the verdict is finalized.

7. Detention is not a punishment of a person before being sentenced, but it is a protection measure that is applicable for certain purposes and in certain circumstances in order to be able to render a lawful, effective judgement.

8. Three different causes for detention are stated in Article 100 of the Code of Criminal Procedure (CCP or the Law No. 5271). The decision to detain someone can be made when one of these causes exists provided that other circumstances accrue.

9. Hiding or escape of the suspect or the accused or presence of tangible facts raising doubts on the escape thereof are stipulated as causes for detention in Article 100 of the Law No. 5271. Suspicion of spoliation of evidence is also another cause for detention. It is clearly set out by the above mentioned Article of Law No. 5271 which circumstances raise doubts on spoliation of evidence. Presence of strong suspicion of the crimes mentioned in the third paragraph of Article 100 of Law No. 5271 could also be admitted as a cause for detention.

10. According to Article 101 of Law No. 5271, at the stage of criminal investigation, the Magistrates' Court judge decides on the detention of the suspect upon the request of public prosecutor; however, during prosecution process, the court can decide on the detention of the suspect on its own motion as well as at request of the public prosecutor.

11. "Objection" to the decisions of detention of the suspect or the accused is prescribed as a legal remedy in the fifth paragraph of Article 101 of Law No. 5271. The public prosecutor can also appeal against the court's decision of detention meaning that the public prosecutor can take legal action in favour of the accused.

12. The general principles regarding the objection in Article 268 and following articles of Law

No. 5271 shall prevail in respect of objection procedure and instance for reviewing. An appeal may also be made against the decisions of the judge or the court that reject claims of release of the detainee.

13. On the other hand, it is provided in the Article 149 of the Law No. 5271 that the suspect or the accused can benefit from the help of one or more attorneys at every stage of the investigation and the prosecution, if the suspect has a legal representative, he/she can also appoint an attorney for the suspect or the accused. Three attorneys at most can be present in the investigation phase, the attorney shall not be prevented and restricted from the right of meeting with the suspect or the accused, accompanying him during interrogation or query, and providing legal assistance at every stage of the investigation and prosecution.

14. The crime of membership to armed organization set out in Article 314 of the Turkish Criminal Code No. 5237 implies the armed organizations formed to commit the crimes prescribed in the fourth and fifth section of the said Law, titled 'Offences Against National Security' and 'Offences against Constitutional Order And Operation of Constitutional Rules'. In Paragraph 1 of this Article, forming or leading an armed organization for the purpose of committing offences within the scope of this Paragraph is defined as a separate offence. In Paragraph 2, being a member of such an organization is sanctioned as a separate offence.

15. Although sanctions are imposed in Law No. 5237 upon forming, managing or being a member of an organization for the purpose of committing a crime, Article 314 sets a limit upon the intended offences. Likewise, there is a difference between the two offences in terms of the nature of the organization. Because the organization within the scope of Article 314 must be armed. In other words, arms constitute an element of this offence. However, it is not necessary for all members to be armed for the organization to be classified as "armed". Certain armed members in a level sufficient to commit the crimes intended are enough for classifying an organization as "armed".

16. Membership to an armed organization is to join in, be committed to and enter into the service of the hierarchical power of an organization described in the first paragraph of Article 314. When a person joins in an organization, he/she is considered to accept being a member of the organization. In order for someone to be considered a member of an armed organization, it is required from him/her to show the will to join the organization with a perceptible behaviour,

and this will must be towards continued participation.

17. On the other hand, as required by Article 154 of the Code of Criminal Procedure, the attorneys have the right to see the suspects. The suspects and their attorneys have the right to request the investigation file.

18. Freedom of press has been regulated in Articles 28 to 32 of the Constitution, Article 10 of the European Convention on Human Rights (ECHR) and Articles 1 and 3 of the Press Law. As an inseparable element of freedom of expression, freedom of press not only guarantees the right to disseminate opinions, comments and news, but also the right for people to enjoy thereof. In other words, the purposes of freedom of press are to create and disseminate scientific, artistic and intellectual works; to inform the public on current events, political matters and the persons of concern to the public; to criticize and share the criticisms via media tools and, in this way, to provide the necessary environment for the people's individual development on one hand, and on the other hand, to guarantee people's rights to produce ideas about, and participate in the administration. The prohibition introduced in the Article 285 of the Turkish Criminal Code, which prescribes the breach of confidentiality of the investigation, does not aim to prevent informing the public of the prohibition, offence or the proceeding. The prohibition imposed with the article is about the aspects of the investigation or prosecution that must remain undisclosed.

19. Indeed, for the European Court of Human Rights, the freedom of press constitutes the unalienable basis of a liberal and democratic society. Within this scope, pursuant to the right to make news, publishing or broadcasting the events regarding judicial investigations and prosecutions should be considered in the context of the freedom of press.

20. On the other hand, the following matters should be expressed with respect to the compliance of the State of Emergency measures to international human rights law and freedoms affected by the State of Emergency measures.

21. The Republic of Turkey is a democratic State of Law, is a member of the United Nations and a founding member of the Council of Europe and is devoted to human rights, rule of law and democracy. Besides, Turkey continues to fight against several terrorist organizations within the framework of the Constitution and the laws and in compliance with the fundamental

principles of democratic state of law and of international law.

22. It is a state's duty to bring the armed coup plotters to justice in order for them to give account for their actions, and to eliminate the continuing coup threat. Within this scope, it is a necessity to determine and take the required legal actions against the civil servants that are affiliated with Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) terrorist organization which has infiltrated into various ranks within the State's structure. It is also the responsibility of the State to take measures in order to prevent future threats against the national will.

23. Two types of procedures for the State of Emergency have been stipulated in the Constitution, taking into account the reason of its declaration. The first State of Emergency regulated in Article 119 of the Constitution can be resorted to "in the event of natural disaster, dangerous epidemic diseases or a deep economic crisis", and the second State of Emergency regulated in Article 119 of the Constitution can be resorted to "in the event of serious indications of widespread violence o serious deterioration of public order". Besides, in the Law no. 2935 on State of Emergency, issued within the framework of the authority given by the Constitution, it is determined in detail how to use these powers.

24. It is allowed in some international human rights documents for states to derogate from the normal legal regime during a war or other emergency threatening a nation's existence, and given the nature of the situation, limiting the fundamental rights and freedoms more than it is allowed in normal conditions. Derogation has been regulated in Article 4 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the European Convention on Human Rights (ECHR).

25. Within this context, considering the scope of the threat posed by the coup attempt in Turkey against the democratic constitutional system, the limitations introduced to fundamental rights and freedoms are in compliance with the Constitution and international obligations.

26. Indeed, in both its decisions (namely Aydın Yavuz and Others (D.No: 2016/22169, 20 June 2017, paragraphs 164 and 230) regarding individual applications and its annulment/rejection decision no. 2016/177 and decision no. 2016/160 upon the application for annulment that was made with the allegation that the decree-laws violate the Constitution) the Constitutional Court did not uphold the allegations of contradiction to the Constitution on the grounds that the State

of Emergency is a constitutional and legal institution and that action was taken in accordance with the powers given by the Constitution. These decisions have been published in the Official Gazette and can also be found on the website of the Constitutional Court.

27. Within this context, according to Article 4 of the ICCPR and Article 15 of the ECHR, Turkey availed itself of this right and a statement of derogation was submitted. However, notifications of derogation from the said conventions have been revoked as the State of Emergency has ended as from 19 July 2018.

28. It is necessary to address the case law and practice of the European Court of Human Rights (ECHR) in the context of the application of Article 15 of the ECHR in order to shed light on the issue and make a comparative assessment. According to the ECHR, for example; in an extraordinary situation, greater intervention in the freedom of expression than ordinary times for better protecting the public order may be "necessary in a democratic society" (Brind v. United Kingdom, no. 18714/91, 77-A DR 42, 1994). A similar interpretation could be made regarding the explicit limitations which are related to the right to respect for private life when there is a need that requires the confidential surveillance of terror suspects (Klass v. FAC, A 28, 1978). More importantly, following the suspension of the ECHR on the activities of the IRA in Northern Ireland, it has been adopted by the ECHR that the usual criminal procedure is inadequate to eliminate the broad and serious danger posed by the great wave of violence and fear caused by IRA's activities in Northern Ireland. In this respect, as contrary to the provisions of paragraph 1 of Article 5 of the ECHR in the ordinary period, deprivation of the freedom of persons without a judicial decision, and as contrary to the provisions of paragraph 4 of Article 5 in the ordinary period, the removal of procedural safeguards that regulate the deprivation of liberty were found necessary by ECHR for the elimination of the emergency. (Ireland v. United Kingdom, A 25, 1978).

29. Article 15 of the Constitution of the Republic of Turkey, similar to the Article 4 of the ICCPR and Article 15 of the ECHR, clearly regulates the action that should be taken by the administration in such situations. According to these regulations, the measures taken during the State of Emergency period after the coup attempt precisely conform to the principles of “absolute necessity” and "proportionality".

30. The measures taken during the State of Emergency did not lead to any changes in daily life

since fundamental rights and freedoms were not limited in a way to affect everyday life. The measures taken were limited to the matters necessitated by the State of Emergency. The State of Emergency decision was taken not to limit rights and freedoms, but to be able to act faster and in a more effective manner against FETÖ/PDY and other terrorist organizations. It was the most natural right of the State to use this legal authority to protect democracy and national will.

31. Following the coup attempt, decree-laws were issued to swiftly clear the Public Institutions of people affiliated, in contact, and in allegiance with FETÖ/PDY. During this process, all actions are taken in accordance with legal procedures and all cases are addressed with utmost care.

32. There are domestic remedies for those claiming that their rights have been violated. Many civil servants were reinstated to duty and many institutions, foundations and associations were re-opened as a result of the evaluations made in response to the objections including the applications to appeal boards.

33. The State of Emergency measures are reviewed regularly, in line with the changing conditions. Issues brought by the Council of Europe (CoE) and the recommendations of the bodies of the CoE are taken into account. Within this framework, some regulations were made in terms of State of Emergency measures.

34. Within this scope, the custody period of 30 days (which was never fully utilized in practice) has been reduced to 7 days (It can be extended for another 7 days only by public prosecutor's decision.), in accordance with the case-law of ECHR, namely Aksoy v. Turkey and Lawless v. United Kingdom.

35. It should be indicated that in terms of all crimes except for the above-mentioned ones, and for all crimes committed after the termination of the State of Emergency, the detention period is one day according to the general provisions and four days in the event of extension in necessary cases.

36. The regulation made during the State of Emergency, which allows the limitation of the right of the suspect to see his/her attorney up to five days, have been revoked upon the decision of

the Public Prosecutor. General investigation provisions in Article 154/2 of the Code of Criminal Procedure are now in effect. Accordingly, the right of the suspect in custody to see his/her attorney can be restricted to twenty-four hours upon the request of the public prosecutor, and he/she cannot be interrogated during this period. Therefore, this legal arrangement is harmonized with the decisions of the ECHR, namely İbrahim v. United Kingdom, Simeonovi v. Bulgaria, and Salduz v. Turkey.

37. In addition, with the decree-law no. 682, it was provided for that civil servants who commits the crime of torture shall be expelled from public office.

38. The Inquiry Commission on State of Emergency Measures (the Commission) was established to make assessments and decisions on the applications made regarding the proceedings conducted solely through decree-laws such as direct dismissals, expulsions from studentship, closure of institutions and organizations and decree revocation of retired personnel; on the grounds that they have membership, coherence or contact with terrorist organizations. Opportunity to apply is also given to those against whom legal action is taken before the establishment of the Commission.

39. Turkey safeguards its democracy in accordance with the rule of law. Turkey is a country where everyone has the freedom to seek their rights and where all persons and organizations can request administrative and judicial review of all procedures and actions with legal consequences concerning them. Measures taken against the threats of coup and terrorism within the scope of the state of emergency had been taken to make sure that Turkey maintains a country where the abovementioned rights are guaranteed.

40. Turkey is a founding member of the Council of Europe and a state of law that follows international standards of human rights. Democracy and rule of law have also been strongly underlined in our Constitution. As per the principle of the rule of law, Turkey's fight against terrorism is carried out in accordance with the laws issued, which are in line with international law and constitutional principles.

41. The Constitution of Turkey imposes a positive obligation upon the state to ensure the welfare, peace and happiness of the people and the society, to protect the Republic and democracy, to remove the obstacles that limit the fundamental rights and freedoms of the

persons. As a requirement of its positive obligations, Turkey should also take the necessary measures to protect the people from violence.

42. In this context, the national authorities are actively and resolutely combatting, in accordance with the rule of law and with due regard to the criteria of necessity and proportionality, the terrorist organizations that threaten the national security and the public order by targeting the security forces and the civilians.

II. OVERVIEW

43. It is seen fit to first provide information on the structure and operation of the FETÖ/PDY terrorist organization, the events that took place during and after the 15 July 2016 Coup Attempt, and the measures taken by the Republic of Turkey during this process, before moving on to the particular cimcumstances of the present communication.

A. FETÖ/PDY AND THE 15 JULY COUP ATTEMPT

1. Overall Structure and Operation of the FETÖ/PDY Terrorist Organization

44. FETÖ/PDY is an armed terrorist organization established by Fetullah Gülen, which aims to suppress, debilitate and direct all the Constitutional institutions, to overthrow the elected President and Government of the Republic of Turkey and to dismantle the constitutional order in order to establish an oppressive and totalitarian system through resorting to force, violence, threat, blackmailing and other unlawful means.

45. Before the terrorist coup attempt, a parallel structure was established by the FETÖ/PDY within all public institutions and organizations of the State, notably the judiciary, security directorates, civil administration and armed forces. To attain its goals, the FETÖ/PDY used different methods; such as, unlawfully obtaining the questions of important official exams (the Public Personnel Selection Exam and the University Student Placement Exam etc.) and making its members pass these exams by way of cheating; placing its members in public institutions and also in prominent schools and universities abroad, dismissing the non-members by fabricating false documents and evidence to initiate judicial and administrative investigations against them; placing its members to these cadres.

46. They formed structures in the public institutions by creating cells. The FETÖ/PDY established the intra-organizational communication among its members through confidential

and encrypted means. Investigations revealed that an encrypted smart phone application "Bylock" was used for the intra-organizational communication.

47. The National Security Council (NSC) has made various decisions, identifying FETÖ/PDY as terrorist organization which cooperates with other terrorist organizations and constitutes a threat to Turkey's national security. The first decision in this manner, was taken in the meeting on 26 February 2014. As of this date, various assessments were made on FETÖ/PDY in NSC meetings. The organization's "parallel structure" was underscored in the meeting on 30 December 2014.

48. In the meeting that was held shortly before the 15 July Coup Attempt, on 26 May 2016, FETÖ/PDY was included in the list of terrorist organizations; and this decision was presented to the public and appeared in various media outlets. Moreover, all the public institutions have been informed of this decision as the recommendations of the NSC have been submitted to the Council of Ministers.

49. The fact that the FETÖ/PDY is an armed terrorist organization had been established with the decision rendered by the Erzincan Assize Court prior to 15 July 2016. In addition, numerous cases were brought against the organization in question and its members after 15 July 2016. In this regard, members of the armed terrorist organization FETÖ/PDY, including public officials, were convicted in numerous cases, and the members of FETÖ/PDY who participated in the coup attempt were sentenced to aggravated life imprisonment for attempting to eliminate the order set forth in the Constitution of the Republic of Turkey. Some of these judgments were upheld by the Court of Cassation and finalized. The Turkish Constitutional Court also stated in its various judgments rendered on the individual applications that FETÖ/PDY is an armed terrorist organization. Consequently, the fact that FETÖ/PDY is an armed terrorist organization was confirmed by final court judgments.

2. The Events that Took Place on the Night of the 15 July Coup Attempt

50. On the night of 15 July 2016, upon the instruction of the founder and leader of the FETÖ/PDY, Fetullah Gülen, and in line with the plan approved by him, "a group of terrorists in uniforms" within the Turkish Armed Forces attempted an armed terrorist coup against the Turkish democracy for the purpose of overthrowing the elected President, the Parliament and the Government together with the Constitutional order. The Presidential Compound, the hotel where the President was staying at, the Grand National Assembly of Turkey (GNAT), the Police Special Operations Centre and the security units, the premises of the National Intelligence

Organization and various military units were attacked with bombs and arms. The attack on the hotel where the democratically elected President was staying at during his holiday with the aim of assassinating him is the arch evidence of the plotters' determination to sieze control of the government. A public action was filed regarding this attack and the legal proceeding is ongoing.

51. A declaration was published by force at the official website of the Turkish Armed Forces, and announced on the state-run television (TRT) seized by terrorists. In the declaration, it was stated that the army had seized power and that martial law and a curfew were declared in Turkey. The headquarters of private TV organizations, and the printed media were raided. The coup plotters also attacked the satellite control stations and wanted to cut off internet and all television broadcastings, except for the TRT which was siezed by plotters.

52. During that night, the Boğaziçi and Fatih Sultan Mehmet Bridges in İstanbul were blocked by armed soldiers, and İstanbul Atatürk Airport was also occupied. During the 15 July 2016 coup attempt, bombings and armed attacks were perpetrated by use of aircraft and helicopters against many targets, including the premises of the GNAT, the Presidential Compound, the Directorate General of Security of Ankara, the Special Operations Department of the Directorate General, the National Intelligence Organization (MIT); an assassination attempt was made against the President, the Prime Minister's convoy was fired with guns, many senior military officials, including the Chief of General Staff, were taken hostage, and a great number of public institutions were occupied or attempted to be occupied. 8,651 military personnel were involved in the coup attempt and 35 aircraft, including combat aircraft of the Turkish Armed Forces, 3 ships, 37 helicopters, 246 armoured vehicles including 74 tanks and nearly 4,000 light weapons were used. As a result of the terrorist attacks, a total of 251 citizens were killed, whereas more than 2.000 people were injured.

53. The Turkish Parliament building, which reflects the public's will and constitutes heart of democracy, was bombed for the first time in the history of the Republic of Turkey. Fighter jets (F-16) carried out bomb attacks in the course of the extraordinary meeting of the Plenary Session against the coup attempt. During the attack, Parliament officials, some civilians and many police officers were injured, and extensive damage was inflicted to the Parliament building.

54. On the night of 15 July 2016, tanks ran over the civilians who took to the streets to defend their democracy with bare hands, some of whom were killed and injured as a result of being trapped under the tanks. Fighter jets made low altitude flights over the cities by breaking the sound barrier, in a manner which led to fear and panic in the public. The GNAT and people were shot randomly by the coup plotters, snipers directly targeted people from strategic points, the crowds were bombed and shot from fighter jets and helicopters. In brief, the civilians, who defended the democratic regime at the cost of their lives were massacred by coup plotters.

55. The democratic resolve of the Turkish people saved the democratic order against this terrorist campaign. The Turkish people from all walks of life and regardless of their political affiliations united on the streets on the night of 15 July 2016. Putting all the political and ideological differences aside, they peacefully gathered and jointly defended common democratic values and bravely stood against tanks, helicopters and fighter jets with only national flags in their hands in an exemplary unity for the democracy.

56. In all public squares in Turkey, the people were on democracy vigil for approximately one month. With this stand, the Turkish nation has declared its loyalty to the democratic institutions and the rule of law. On 16 July 2016, all political parties represented at the Parliament signed a joint statement against the coup attempt. Representatives of the media, academia, business circles and all other segments of Turkish society uniformly condemned the coup attempt.

57. In the aftermath of the coup attempt, there are ongoing investigations and pending trials against the members of the FETÖ/PDY in particular according to Article 312 (attempt to overthrow the Government of Republic of Turkey by way of coercion and violation) and Article 314 (being a member of the armed terrorist organization) of the Turkish Criminal Code (TCC) and also other unlawful acts within the context of the TCC.

58. The Government would like to emphasize that the terrorist coup plotters attempted to overthrow the democratic constitutional order and thus threatened rights and fundamental freedoms of people. Therefore, the Turkish state has assumed its legitimate right and duty to take all the necessary measures to completely eliminate this severe threat and danger posed against the survival of the nation and the state in accordance with its constitution and legislation, as permitted by international norms and obligations.

3. Declaration of the State of Emergency and Derogation

59. Considering the magnitude of the threat posed by the 15 July Coup Attempt, it is not sufficient to only take into consideration the damages caused by the attempted coup. The risks that could have emerged if the said coup attempt was not prevented promptly or had managed to succeed should also be taken into consideration. Considering the situation in our neighboring countries, in the event of exhaustion of the state authority, not only the democratic order ceases to function, but atmosphere of disarray and chaos arises where the most fundamental freedoms are constantly under attack.

60. Following the attempted coup of 15 July, in order to restore public order, to reinstate democratic institutions and to eliminate promptly the threat faced with and to fight effectively against the FETÖ/PDY in line with the recommendation of the NSC and in conformity with the Constitutional and legal framework, a State of Emergency has been declared throughout the country for 90 days by the Decree-Law of the Council of Ministers dated 20 July 2016, under Article 120 of the Constitution and Article 3 § 1 (b) of the Law no. 2935 on State of Emergency. This decision was upheld by the decision of the General Assembly of the GNAT dated 21 July 2016 and numbered 1116.

61. Over the years, FETÖ/PDY members have infiltrated state institutions and spread into educational, health and media sectors and academic institutions. Thus, with a view to ensuring continuity of the effective implementation of measures for the protection of Turkish democracy, the principle of the rule of law, as well as the rights and freedoms of the citizens, the extension of the emergency rule has become an exigency. Consequently, the Council of Ministers decided to extend the State of Emergency for seven times and each decision was upheld by the GNAT. Lastly, the Council of Ministers decided to extend the State of Emergency until 19 July 2018. (The SoE has ended as from 19 July 2018.)

62. It should once more be noted that the SoE was declared strictly out of exigency. It is known that member states of Council of Europe (CoE) have resorted to State of Emergency in response to terrorist threats that are much smaller in scale. The threats faced by Turkey are incomparable to those faced by other countries in the CoE.

63. Following the declaration of State of Emergency, Turkey resorted to the right of derogation from the obligations in the European Convention on Human Rights (ECHR) and International

Covenant on Civil and Political Rights (ICCPR). Notifications of derogation from Convention obligations were submitted to the Council of Europe in accordance with Article 15 of the ECHR and to the Secretariat of the United Nations in accordance with Article 4 of the ICCPR, concerning the rights permitted by the Conventions. Notifications of derogation from these conventions have been revoked as the State of Emergency has ended as from 19 July 2018.

64. In line with Article 4 of the ICCPR, the Decree-Laws are issued and measures are taken to the extent strictly required by the exigencies of the situation and proportionate to the current crisis faced. All measures were needed to be taken to eliminate the influence of terrorist organizations within the State.

65. During this process, legal principles are followed and each case is assessed with utmost care. Turkey is fully aware of its obligations under international conventions and acts in full respect for democracy, human rights and the principle of rule of law. The principles of "necessity", "proportionality" and "legality" have been sensitively complied with as regards to the measures taken under the State of Emergency. The Government would also like to underline that while taking the measures under Article 15 of the ECHR, the State parties naturally continue to be subject to the supervision of the European Court of Human Rights (ECtHR).

66. Unlike other terrorist organizations such as PKK or DAESH, FETÖ/PDY is an atypical armed terrorist organization. In this perspective, the required measures are taken with a view to avert the organization's strength within the state. The scope of the Decree-Laws issued in this respect has been limited to the terrorist organizations in order not to interfere with the rights and freedoms of others. Furthermore, State of Emergency measures are regularly monitored in line with changing conditions.

4. Constitutional and Legal Framework for the State of Emergency and Derogation

67. Emergency rule procedures have been laid down in Articles 119 to 122 of the Constitution. Moreover in Article 15, it has been stated that "the exercise of fundamental rights and freedoms may be partially or entirely derogated […] to the extent required by the exigencies of the situation, as long as obligations under international law are not violated."

68. In addition to Constitutional provisions, the legal framework governing the State of Emergency has been circumscribed by the Law on State of Emergency (No. 2935). Moreover,

under emergency rule, the Council of Ministers, headed by the President, has been empowered to issue Decree-Laws relating to matters necessitated by the State of Emergency, under Article 121 of the Constitution. No other law is required for the exercise of this power.

69. As can be seen above, Articles 121 and 15 of the Constitution are in similar wording with Articles 4 of the ICCPR and 15 of the ECHR. Thus, the national protection and legal review in this respect is similar to those at the international level.

70. As explained above in detail, by the attempted coup, Turkey was exposed to a public emergency affecting the whole population and threatening the life of the nation and the SoE has been declared following the attempted coup of 15 July to restore public order, to reinstate democratic institutions and to promptly eliminate the facing threats.

71. However, the measures taken under the emergency rule have not made any changes in daily life. No restrictions have been brought with regard to the exercise of fundamental rights and freedoms in a way that would affect the daily lives of the people. The measures taken remained limited to issues made necessary by the State of Emergency. The decision to declare a State of Emergency was not taken to restrict individual rights and freedoms but rather to allow a prompt response by the State in its fight against terrorist organizations including the FETÖ/PDY. With a view to protecting democracy and the will of the people, it is the natural right of the State to use this legal power.

72. Since the measures are based on Decrees which have legal force, the principle of legality has been satisfied. Besides, legal remedies are available. Fair trial and defense rights have been respected.

73. In the light of the foregoing, it is considered that the measures are in conformity with international law and required by the exigencies of the situation.

5. An Overview of the Proceedings of Custody Following the 15 July Coup Attempt

74. The Government would like to state that on the night of 15 July 2016 coup attempt and in its aftermath, a number of detention and custody proceedings were initiated with a view to ensuring that the persons who are responsible are brought before justice. When the investigations have been initiated and become deeper, the number of the people taken into

custody has increased.

75. Taking into account the magnitude of the coup attempt and the extent of the structure of the organization, the Decree-Laws enacted during the State of Emergency stipulated a number of measures which were necessary for the effectiveness of investigations conducted regarding Constitutional offenses, which shall be applicable during the State of Emergency and which serve a legitimate purpose. Naturally, the general provisions of the Code of Criminal Procedure (CCP) no. 5271 remain in effect. In this respect, taking into consideration the large number of those involved in the coup attempt and members of the terrorist organization, the maximum duration of police custody was raised up to 30 days by the Decree-Law no 667, the duration of which is limited to the duration of the State of Emergency. The purposes sought by this measure were to take statements in a proper manner, to collect evidence for and against the suspects and thus ensuring the State's obligation of conducting effective investigations.

76. On the other hand, persons in custody, their defendants or their legal representatives, spouses or blood relatives of the first or second degree, can apply to the Criminal Magistrates' Office against the order of the Public Prosecutor to request immediate release, in accordance with Article 91 and paragraph 5 of the CCP. Furthermore, this maximum period was limited to offenses against State security, Constitutional order, national defense, State secrets, terror and collective offenses. However, the 30 days upper limit of custody period has never been applied in full and the vast majority of the suspects remained in custody for four or five days.

77. It should be emphasized once more that, persons in custody, their defense lawyers or legal representatives, spouses or first to second-degree relatives may appeal against the written order of the Public Prosecutor as per Article 91/5 of the CCP before the Criminal Magistrates' Office.

78. In addition, legal assistance is provided during police custody and health reports are obtained upon entry and release.

79. Later on, considering the changing circumstances, the measure of extended custody period has been reviewed. With the Decree-Law No. 684 of 27 January 2017, the maximum duration of police custody has been reduced to 7 days. It can be extended for another 7 days only by public prosecutor's decision, taking into account difficulties of collecting evidence and the high number of suspects.

III. PARTICULAR CIRCUMSTANCES OF THE PRESENT COMMUNICATION

80. Mustafa Erdem, Yusuf Karabina, Kahraman Demirez, Cihan Özkan, Hasan Hüseyin Günakan and Osman Karakaya were taken into custody upon their entry to Turkey on 29 March 2018, following the instruction of Istanbul Chief Public Prosecutor's Office. They were informed about the charges against them and their legal rights. They also exercised their right to inform their family that they were taken into custody.

81. Said persons gave their statements on 11 April 2018 at the Public Prosecutor's Office. They were referred to the Criminal Court of Peace on the same day for the crimes of *''International Espionage"* and *"Establishing or Leading Armed Terrorist Organization"* as a result of the investigation carried out and the evidence collected. The Court ruled on their detention for the said crimes on 11 April 2018.

82. The detention of the said persons was reviewed by Istanbul Criminal Court of Peace on 14 May 2018 and 13 June 2018. Continuation of their detention was ruled on by the same Court pursuant to Article 108 and the following articles of the Code of Criminal Procedure (CCP); "*considering that the nature of the crime attributed to the suspects, the contents of their statements, some findings in the digital materials, contents of separate assessments on the actions of each suspect and the reasons for detention raise a strong criminal suspicion that the suspects committed the crimes attributed. Also considering the fact that the crimes suspects are charged with are among the crimes prescribed in the Article 100/3 of the CCP (According to Article 100, there is a presumption of reason for detention for the crimes stipulated in the third paragraph thereof.), the proportionality of the suspects' detention to the punishment they may face if they are found guilty of the said crimes, and the fact that no new evidence was found that would require the termination of their detention, it was decided that the reasons for detention are still present and the judicial control measures would be insufficient when the gravity of the crimes are taken into consideration."*

83. The Office of the Public Prosecutor included the following observations in its letter referring the said persons to the Criminal Court of Peace for their detention:

*"**Cihan Özkan** has been teaching at [redacted] located in the district of [redacted], Kosovo for 6 years. He mentioned that he did not consider FETÖ/PDY as a terrorist*

organization in his statement. He stayed in the dormitories belonging to the organization during his education. …..... He has been working at one of the FETÖ/PDY armed terrorist organization affiliated schools. He deposited [redacted]TRY at Bankasya upon the instruction of the leader of the organization in the second half of 2014. After the examination of the obtained digital materials, it is seen that he used mobile applications (namely Herkulapp, Risale, and Samanyoluhaber) affiliated with the organization. He denied the organizational structure of FETÖ/PDY while under custody. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Cihan Özkan has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of Turkish Criminal Code (TCC).

Hasan Hüseyin Günakan *declared that he would use his right to remain silent without even hearing the allegations against him while giving his statement to the law-enforcement officials. He denied all charges against him, as instructed to the members of the organization in the event that they are apprehended, in the statement he gave to the Chief Public Prosecutor's Office. …... He has been working at [redacted] (one of the FETÖ/PDY armed terrorist organization affiliated schools) located in the district of [redacted], Kosovo. It was established that he used Bylock (encrypted communication system which is used by the members of FETÖ/PDY armed terrorist organization) through the GSM line [redacted] registered on his name. Four digital footprints belonging to Bylock application, the program "Eagle" (which is also frequently used by the members of the organization), and the mobile applications Herkulapp, Risale, and Samanyoluhaber were detected in the preliminary examination made on the suspect's mobile phone. There were also video tapes featuring the organization leader, last access time to which was January 2018, and written materials concerning the documents called "Vaaz" (Sermon), through which the organization leader gave his instructions, on the suspect's mobile phone. Frequent visits to the organization's websites were detected in his web search history. Additionally, according to the investigation carried out by the Department of Counter Smuggling and Organized Crimes, he made contact with two people from the top management of the organization twenty-three times between 2007-2015 through his GSM (same line through which he logged into Bylock). Another suspect, [redacted], in the statement he gave to the Adıyaman Chief Public Prosecutor's Office, identified Hasan Hüseyin Günakan and expressed that he worked at a collage in Kosovo between 2010-2013 as a "head mentor" (serrehber) for the organization. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Hasan Hüseyin Günakan has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of TCC.*

Kahraman Demirez *denied all charges against him, as instructed to the members of the organization in the event that they are apprehended, in the statement he gave to the Chief Public Prosecutor's Office. He also declared that he did not want to answer questions about the organization and its leader. While he was in Turkey, he worked as a teacher at a private teaching institution in [redacted] which was closed due to its affiliation with the organization. He made statements with the aim of spoiling the evidence regarding the members of the organization*

apart from the ones that were caught with him. He declared that he did not want to share the passwords of the encrypted documents on his mobile phone……. He has been working at one of the FETÖ/PDY armed terrorist organization affiliated schools as a headmaster. It was also established that he worked at a firm called '' [redacted]" which was closed due to its affiliation with the organization. Another suspect, [redacted], in the statement he gave to the Elmalı Chief Public Prosecutor's Office, expressed that the suspect was his brother-in-law, that he met his sister abroad and married her, and that he worked at one of the organization's schools. Additionally, in the examination of his bank account activities and credit card receipts which were frozen due to his affiliation with the organization, he made many donations to '[redacted]" foundation which is one of the charitable foundations of the organization; and transferred money several times to [redacted] and the firm [redacted] which are both affiliated with the organization. According to the investigation carried out, it was detected that he was the headmaster of one of the organization's schools located in [redacted], Kosovo. In the preliminary examination made on the suspect's mobile phone, it was detected that some documents were encrypted. When last access dates to those documents are taken into account, it is considered that the statements of the suspect that he does not remember the passwords of these documents are intended to spoil the evidence against him. It is detected after the examination of the obtained digital materials that he used mobile applications (namely Samanyoluhaber and Çağlayan Dergisi) affiliated with the organization and that he corresponded with suspect Mustafa Erdem about the activities of the organization in Kosovo. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Hasan Hüseyin Günakan has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of TCC.

Mustafa Erdem *denied all charges against him, as instructed to the members of the organization in the event that they are apprehended, in the statement he gave to the Chief Public Prosecutor's Office. He also intended to spoil the evidence against him by stating that he does not recall any content about the correspondence on his mobile phone which is confiscated……. He has been working at [redacted] (one of the FETÖ/PDY armed terrorist organization affiliated schools) in Kosovo as a headmaster. It is also determined that the suspect had an account in Bankasya and that he deposited [redacted] TRY into his account in the first half of 2014 following the order of the organization leader. He also made a transaction to a firm called [redacted] that is also affiliated with the organization. According to the investigation on his Bylock content, it is determined that the suspect used the application with the ID number [redacted], and his password was [redacted] indicating the suspect's birth place and the license plate number of his hometown. Persons who have added the suspect as a contact on the application did so under the names such as [redacted], [redacted], [redacted] [redacted] confirming that the person with the abovementioned ID number is indeed the suspect Mustafa Erdem. When the content of his Bylock account is examined, it is determined that he corresponded frequently about the educational structure of the organization in Kosovo as well as other matters related to the organization. In the open-source investigation on the suspect, it was established that a correction notice was requested by a written warning on behalf of the suspect's name against a news report that was to the detriment of the organization's structure in Kosovo and [redacted]. Even the name of the educational institution he was working at [redacted] is in accordance with the names given to the educational institutions belonging to the*

organization. Another suspect, [redacted], in the statement he gave to the Adıyaman Chief Public Prosecutor's Office, identified Mustafa Erdem and expressed that he worked as the "imam" (used in the jargon of the organization to refer to a representative of an institution, a district, a city, or a country) of Kosovo as of 2013. It is detected after the examination of the obtained digital materials that he used the mobile application named "Falcon" (another application used by the members of the organization after Bylock was compromised.) hidden under the display icon of the Google Play Store. The password the suspect used to log into Falcon is the same as his Bylock password. Various and detailed correspondences regarding organizational activities were found among his Falcon data. Digital footprints of other applications that are often used by the members of the organization were found on his mobile phone, namely; Bylock, Aktif Haber, Herkul.org, Samanyoluhaber, Rotahaber, Eagle, Çağlayan Dergisi, Kakao Talk. Digital footprints of Cleanthemall and Colornote, which are applications that allow the user to permanently delete all data were also found on the suspect's mobile phone, along with number of notes regarding organization's activities including contents on Kosovo's senior officials. There were also video tapes featuring the organization leader. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Mustafa Erdem has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of TCC.

***Osman Karakaya** denied all charges against him. The suspect was dismissed from public service with Decree Law No. 672. He was a member of "[redacted]" which is closed down due to its affiliation with FETÖ/PDY armed terrorist organization. According to the open-source investigation carried out, the suspect drew up reports according to the instructions and policies of the organization regarding the trials more commonly known as [redacted] which was planned and executed by the organization in order to eliminate its adversaries. According to the indicment of the Chief Public Prosecutor's Office in [redacted] regarding the network of the organization within the [redacted], it was detected that the suspect was unlawfully appointed to the department of social services even though it was not his field of expertise, and he engaged in activities on behalf of the organization on the executive board of the faculty. It was also determined that the suspect carried out his activities in Kosovo after the political operation targeting the Turkish Government which the organization disguised as a judicial investigation in 2013, more commonly known as "17-25 December Proceedings". He also worked for the organization in [redacted]. Over hundred correspondences with several people from the top management of the organization between 2007-2014 were detected. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Osman Karakaya has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of TCC.*

***Yusuf Karabina** denied all charges against him, as instructed to the members of the organization in the event that they are apprehended, in the statement he gave to the Chief Public Prosecutor's Office. According to the examination of his Bylock records, the suspect was logged in with ID numbers [redacted] and [redacted]. These ID numbers were added as contact by other*

users under the names [redacted], [redacted], [redacted]. Messages sent from the abovementioned ID numbers such as "abi kosovadan yusuf görüşebilir miyiz?"("brother, I am Yusuf from Kosovo, can we meet and talk?') were also detected. Therefore, the suspect was identified as a Bylock user with the ID numbers mentioned above. Over hundred correspondences regarding the organization's activities in Kosovo were also detected among his Bylock records. According to the investigation carried out, it was determined that he was working at [redacted], one of the organization's schools located in [redacted], Kosovo. Another suspect, [redacted], in the statement he gave to the Adıyaman Chief Public Prosecutor's Office, identified Yusuf Karabina and expressed that he was in charge of accounting in the organization and that he worked as the headmaster of [redacted] and the deputy "imam" of Kosovo. Applications that are often used by the members of the organization were found on his mobile phone, namely; Çağlayan Dergisi, Samanyoluhaber, Zaman, and Risale, along with digital footprints of the application Kakao Talk. There were several correspondences about the organization's activities in Kosovo on the application Viber, which was also found on the suspect's mobile phone. The organization leader made promising and encouraging statements, showing his support for the suspect. The organization's educational activities abroad are in fact a cover for organization's acts of espionage against other countries, carried out on an international scale. Considering all of the matters above, it is asserted that suspect Yusuf Karabina has committed the crimes of "Leading an Armed Terrorist Organization" and "International Espionage" within the scope of Article 331 of TCC.

84. The investigations against the said persons are ongoing.

85. Hasan Hüseyin Günakan, Yusuf Karabina, Cihan Özkan on 14 May 2018 and Osman Karakaya on 8 June 2018 filed individual applications to the Constitutional Court (CC). Complaints they have conveyed to the CC are similar to those conveyed to the Working Group. However, the applications are still before the CC as the verdicts have not yet been given.

IV. NATIONAL DOMESTIC REMEDIES

a. Right of Objection Stipulated in Article 91 of the Code of Criminal Procedure

86. In connection with the claim that detention of the suspects is arbitrary or the ongoing proceedings are contrary to law, there has not been any objection raised by the suspects or their attorneys against the decisions of apprehension, custody, or detention.

87. Whereas, the Paragraph 5 of Article 91 of the CCP is as follows;

"...(5) The person apprehended or his/her attorney, legal representative, spouse or a blood relative of the first or second degree may apply to the Criminal Magistrate's Office against the written order by the public prosecutor regarding apprehension, custody or extension of the custody in order to obtain immediate release from custody. The judge shall immediately examine

the file and decide on the request within 24 hours. If he considers that the apprehension, detention or extension of the detention is appropriate, the request shall be dismissed or itshall be decided that the person apprehended is to be brought before the public prosecutor immediately together with the investigation documents…"

b. Action for Compensation in Accordance with Article 141 and Subsequent Articles of the CCP

88. The complaints relating to alleged arbitrary custody and detention can be reviewed in domestic law by first instance courts. Article 141 of the CCP entitled "Claim for Compensation" is as follows:

*"**Article 141 -** (1) Persons who suffer damage during the investigation or prosecution of offenses may request from the State compensation for material and immaterial damages incurred, if:*

a) they were unlawfully apprehended, detained or their detention was unlawfully extended,

b) they were not brought before a judge within the statutory custody period,

c) they were arrested without being informed of their statutory rights or their request to exercise those rights was not met,

d) they were not brought before the court within a reasonable time and did not receive a judgment within a reasonable time, even though they were lawfully detained,

e) after they were lawfully arrested or detained it was decided not to prosecute them or they were acquitted,

…

g) they were not informed of the grounds for their apprehension or detention and of the charges against them either in writing or, if this was not immediately possible, orally,

h) their relatives were not informed of their apprehension or detention,

i) the search warrant was implemented in a disproportionate manner,

j) their belongings or other property were confiscated in the absence of the required conditions, or the necessary measures were not taken for their protection, or their belongings and other property were used for reasons outside the purpose or if they were not returned on time.

k) (Addition: Article 11/4/2013-6459/17) they were not allowed to enjoy the procedures enshrined in Law they can utilize against the apprehension or detention.

…"

89. According to the national judicial records the suspects have not filed any action for compensation as per the CCP's Article 141 and subsequent articles.

90. The European Court of Human Rights (ECtHR), in its A.Ş v. Turkey (no: 58271/10) judgement of 13 September 2016, approved the Government's objection of inadmissibility on the grounds that the applicant who submitted complaints regarding the prolonged detention should have primarily filed an action for compensation in accordance with the Article 141 of the CCP. The ECtHR held that the domestic courts' and Court of Cassation's approach in accordance with Article 141 and subsequent articles of the CCP are convincing in terms of the effectiveness of this remedy.

c. Individual Application to the Constitutional Court

91. In line with the principle of subsidiarity of the ECHR system, individual applications to the CC, which can be regarded as a milestone in the protection and promotion of human rights in Turkey, was introduced on 24 September 2012 by the promulgation of the Law on the Establishment and Trial Procedures of the Constitutional Court No. 6216.

92. Under the said Law, those claiming that their rights and freedoms enshrined in the Constitution of the Republic of Turkey or in the ECHR and its protocols to which Turkey is a party have been violated, may apply to the CC.

93. In many recent judgments, including those claiming that their rights and freedoms have been violated on account of the legal procedures following the attempted coup of 15 July 2016, the ECtHR has noted that individual application to the CC is an effective remedy that should be exhausted before the case can be taken to the ECtHR (see *Mercan v. Turkey*, no. 56511/2016, 8 November 2016; *Bıdık v. Turkey*, no. 45222/15, 22 November 2016; *Zihni v. Turkey*, no. 59061/2016, 29 November 2016).

94. Hasan Hüseyin Günakan, Yusuf Karabina, Cihan Özkan on 14 May 2018 and Osman Karakaya on 8 June 2018 filed individual applications to the CC. The others have not filed individual applications regarding any of their allegations even though there is no obstacle for them to do so.

VI. ASSESSMENT OF THE PRESENT COMMUNICATIONS

1. Admissibility of the Communications

A. PRELIMINARY OBJECTION OF DEROGATION

1. In General

95. As mentioned above, after the 15 July 2016 terrorist coup attempt, a State of Emergency was declared in accordance with the Constitution and international law. Within the context of the ICCPR, the notification of derogation was communicated to the United Nations Secretary General on 2 August 2016 in accordance with Article 4 of the Convention. These notifications have been renewed after every extension of the State of Emergency. It was clearly stated in these notifications which articles are subject to derogation. Therefore, there was a notice of derogation duly made and communicated in accordance with the procedure to be applied in the present communications.

96. When the complaints and accusations submitted to the Working Group are examined, it is understood that the said complaints are within the context of the right of freedom and security prescribed in Article 9 of the Convention and the right of fair trial prescribed in Article 14.

97. In this context, it is unequivocal that the complaints fall within the scope of the derogation notice. Therefore, it is essential to carry out the examination in conjunction with Article 4 of the ICCPR. In this scope, it is necessary to focus on the purpose, the legal value and the effect of the derogation notice on the present communications.

2. The Purpose and Nature of the Derogation

98. The derogation procedure has a very important function both in the ECHR and ICCPR. It enables the State in certain exceptional circumstances to unilaterally derogate from a number of obligations which are applicable during normal periods. In face of such an extraordinary crisis, a state's failure to restrict certain Convention obligations may become intolerable. Under such circumstances, the legitimate reason for restricting the rights, which can be derogated from, is that if the State fails to take such effective measures, a greater threat might arise against the independence and freedom of the people, the fundamental rights and freedoms, particularly the right to life, and against the life of the nation. In other words, the purpose of notification of derogation is taking the necessary measures for the protection of democracy and fundamental rights and freedoms, and securing the life of the nation.

99. Derogation by a State from its regular obligations emanating from the ECHR and ICCPR is the *raison d'etre* of Articles 15 of the ECHR and 4 of the ICCPR. As, under such circumstances, a general threat against the existence of the nation and an attempt to revoke the rule of law, democracy and the institutions of the State is present. Therefore, for the elimination of the threat and for the restoration of public order, public interests, which are both vital for the society and the State shall take precedence over individual interests. Accordingly, when the right to derogation is exercised on account of threats aiming at abolishing the free and democratic order established by the Constitution and the fundamental rights and freedoms, the necessary measures can be taken to maintain public safety and order.

100. Therefore, an examination to be made following a notification of derogation should take into account the purposes of the derogation and the conditions under which it was declared. It is of vital importance that an assessment of the conditions during the emergency period should not be based on the principles and approach prevalent during normal periods. In this context, the examination of a case subject to a notice of derogation should take into account the conditions in the emergency period and be limited to international obligations and whether the interference in the present communication was proportionate to the threat faced. In other words, when a derogation is in force, the level of protection would not be equivalent to that granted during normal times. Claiming the opposite would be incompatible with the purpose and meaning of the derogation principles. Moreover, such an approach would render the application of the said articles of the conventions impossible.

3. The approach by the European Court of Human Rights

101. Within the scope of the examination of the present communication, it is necessary to address the case law and practice of the ECtHR in the context of the application of Article 15 of the ECHR in terms of shedding light on the issue. According to ECtHR, for example; further intervention in the freedom of expression in an extraordinary situation for more effective protection of public order may be "necessary in a democratic society" than it is in ordinary times. (Brind v. United Kingdom, no. 18714/91, 77-A DR 42, 1994). A similar interpretation can be made for obvious restrictions on the right to respect for private life when a need arises for terrorist suspects to be secretly monitored (Klass v. FAC, A 28, 1978). More importantly, following the suspension of the ECHR in connection with the activities of the IRA in Northern

Ireland, it has been adopted by ECtHR that the usual criminal procedure is inadequate to eliminate the broad and serious danger posed by the great wave of violence and fear caused by IRA's activities in Northern Ireland. In this respect, in the ordinary period, deprivation of the freedom of persons without a judicial decision, in order to take the statement thereof, as contrary to the provisions of paragraph 1 of Article 5 of the ECHR and in the ordinary period again, the removal of procedural safeguards that regulate the deprivation of the liberty of a person as contrary to the provisions of paragraph 4 of Article 5 were found necessary by ECtHR for addressing the emergency. (*Ireland v. United Kingdom*, A 25, 1978).

102. In its judgments of Mehmet Hasan ALTAN/Turkey (no: 13237/17) and Şahin ALPAY/Turkey (no: 16538/17) dated 20 March 2018, the ECtHR also examined the declaration of State of Emergency in Turkey following the 15 July 2016 terrorist coup attempt as well as Turkey's derogation within the scope of Article 15 of the ECHR. ECtHR stated in its judgement that, by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogation necessary to avert it. Accordingly, the ECtHR maintained that, in this matter a wide margin of appreciation should be left to the national authorities.

103. ECtHR has also taken into account the position of the Government asserting that the terrorist coup attempt and its consequences posed a serious threat to the democratic constitutional order and human rights, posing a threat to the nation's existence in the sense of Article 15 of the Convention.

104. ECtHR stated in its mentioned judgments that, in the light of the Constitutional Court's assessments and the whole of the elements presented to its examination, the terrorist coup attempt revealed the existence of a "public danger threatening the nation's existence" in the meaning of the Convention.

4. Declaration of a State of Emergency in Turkey

105. State of Emergency is a form of emergency rule declared for certain reasons, that enable temporary restrictions to the fundamental rights and freedoms. Emergency rule procedures have been laid down in Articles 119 to 122 of the Constitution. Moreover as per Article 15 of the Constitution, the exercise of fundamental rights and freedoms may be partially or entirely derogated to the extent required by the exigencies of the situation, as long as obligations under international law are not breached.

106. In addition to the Constitutional provisions, the legal framework governing State of Emergency has been circumscribed by the Law on State of Emergency (No. 2935). Moreover, under emergency rule, the then Council of Ministers, headed by the President, has been empowered to issue Decree-Laws relating to matters necessitated by the State of Emergency, under Article 121 of the Constitution. No other law is required for the exercise of this power. As seen above, Articles 121 and 15 of the Constitution are written in line with the spirit of the Articles 4 of the ICCPR and 15 of the ECHR. Thus, the national protection and legal review in this respect are in line with the international standards.

107. In practice, in conformity with this Constitutional and legal framework, a State of Emergency has been declared following the terrorist coup attempt of 15 July 2016 to restore public order, to reinstate democratic institutions and to eliminate promptly the threat faced with.

108. As explained above in detail, due to the terrorist coup attempt, Turkey was exposed to a public emergency affecting the whole population and threatening the life of the nation. However, the measures taken under the emergency rule have not made any changes in daily life. No restrictions have been brought to the exercise of fundamental rights and freedoms that would affect the daily lives of the people. The measures have been kept limited to issues which necessitated the State of Emergency. The decision to declare a State of Emergency was not taken to restrict individual rights and freedoms but rather to allow the State to initiate prompt and effective responses in its fight against terrorist organizations including the FETÖ/PDY. With a view to protecting democracy and the will of the people, it is a natural right of the State to use this legal power.

109. As mentioned above, over the years, FETÖ/PDY members have infiltrated the state institutions and spread to the sectors such as education, health, media and academia. Therefore, the declaration and the extension of the emergency rule has become an exigency. In line with international obligations, the rule of law is upheld with due respect for fundamental rights and freedoms.

110. In line with Article 4 of the ICCPR, the Decree-Laws are issued and measures are taken to the extent strictly required by the exigencies of the situation and proportionate to the crisis faced by the authorities. The measures are aimed to eliminate the influence of terrorist

organizations within the State. For this purpose, the scope of the Decree-Laws were limited to eliminate terrorist threats, and any interference with the rights and freedoms of others have been avoided.

111. Since the measures are based on Decree-Laws which were subsequently enacted by the parliament as law, the principle of legality has been satisfied. Besides, legal remedies are available. Fair trial and defense rights have been respected.

112. In the light of the foregoing, it is evident that the measures taken are in conformity with international law and required by the exigencies of the situation.

5. Assessment of the Specific Conditions of Present Communications

113. The persons concerned were under custody for 14 days. They were taken under custody in accordance with the court ruling. Nevertheless, said persons did not file an objection against the custody, even though they had the chance to do so.

114. The period of custody is considered proportional and in line with international conventions, taking into account the fact that investigations are being carried out against a large number of people suspected to be affiliated with FETÖ/PDY, and the fact that numerous people were taken under custody under the same investigation; also taking into account the scope of the investigation, the complexity and the seriousness of the crimes said persons are charged with.

115. Said persons were notified of the charges against them. They gave their statements accompanied by an attorney, therefore their right to defence and legal assistance were abided by.

116. In this context, all decisions of custody and detention were given by independent judges, and these decisions contained justifications on why these measures were taken, meaning that they were not arbitrary. Said persons also had the right to appeal against these decisions and they did so.

117. In the light of the explanations above, it is assessed that the Working Group should find the present communications inadmissible due to the fact that they fell under the scope of derogation, and the measures taken against them were clearly not arbitrary.

B. NON-EXHAUSTION OF DOMESTIC REMEDIES

118. Said persons except Hasan Hüseyin Günakan, Yusuf Karabina, Cihan Özkan and Osman Karakaya did not file any applications at the national level regarding the complaints conveyed to the Working Group. In other words, their complaints were directly forwarded to the Working Group without being submitted at the national level.

119. International human rights protection mechanisms are remedies that are of subsidiary nature. It will not be appropriate for an international organization or a court to assess the claim of a breach of human rights which could be found out and eliminated within the contracting states' respective domestic law process.

120. In this context, said persons did not submit an appeal before the Magistrate's Office alleging that their detention and the ongoing proceedings against them were unlawful or arbitrary.

121. Said persons have not filed an action for compensation in accordance with the Article 141 of the CCP against the unlawfulness of their custody or detention, or against the conditions of the custody.

122. Some of the said persons did not file any individual applications to the CC regarding the complaints they communicated to the working group.

123. The Working Group, on the communication *Yang Jianli against the People's Republic of China* in 2003, stated that it would evaluate events and evidence as part of an investigative role in a particular communication, but it will not determine any legal issues concerning the events of the communication, in other words, it will not replace the role of national judicial authorities.[1]

124. In this context, it is worthwile to mention that a complaint mechanism attached to the UN Human Rights Council, found the applications of two former judges, who were suspected to be members of FETÖ/PDY, inadmissible in 2018 for non-exhaustion of domestic remedies

[1] *See* "http://scholarship.law.umn.edu/cgi/viewcontent.cgi article=1569&context=faculty_articles" *for detailed Information on the Working Procedures of the Working Group and its Case Law.*

referring to the applicants' individual application mechanism to the Constitutional Court. This mechanism has referred to the ECHR's judgement in its relevant decision. Therefore, it is considered that the complaints that are not raised at the national level and put forward directly to the Working Group should be rejected, in light of the subsidiarity principle of the Convention, and non-exhaustion of domestic remedies according to Article 41/1.c of the ICCPR.

C. MERITS OF THE COMMUNICATIONS

1. The Allegation of Arbitrary Custody and Detention

125. It was conveyed to the Working Group that the persons concerned were taken under custody and detained unlawfully and arbitrarily.

126. The Republic of Turkey is a democratic, secular and social State governed by the rule of law, upholding the notions of peace, national solidarity and justice, and respect for human rights. The judicial power is held by independent and impartial courts on behalf of the Turkish Nation, and under Constitutional safeguards.

127. As it is stated above, on the night of 15 July 2016, "a group of terrorists in uniforms" within the Turkish Armed Forces attempted an armed terrorist coup against the Turkish democracy for the purpose of overthrowing the elected President, the Parliament and the Government together with the Constitutional order.

128.According to the information obtained through judicial proceedings regarding the coup attempt, and according to the statements of some soldiers and public officials who were members of FETÖ/PDY, it is concluded that the attempted coup was carried out upon the instruction of the founder and leader of the FETÖ/PDY, Fetullah Gülen, and in line with the plan approved by him, and this terrorist organization is responsible for the material and immaterial damages, including the murder of civilians and public officials. Moreover, as the investigations and prosecutions carry on, new evidence exposing the structure of the organization is being obtained each passing day.

129. Besides, the prosecution of only those who directly took part in the attempted coup is not sufficient to combat FETÖ/PDY terrorist organization and to identify all those responsible for the attempted coup. Therefore, it is also very important to identify and prosecute other members, who infiltrated the bureaucracy in order to help orchestrate a violent takeover.

130. While Article 9 of the ICCPR states that no one shall be subjected to arbitrary arrest or detention, it is foreseen in the same article that a person may be held on grounds and in accordance with procedures prescribed by law. In other words, a person may be deprived of his/her liberty in accordance with due process in situations prescribed by domestic law.

131. It is also necessary, according to the ECHR judgements, for there to be a reasonable doubt or plausible reasons (raisons plausibles) that an offence has been committed in order for a person to be deprived of liberty.

132. The reasonable doubt should be sufficient to persuade an entirely objective observer when the evidence obtained and specific conditions of the case are considered. In other words, reasonable doubt or plausible reason requires the presence of an event or information sufficient to convince an objective observer that the accused person may have committed an offence (see, Fox, Campbell and Hartley v. The United Kingdom, no. 12244/86 12245/86 12383/86, 30 August 1990, par. 32, O'Hara v. The United Kingdom, 37555/97, par.).

133. The ECHR states that the initial existence of reasonable doubt is enough to deprive someone of his freedom under Article 5/1 of ECHR and the existence of reasonable doubt should be maintained so that his detention could continue.

134. As detailed in the Public Prosecutor's letter referring the said persons to the Criminal Court of Peace for their detention, the accusations against the said persons are based on concrete evidence. Furthermore, considering the conditions of the SoE, the period in which the said persons were in custody or in detention should be accepted as reasonable.

135. Said persons were informed about the charges against them. They also enjoyed their right to see an attorney while they were in custody and in detention.

136. Said persons were swiftly referred to the court after they were taken in custody.

137. Said persons have the right to challenge their custody and detention before the court from the moment they were taken in custody. Likewise, they have been able to object to their detention and demand their release through their attorneys.

138. On the other hand, as described in detail above, said persons have the right to seek compensation pursuant to Article 141 and the subsequent Articles of the CCP claiming the unlawfulness of their detention.

139. In addition, they have the right to apply individually to the CC, alleging that their fundamental rights were violated, particularly their right to freedom and security.

140. All the remedies and guarantees described above are in accordance with Article 9 of the ICCPR.

141. Also considering the declaration of derogation, period in which said persons were in custody or in detention cannot be assessed as baseless or arbitrary.

142. On the other hand, international mechanisms are of subsidiary nature. The main assesment of evidence and particular circumstances of the case can be made by national judicial authorities. Therefore, in accordance with the principle of subsidiarity, the Working Group on Arbitrary Detention should assess the communications without substituting itself for the national authorities or ignoring the evaluations thereof.

143. As is seen, the prosecution of the persons concerned is based on concrete evidence. It is clear that the allegations that they were taken in custody or detained because of their dissident views aims to mislead the Working Group and constitutes an abuse of right. Accordingly, it is assessed that these allegations are manifestly ill-founded.

2. Allegations regarding Legal Assistance and the Custody Procedure

144. Article 19 of the Turkish Constitution regulates the right to personal freedom and security. First sentence of the said article underlines that all shall enjoy personal freedoms and security, and the cases and conditions to deprive a person's freedom are stipulated in the following articles thereof. This provision of our Constitution guarantees the right to personal liberty and security as a human right.

145. For information on procedures related to custody and detention, and the said persons' right

to object thereof, see paragraphs 3-13 above.

3. Allegations regarding Ill-Treatment

146. Turkey, in line with its "zero tolerance against torture" policy, is one of the few countries in the world that have abolished the statute of limitations regarding the crime of torture. Any allegation regarding torture or ill-treatment is effectively prosecuted before independent and impartial judicial authorities.

147. According to Article 92 of the CCP and Article 26 of the Regulation on Apprehension, Custody, and Statement Taking (Yakalama, Gözaltına Alma ve İfade Alma Yönetmeliği), Chief Public Prosecutors or the public prosecutors they have appointed, examine and oversee every record and procedure regarding custody and detention, the detention facilities, rooms in which the suspect give their statements, and the reasons and period of custody.

148. In addition, as part of the general inspections of provinces and districts which are routinely carried out by civil superintendents, police stations and detention ficilities are inspected. Observations and evaluations regarding these inspections are carried to final inspection reports which are sent to relevant police departments to be followed and fulfilled.

149. Furthermore, the Law Enforcement Monitoring Commission (Kolluk Gözetim Komisyonu) is established; which is aimed to expedite and improve the complaints system of the law-enforcement units, ameliorate its transparency and credibility, to keep under record in a centralized manner the procedures carried out by the administrative authorities regarding the law enforcement officials' alleged crimes or actions that require disciplinary punishment.

150. Penal institutions are periodically and on ad-hoc basis inspected by the Parliament and national/international inspection mechanisms.

151. Within the context of administrative supervision, penal institutions are supervised by the inspectors of the Ministry of Justice, and of Directorate General of Prisons and Detention Houses, Chief Public Prosecutor and public prosecutors in charge of penal institutions.

152. Furthermore, human rights councils of the provinces and districts composed of representatives from non-governmental organizations can also carry out visits to penal

institutions.

153. The Ombudsman Institution and Human Rights and Equality Institution of Turkey (having independent inspection authority within the context of OPCAT) can also make visits (without any permission) to places where people are deprived of their liberty.

154. The chairmen and members of the Human Rights Investigation Commission of the GNAT or Committee of Parliamentary Investigation can visit, investigate and supervise the penal institution within the scope of parliamentary inspection.

155. In addition, Human Rights Investigation Commission of the GNAT, Monitoring Boards, judges of execution, probation personnel and delegations and persons authorized by law can hold private meetings with convicts and detainees.

156. All places in Turkey where persons are deprived of their liberty, including penal institutions and detention facilities can be inspected by the international mechanisms such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), UN Subcommittee on Prevention of Torture (SPT), and Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

157. Turkey is a party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and fully cooperates with the CPT which is the supervising body of the Convention. The procedure regarding the postponement of the CPT's visit, which was allowed by the Convention for reasons of national defence and public security, has not been applied, thus enabling the CPT's visit following the 15 July 2016 coup attempt.

158. Moreover, the rejection of all the applications made to the ECtHR by some persons who were detained after the 15 July 2016 coup attempt and still are in prison, alleging that they are being subjected to ill-treatment and their right to life is threatened, should be taken into consideration. ECtHR has not taken notice of the applicants' allegations, referring to the information and documents provided by the Government.

159. Turkey safeguards its democracy in accordance with the rule of law. Turkey is a country where everyone has the freedom to seek their rights and where all persons and organizations

can request administrative and judicial review of all procedures and actions with legal consequences concerning them. Measures taken against the threats of coup and terrorism within the scope of the state of emergency had been taken to make sure that Turkey maintains a country where the abovementioned rights are guaranteed.

160. Consequently, the measures taken are proportional to the prevailing circumstances and there are review mechanisms and remedies to which persons claiming their rights have been violated can apply.

D. CONCLUSION

161. In light of the explanations provided above, it is believed that the present communications should be dismissed for procedural reasons.

162. Regarding the substance of the communications, it is believed that the International Covenant on Civil and Political Rights has not been violated.