

**Mandates of the Special Rapporteur on extreme poverty and human rights; the Working Group on Arbitrary Detention; the Special Rapporteur on the right to education; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

REFERENCE:  
OL TUR 2/2018

20 February 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extreme poverty and human rights; Working Group on Arbitrary Detention; Special Rapporteur on the right to education; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 35/19, 33/30, 26/17, 34/18 and 31/3.

We are writing in response to the reply of your Excellency's Government of 27 July 2017 to the communication dated 11 April 2017 (AL TUR 4/2017). We would like to thank you for your reply, which touches on many of the issues raised in our communication of 11 April 2017 and reflects the willingness of your Excellency's Government to engage and cooperate with the UN special procedures mechanism. In response, we would like to offer observations on your reply and to take this opportunity to pose follow-up questions to continue our dialogue on these important matters.

*Continued state of emergency*

In our letter of 11 April 2017, we noted that "...the state of emergency has been extended twice, seemingly without an objective assessment of the situation and careful public justification as to why a continued proclamation of a public emergency is necessary" (page 12). The reply of your Excellency's Government merely noted that the state of emergency "...aims at swift and efficient elimination of terrorist groups in the functioning of the state", without offering any objective and thorough assessment of the threats posed by the "terrorist groups" or any justifications for maintaining the state of emergency. We understand that the state of emergency has been once again extended for another three months on 18 January 2018. While the Government has reportedly defended the extension on the basis that security threats by terrorist groups continue to exist in the country, it remains unclear exactly what is the nature of such security threats, how the risk of those threats has been assessed, and why the state of emergency is still warranted over 18 months after the attempted coup. In this regard, we recall that several special procedures mandate holders had strongly urged the Government not to extend the

state of emergency on the grounds that it would pose “significant challenges to the effective protection of human rights”.<sup>1</sup>

We would like to reiterate that a threshold for declaring a public emergency that permits derogations from certain human rights is extremely high. It must be an exceptional situation that “threatens the life of the nation” and not every disturbance or catastrophe would qualify as such.<sup>2</sup> Moreover, even if the conditions for declaring a state of emergency are present, measures taken under the state of emergency must not extend beyond what is “strictly required” by the exigencies of the situation. The Turkish Constitution provides for a similarly high threshold, allowing a state of emergency to 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...”.<sup>3</sup> The onus is on the State to provide compelling justifications for its decision to proclaim a state of emergency and to demonstrate that the threshold has been adequately met. The information before us does not indicate that the Turkish Government has fulfilled this onus, which is a worrying indication of the abuse of a State’s emergency powers.

Also, as a general note, we respectfully remind your Excellency’s Government of the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolution 49/60, 51/210, 72/123 and 72/180. All these resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.

*Emergency measures not in accordance with Turkey’s obligations under the ICESCR*

In our communication of 11 April 2017, we primarily addressed the impact of the state of emergency measures on the human rights guaranteed under the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). We referred to the fact that, while the ICESCR permits certain limitations (but not derogations) on the rights granted therein, the emergency decrees did not appear to be permissible limitations within the meaning of the Covenant. We set out detailed reasons as to why we believe that the

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<sup>1</sup> UN human rights experts urge Turkey not to extend state of emergency (17 January 2018), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22592&LangID=E>

<sup>2</sup> Human Rights Committee, General Comment No. 29: State of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (2001), para. 3.

<sup>3</sup> Article 120, The Constitution of the Republic of Turkey.

requirements of the ICESCR have not been met (see page 8 to 11 of our letter of 11 April 2017).

In your reply of 27 July 2017, your Excellency's Government claims that "the Turkish state has assumed its legitimate right and the 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" (page 3). The reply fails, however, to give any reasons why international law, particularly the ICESCR, allows for the specific measures taken by your Excellency's Government. The current dialogue with your Excellency's Government would remain empty in the absence of specific reference to Turkey's specific obligations under the ICESCR, as explained at length in our letter of 27 April 2017.

What is more, our letter claims exactly the opposite of what your Excellency's Government posits on page 3 of its reply: the Turkish state does *not* have a right to take "all the necessary measures to completely eliminate" a perceived threat. Turkey can only take those measures that are in compliance with its obligations under international human rights law, including the ICESCR and also the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The essence of Turkey's human rights obligations is that there are legal limits to the measures that the State can take.

#### *Lack of transparency*

The reply of your Excellency's Government stresses that "all measures taken during the state of emergency are in complete transparency" (paragraph 5). However, the lack of transparency is precisely one of the most critical concerns with respect to the state of emergency measures. As we already noted in our letter of 11 April 2017, the criteria for assessing one's membership, affiliation or connection with specific terrorist organizations were not spelled out in the emergency decrees and have never been made public.<sup>4</sup> The affected civil servants have often been subject to suspensions and dismissals on the basis of criteria and assessments that they were not aware of and they could not challenge (see page 5 and 6 of our letter). To this day, we continue to receive reports indicating that thousands of civil servants have been dismissed on the basis of their alleged membership of or links to terrorist organizations without concrete evidence. It has been reported, for instance, that the latest decree issued on 24 December 2017 ordered the dismissal of 2,756 military officers, police officers and other civil servants for their alleged links with terrorist organizations, although it is unclear whether such links are substantiated with evidence. We remind your Excellency's Government its obligation of

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<sup>4</sup> In her 2018 thematic report, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, stresses that "given that the counter-terrorism laws increasingly involve criminal regulation of activities that might not previously have been deemed criminal acts by states, allied with ever-widening national definitions of terrorism, the Special Rapporteur underscores the importance of meaningful notification as essential to the fulfilment of the principle of *nullem crimen sine lege*." (A/HRC/37/52) para 24.

proportionality, necessity and non-discrimination to be exercised in respect of each of these individual cases. In this regard, we also reiterate the concerns repeatedly expressed by the special procedures mandate holders that human rights lawyers and defenders continue to be arrested and detained on terrorism charges, based “solely on actions such as downloading data protection software, publishing opinions disagreeing with the Government’s anti-terrorism policies, organizing demonstrations, or providing legal representation for other activists”.<sup>5</sup>

In the reply, your Excellency’s Government has also stressed that the decisions to transfer students of the closed higher education institutions to other State-run universities or foundation-run universities were issued in an “open and transparent way in the web site of the Council of Higher Education of Turkey”. However, we have not been offered any details of how the Council of Higher Education has determined the transfer, whether the affected students were consulted and given a meaningful opportunity to choose where they would like to continue their studies, and whether the Council of Higher Education has taken into account the individual circumstances of the affected students in order to ensure that higher education remains available, accessible and acceptable to them. In justifying the decisions, your Excellency’s Government seems to rely on the assertion that the Council of Higher Education is an independent, non-political body, competent to support and maintain the autonomy of academic institutions. Based on the available evidence, however, it would be a mischaracterization to describe the Council of Higher Education as a non-partisan defender of academic freedom. The composition of the Council’s membership is indicative of its political character: One third of its 21 members are directly appointed by the President of the Republic of Turkey, while one third are selected by the Council of Ministers and the remaining third by the Inter-University Council. The latter two categories of members are subject to approval by the President of the Turkish Republic, which means that the executive retains complete control over the entire membership of the Council of Higher Education. In fact, it is the Council of Higher Education which has been responsible for the mass suspension and dismissal of academics, faculty members and staff, thereby curtailing academic freedom, which underpins the enjoyment of the right to education.

In light of the above, we remain unconvinced that the state of emergency measures have been undertaken in complete transparency within the limits permitted by international human rights law.

#### *The right to an effective remedy*

Your Excellency’s Government reiterates that several domestic remedies are available to those who have been affected by the state of emergency measures and

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<sup>5</sup> Turkey: UN experts call for dropping of terror charges against leading human rights defenders (13 November 2017),

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22390&LangID=E>

Concerns about the use of By Lock as grounds for terrorism-charges were raised by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression following his official country visit to Turkey in November 2016 (A/HRC/35/22/Add.3).

highlights in particular the new remedial mechanisms introduced by Decree Law No. 685, including the Inquiry Commission on the State of Emergency Measures. This Inquiry Commission is mandated to review and render decisions on appeals against the dismissals of civil servants or closure of institutions and organizations. Your Excellency's Government has stated that the establishment of this Commission is "in line with the recommendations by the Council of Europe" and that the European Court of Human Rights has ruled that remedies that Decree Law No. 685 may constitute "an accessible remedy". As correctly cited by your Excellency's Government, the European Court of Human Rights in the case of *Köksal v. Turkey* found the complaint by a dismissed school teacher inadmissible on the basis that the remedies introduced by Decree Law No. 685 constituted, in principle, an accessible remedy and that the applicant had to exhaust domestic remedies before submitting a complaint to the Court. We wish to underline in this regard, however, that the Court's judgment was based on the technical admissibility criteria under article 35 of ECHR and does not necessarily have a bearing on the question of whether or not the Inquiry Commission is able to provide, in substance, effective remedies to the affected individuals. The Court itself emphasized that its judgment did not preclude a possible re-examination of the question of the effectiveness and reality of the remedy, both in theory and in practice, in light of the decisions to be given by the commission and domestic courts, subject to the effective enforcement of those decisions.<sup>6</sup> The effectiveness of the remedy is to be judged against the jurisprudence of the European Court of Human Rights under article 13 of ECHR, starting with the decision in *Kudla v Poland*, Judgment of 26 October 2000, appl. no. 30210/96. In this regard, we remind your Excellency's Government that the remedy required by article 13 needs to be "effective" in practice as well as in law. Also, we would like to remind your Excellency's Government about the Recommendations of the Council of Ministers of the COE: Recommendations [Rec\(2004\)6](#) on the improvement of domestic remedies and [CM/Rec\(2010\)3](#) on effective remedies for excessive length of proceedings, which was accompanied by a guide to good practice.

As already raised in our letter of 11 April 2017, there are doubts over the independence, capacity and effectiveness of the Inquiry Commission. Referring to the Inquiry Commission shortly after its establishment was announced, the European Commission for Democracy Through Law ("Venice Commission") stressed that:

"The essential purpose of that body would be to give individualised treatment to all cases. That body would have to respect the basic principles of due process, examine specific evidence and issue reasoned decisions. This body should be independent, impartial and be given sufficient powers to restore the status quo ante, and/or, where appropriate, to provide adequate compensation."

In view of its size, composition, duration of its mandate and principles of functioning, the Venice Commission has taken a rather skeptical view on the potential effectiveness of the Inquiry Commission, stating that "[i]t remains to be seen whether this

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<sup>6</sup> *Köksal v. Turkey* (application no. 70478/16), para. 29.

commission...will be able to give individualised treatment to all cases, and issue reasoned decisions based on verifiable evidence”.<sup>7</sup> Unfortunately, the reply of your Excellency’s Government has not supplied information that would allow us to reverse this doubt, even though we explicitly addressed this issue in our letter of 11 April 2017. According to media reports, the Inquiry Commission has received tens of thousands of applications since it has become operational in July 2017. However, we were unable to find any public information on the number of applications received and considered by the Inquiry Commission, decisions rendered in those cases, and remedies provided in successful cases. We would welcome more specific information on the mandate and work of the Inquiry Commission, as detailed in the questions below.

We would welcome any comments that your Excellency’s Government may have on our observations above, as well as any other relevant information that it may wish to submit in response to this communication. More specifically, we would also be grateful for further information on the following questions, as well as for an answer to questions 2, 4 and 5 of our original letter of 11 April 2017:

1. What are the grounds on which the state of emergency has been further extended on 18 January 2018? Please provide evidence of specific threats that continue to threaten the survival of the Turkish State and detailed justifications for the extension of the state of emergency.
2. In paragraph 6 of the reply, your Excellency’s Government has referred to article 141 of the Civil Servants Law No. 657, which provides for the rights of suspended or arrested civil servants to be paid two-thirds of their salary during the period of suspension or arrest and to continue to benefit from the social rights and assistance. Could you please indicate:
  - a. How many suspended or arrested civil servants benefited or currently benefit from the entitlement to their partial salary during the period of their suspension or arrest?
  - b. How many suspended or arrested civil servants benefited or currently benefit from “the social rights and assistance” and clarify exactly what they received or receive?
3. Could you please clarify what compensation or assistance has been provided to dismissed civil servants?
4. Could you please provide specific details of assistance provided by the Social Assistance and Solidarity Foundations (SASF), pursuant to the Law

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<sup>7</sup> European Commission for Democracy through Law (Venice Commission), Turkey: Opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media (Opinion 872/2016), 13 March 2017, [https://www.humanrights.ch/upload/pdf/170321\\_Turkey\\_Media.pdf](https://www.humanrights.ch/upload/pdf/170321_Turkey_Media.pdf), at para. 88.

on Social Assistance and Solidarity (Code No. 3294)? How many individuals and families have received such assistance and what were the criteria used in assessing their eligibility and determining the type and level of assistance to be given?

5. Could you please indicate the number of cases considered by the Inquiry Commission and the outcomes in those cases? Please provide details of its methods of work and criteria for its decisions, as well as a breakdown of successful and unsuccessful cases. In the event of successful cases, please indicate what remedies have been awarded to the applicants.
6. What criteria does the Government use to decide whether an individual has a connection with the Gülenist movement? Is merely using the encrypted application “By Lock” sufficient to conclude that an individual has a connection to the Gülenist movement? How does the Government assess whether this particular application was not used for purposes other than communication with members of the Gülenist movement?
7. Please also provide information on what steps have been taken by the Council of Higher Education to ensure that students affected by the closing of higher education institutions were meaningfully consulted and their individual circumstances taken into account in the school transfer decisions.

We would appreciate receiving any response or information within 60 days. Your Excellency’s Government’s response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Philip Alston  
Special Rapporteur on extreme poverty and human rights

Elina Steinerte  
Vice-Chair of the Working Group on Arbitrary Detention

Koumbou Boly Barry  
Special Rapporteur on the right to education

David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Fionnuala Ní Aoláin  
Special Rapporteur on the promotion and protection of human rights and fundamental  
freedoms while countering terrorism