

UPR Submission on Violations of Non-derogable Rights in Turkey

By

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EXECUTIVE SUMMARY

1. This submission by the London Advocacy (LAG) highlights a number of key areas of concern regarding Turkey's compliance with its international human rights obligations relating to non-derogable rights.
2. This submission examines violations of the right to life, the prohibition of torture and the prohibition of enforced disappearance as three of non-derogable rights.
3. This submission ends with a recommendations section.

FOLLOW UP TO THE PREVIOUS REVIEW

4. In the 2015 report which Turkey put forward for review, the country referred to the referendum in 2010, the judicial reform packages adopted starting from 2011, the democratization package adopted in 2014, the action plan for the prevention of the ECtHR violations in 2014, the jurisprudence of the Constitutional Court upon individual applications, the Ombudsman system, the work of the Turkish Human Rights Institution and the Parliamentary Human Rights Examination Commission on enforced disappearances as a basis of progress in its human rights records. Besides, it referred to the fact that Turkey has become a member of the Convention against Torture, removed the restrictions in relation to the commission of the crime of torture, followed a zero-tolerance policy against torture, and passed amendments on the prohibition of the use of evidence obtained through torture in a court of law.¹ Other states recommended Turkey to strengthen the mechanisms established to implement the Convention against Torture and to set up domestic mechanisms against torture.² Nevertheless, Turkey rejected the suggestion to sign the International Convention for the Protection of All Persons from Enforced Disappearance.³
5. Enforced disappearances, which were heavily used in the 1990s, have started to occur again since January 2016 and have increasingly continued after the 15 July 2016 coup attempt. There is credible evidence endorsed by the UNHCR Working Group on Arbitrary Detention⁴ suggesting beyond any doubt that enforced disappearances have been planned, encouraged and even committed by the Turkish state agencies in a widespread and systematic manner. This report examines the enforced disappearances which were allegedly perpetrated by

¹ A/HRC/WG.6/21/TUR/1 paras 9, 10, 11, 12, 16, 19, 25, 28, 30, 77, 85, 86.

² A/HRC/29/15 para 148.32 (Spain), para 149.8 (France).

³ A/HRC/29/15 para 151.4.

⁴ https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session81/A_HRC_WGAD_2018_11.pdf

Turkish government agencies, and the human rights violations which took place within the scope of the commission of these disappearances.

INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS OF TURKEY

6. The Republic of Turkey is a member of the United Nations and a party to the ICCPR and the ICESCR. Turkey is also party to the European Convention on Human Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, all of which set standards about the prohibition of enforced disappearance and torture. Turkey is not a party of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).
7. According to the United Nations General Assembly, 'any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.'⁵
8. Enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁶
9. According to the Working Group on Enforced or Involuntary Disappearances, enforced disappearance can amount to be a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁷
10. The right to life, the prohibition of torture and the prohibition of enforced disappearance impose a positive as well as negative obligations on states party to the ICCPR and other UN treaties, which Turkey is a party to. The positive obligation requires the states to take appropriate steps to prevent these crimes under its jurisdiction.⁸ These obligations also require the carrying out of an effective investigation when the right to life or the prohibition of torture has been violated.⁹ As for the negative obligation, it requires the state not to commit, abet, encourage or permit these crimes.

LEGAL FRAMEWORK RESTRICTIONS

11. On 21 July 2016, the Turkish Government declared a state of emergency. The state of emergency was effective until 18 July 2018 when it was officially ended by the

⁵ Declaration on the Protection of all Persons from Enforced Disappearance, Article 1, Adopted by General Assembly resolution 47/133 of 18 December 1992.

⁶ International Convention for the Protection of All Persons from Enforced Disappearance, Article 2.

See also, General Comment on the definition of enforced disappearance, para. 2.

⁷ General Comment of Working Group on Enforced or Involuntary Disappearances

https://www.ohchr.org/Documents/Issues/Disappearances/GCas_crime_against_humanity.pdf

⁸ Council of Europe, Guide on Article 2 of the European Convention on Human Rights: Right to Life (updated on 31 December 2018) Para. 9.

⁹ *Armani da Silva v. the United Kingdom* no. 5878/08 (ECHR, 30 March 2016) Para. 229.

Turkish Parliament.¹⁰ In Turkey's notification lodged with the Secretary-General of the United Nations, the following articles were mentioned as rights which would have been affected from the derogations: *art. 2 (3) (right to an effective remedy); art. 9 (right to liberty and security); art. 10 (right to humane treatment in detention); art. 12 (freedom of movement); art. 13 (procedural guarantees in expulsion proceedings); art. 14 (right to a fair trial); art. 17 (right to privacy); art. 19 (right to freedom of expression); art. 21 (right of peaceful assembly); art. 22 (freedom of association); art. 25 (political rights); art. 26 (equality before the law); art. 27 (protection of minorities) of the ICCPR*. Considering article 4 ICCPR and United Nations' Human Rights Committee's General Comments numbered 29, 32 and 35, it can prima facie be said the derogations of the right to an effective remedy (art. 2(3)), the right to humane treatment in detention (art. 10) and the protection of minorities (art. 27) are invalid, as they refer to non-derogable rights.¹¹

12. The right to life, the prohibition of torture, the prohibition of enforced disappearance are stipulated in a non-derogable way under article 15(2) of the Constitution and article 4(2) of the ICCPR. However, various emergency decrees and ordinary laws enacted by the Turkish Government have resulted in de facto derogation from the right to life, the prohibition of torture and the prohibition of enforced disappearance:
 - 12.1. Emergency Decree (no. 667, art. 9(1), dated 23 July 2016) stipulated that "legal, administrative, financial and criminal liabilities shall not arise in respect of the persons who have adopted decisions and who fulfil their duties within the scope of this Decree Law".
 - 12.2. Emergency Decree no. 668 (art. 37) has further expanded this principle of impunity, specifying that there will be no criminal, legal, administrative or financial responsibility for those making decisions, implementing actions or measures, or assuming duties as per judiciary or administrative measures for suppressing coup attempts or terror incidents, as well as individuals taking decisions or fulfilling duties as per state of emergency Executive Decrees.¹²
 - 12.3. By Emergency Decree no. 696 (art. 121), the impunity provided to public servants under Emergency Decrees nos. 667-668 was also extended to civilians. More precisely, it was stipulated that those civilians acting to suppress the coup attempt of 15 July 2016 and the ensuing events will have no legal, administrative, financial or criminal responsibility.
 - 12.4. Emergency Decree 667, 668 and 696 were approved by the Turkish Parliament and have acquired qualification of permanent law (Law Nos. 6749, 6755 and 7079).
13. Pursuant to these decree laws, public prosecutors have given non-prosecution decisions on criminal complaints that were filed for alleged murder and torture incidents. Trabzon Prosecutorial Office thus gave a non-prosecution decision under article 9 of Emergency Decree no. 667 on a complaint filed by an individual

¹⁰ <https://www.bbc.co.uk/news/world-europe-44881328>

¹¹ International Commission of Jurists, 'Justice Suspended: Access to Justice and the State of Emergency in Turkey' (2018), 9 <<https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf>> accessed 4 March 2019.

¹² Ismet Akça (n 134) 73.

who alleged that he was tortured during police custody.¹³ Likewise, the Istanbul Prosecutorial Office gave a non-prosecution decision on a complaint that was filed by the family members of a military cadet who was murdered by civilians during the coup attempt after he surrendered to the police.¹⁴ In addition, since the failed coup attempt, wide-spread torture and ill-treatment incidents have been reported in Turkey by the United Nations' High Commissioner for Human Rights¹⁵, the UN Special Rapporteur on Torture,¹⁶ Human Rights Watch¹⁷ as well as many other reliable institutions.

14. In conclusion, the impunity clauses introduced within the emergency measures and subsequent legislative actions, and their interpretation and implementation by law enforcement forces, judges and prosecutors, have resulted in a *de facto* derogation of the right to life, to the prohibition of torture and the prohibition of enforced disappearance, which is clearly illegal under the Constitution, the ICCPR and other UN treaties which Turkey is party to.
15. Although 'during the 1990s enforced disappearances became a pattern of human rights violations against Kurdish civilians'¹⁸, this pattern stopped in the next decade. A coalition consisting of various human rights NGOs has collected the names of more than 1,300¹⁹ persons allegedly disappeared by state agents between 1980 and 2002 (the year the emergency rule was lifted), mostly in the Kurdish region.²⁰
16. However, after the attempted coup in 2016 it has re-emerged, and, more than 25 enforced disappearance incidents have been reported since then. Since 2016, Sunay Elmas, Mustafa Özgür Gültekin, Hüseyin Kötüce, Turgut Çapan, Mesut Geçer, Önder Asan, Ayhan Oran, Mustafa Özben, Cemil Koçak, Murat Okumuş, Fatih Kılıç, Durmuş Ali Çetin, Cengiz Usta, Ümit Horzum, Hıdır Çelik, Enver Kılıç,

¹³ The Arrested Lawyers Initiative, Extradition to Turkey: One-way Ticket to Torture and Unfair Trial (February 2018) 26, <<https://arrestedlawyers.org/2018/02/09/report-extradition-to-turkey-one-way-ticket-to-torture-and-unfair-trial/>> accessed 23 April 2019.

¹⁴ The non-prosecution decision, dated 07.11.2018, was upheld by the Istanbul Peace Criminal Judgeship.

¹⁵ Office of the United Nations' High Commissioner for Human Rights, 'Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East' (March 2018) Paras. 77-84.

¹⁶ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on his Mission to Turkey (18 December 2017) Paras. 26-28.

¹⁷ Human Rights Watch, 'A Blank Check: Turkey's Post-Coup Suspension of Safeguards Against Torture', (2016) 28.

¹⁸ Hafiza Merkezi & ECCHR, Monitoring Report (15 January 2016), para.7

https://hakikatadalethafiza.org/wp-content/uploads/2016/03/Rule-9-2-Communication-on-Turkey-Jan.-2016-HM_ECCHR.pdf

¹⁹ Ibid, para.27-28

The ECtHR has examined a large number of applications alleging enforced disappearances that occurred in the 1990s in southeastern Turkey as a result of state agents' activities within the context of the Kurdish conflict and found violations of the Convention in its significant number of judgments in respect of Turkey. As identified by Hafiza Merkezi, 67 applications related to 126 forcibly disappeared persons have been brought before the ECtHR up to the present, 51 of which resulted in violation judgments, whereas 7 of them resulted in friendly settlements, and 9 of them were declared inadmissible. In these judgments the violation of a range of rights, mainly the rights to life (Article 2), and to an effective remedy (Article 13), as well as the prohibition of torture and inhuman or degrading treatment (Article 3) have been found by the ECtHR.

²⁰ Hafiza Merkezi & ECCHR, Monitoring Report (15 January 2016), para.14

https://hakikatadalethafiza.org/wp-content/uploads/2016/03/Rule-9-2-Communication-on-Turkey-Jan.-2016-HM_ECCHR.pdf

Zabit Kişi, Orçun Şenyücel, Hasan Kala, Ahmet Ertürk, Yasin Ugan, Özgür Kaya, Gökhan Türkmen²¹, Salim Zeybek, Erkan Irmak, Fahri Mert, Mustafa Yılmaz²², Ayten Ozturk became victims of enforced or involuntary disappearances in Turkey.²³ Zabit Kisi and Ayten Ozturk, who were subjected to this crime for respectively 108 and 184 days, were then handed over to the police. In the courthouse, both victims told their gruesome stories of the secret detention facilities of the Turkish intelligence services (MIT).²⁴ Regarding these incidents, Human Rights Watch concluded that “There were credible grounds to believe that government agents forcibly disappeared the missing men.”²⁵

17. Further to this, 13 journalists from nine media outlets in eight countries have investigated the Turkish Government’s global abduction operation by which around a hundred victims were brought to Turkey by force.²⁶
18. Apart from the successful abductions and irregular renditions the Turkish intelligence agents were involved,²⁷ there have also been reports about thwarted attempts of abductions by, or in collaboration with, the Turkish officers. These include an attempt to abduct Fethullah Gulen from the US,²⁸ a businessman named Arcan from Switzerland,²⁹ Veysel Akcay, Director General of the Mongolia Empathy Schools,³⁰ and Mesut Vardak, Yılmaz Aytan, Önder Akkuşçu, Yunus Demirci and Sami Yavuz in Afghanistan.³¹
19. Between 18 and 21 May 2019, at least 51 persons, including three children, were detained in Halfeti, Urfa, during police raids following armed clashes between security forces and the PKK. Images circulated on the internet and eyewitnesses’ testimonies show that during the arrest the detainees were pushed to the floor, handcuffed behind their backs and kept on the ground in stress position for hours.

²¹ Public Authorities are reluctant to investigate claims, Ankara Public Prosecutors’ Office issued a non-investigation decision within days on complaint filed by the spouse of Gokhan Turkmen.

<https://twitter.com/GokhanTurkmen07/status/1146531080574590976>

²² Public Authorities are reluctant to investigate claims, Ankara Public Prosecutors’ Office issued a non-investigation decision within 19 days on complaint filed by the spouse of Mustafa Yilmaz. (Decision no: 2019/27773)

²³ See <https://stockholmcf.org/enforced-disappearances-in-turkey-2/> for a complete list of enforced disappearances that took place in Turkey after the thwarted coup attempt of 2016, including the ones enlisted in this submission.

²⁴ <https://boldmedya.com/en/2019/06/21/ayten-ozturk-who-survived-the-secret-torture-center-in-ankara-i-was-tortured-for-6-months/> and <https://boldmedya.com/en/2019/07/01/zabit-kisi-who-was-tortured-for-108-days-i-no-longer-find-odd-the-ones-who-committed-suicide/>

²⁵ <https://www.hrw.org/news/2017/08/03/turkey-investigate-ankara-abductions-disappearances>

²⁶ Black Site Turkey, <https://correctiv.org/en/top-stories-en/2018/12/06/black-sites/>

²⁷ Among other reports see also: <https://observatoryihr.org/iohr-tv/iohr-organises-turkey-human-rights-advocacy-mission-in-geneva/>

²⁸ <https://www.wsj.com/articles/ex-cia-director-mike-flynn-and-turkish-officials-discussed-removal-of-erdogan-foe-from-u-s-1490380426>

²⁹ <https://ipa.news/tr/2018/03/15/adam-kacirmak/> and https://www.swissinfo.ch/eng/business/diplomatic-incident_arrest-warrant-issued-for-turkish-diplomats/44198410

³⁰ <https://www.reuters.com/article/us-mongolia-kidnapping-turkey/turkish-teacher-kidnapped-in-mongolia-freed-after-authorities-ground-flight-idUSKBN1KI03N>

³¹ <https://turkeypurge.com/gulen-linked-turkish-teachers-businessman-detained-afghanistan> and <https://stockholmcf.org/turkeys-erdogan-allegedly-blackmailed-afghan-govt-for-detention-of-turkish-teachers/> and <https://stockholmcf.org/afghanistans-intelligence-agency-releases-four-abducted-teachers-of-turkish-schools/>

Police officers allegedly also kicked, punched, and hit them with the butt of their weapons. Reportedly, the beating continued in the anti-terrorism branch of Urfa security directorate, where the detainees were taken for interrogation. Some of them told their lawyers that the police threatened, blindfolded them and applied electricity to their bodies and genitals. Lawyers acting on behalf of some of the detainees reported that many of them presented visible injuries, cuts and bruises to their bodies, legs and faces, but were terrified to speak out for fear of being exposed to even heavier torture.³²

20. On 27 May 2019, the Ankara Bar Association published information about a separate case of torture of dozens of dismissed diplomats held in custody at the Financial Crimes Investigation Bureau of the Ankara General Directorate of Security. According to the report, which gathers the testimonies of six of the arrested individuals, the detainees were taken to interrogations during which they were subjected to psychological pressure and forced to sign confessions. Five of these six people reported that they were also subjected to torture and ill-treatment.³³ When the allegations were brought to the Human Rights Commission of the Turkish Parliament, the government suggested that the first-hand relatives of the lawyers that prepared the report were alleged to be Gulenists, and that there were intelligence in their hands that linked this report to foreign powers and hence the report should be deemed to lack credibility.³⁴ Discrediting a bar association's report on intelligence files about the relatives of lawyers who prepared the report, shows the level of deterioration of rule of law in Turkey.

RECOMMENDATIONS

The LAG call upon the Government of Turkey to significantly improve the overall conditions for non-derogable (absolute) human rights in the country. In particular, the Government of Turkey should:

1. Sign and ratify the "International Convention for the Protection of All Persons from Enforced Disappearance."
2. Stop all incidents of abductions and enforced disappearances immediately.
3. Stop the impunity of perpetrators of these crimes and carry out investigation against perpetrators violating non-derogable rights and transparently share the results of such investigations with the public.
4. Reform the MIT law and exclude investigation of violations of non-derogable rights by MIT personnel from the permission mechanism and secure that MIT, and more specifically, the Directory of Special Operations operate under supervision of transparent and civilian control mechanisms.
5. Change the definition of torture in Turkish laws so as to include "the actions and coercions to obtain information or confession from someone" into the definition

³² <https://bianet.org/english/human-rights/209087-report-on-halfeti-by-urfa-bar-association-the-detained-subjected-to-sexual-torture>

³³ <https://ahvalnews.com/detentions/ankara-bar-association-backs-torture-claims-detained-former-diplomats> and <https://ahvalnews.com/detentions/ankara-bar-association-backs-torture-claims-detained-former-diplomats>

³⁴ <https://www.gazeteduvar.com.tr/gundem/2019/07/11/ankara-barosu-iskence-raporuna-feto-suclamasi/>

and to be in line with the international standards and declarations that Turkey is already party to.

6. Establish a legal mechanism to weigh credibility of allegations of torture and enforced disappearances and stop using intelligence reports as measures of credibility.
7. Repeal all legislation and decrees promulgated under the state of emergency.
8. Provide adequate remedies to victims including compensation and allow all abductees who were forcefully brought into Turkey to return back to the country from where they had been abducted or to go to a third country without fear of future persecution to them or their close family.
9. Authorize official visits by the UN Special Rapporteur on non-derogable rights and UNHRC Working Groups.