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Rule 9.2 submission by the Turkey Human Rights Litigation Support Project, Human Rights Watch, and the International Commission of Jurists on the measures required for the implementation of *Kavala v Turkey* (Application no. 28749/18, 10 December 2019) and *Proceedings under Article 46§4 in the case of Kavala v Türkiye* [GC] (Application no. 28749/18, 11 July 2022)

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I. SUMMARY

On 10 December 2019, in *Kavala v Turkey*, the European Court of Human Rights ("ECtHR" or "the Court") found multiple violations of the Convention due to the detention of human rights defender Osman Kavala, prosecuted on charges of attempting to overthrow the constitutional order and the Government with respect to the Gezi Park events of 2013 and the attempted coup in July 2016. This included the finding that Osman Kavala's detention had pursued the ulterior purpose of reducing him to silence (violation of Article 18 taken in conjunction with Article 5§1). Under Article 46 of the Convention, the Court required Turkish authorities to put an end to his detention and secure his immediate release.

Nevertheless, on 25 April 2022, Mr. Kavala was sentenced to aggravated life imprisonment on charges of attempting to overthrow the Government (under Article 312 of the Turkish Criminal Code) for his alleged role in the 2013 Gezi Park protests. In a landmark judgment under the highly exceptional infringement proceedings, the Court found on 11 July 2022 that Türkiye had violated its obligation under Article 46§1 of the Convention to comply with the Court's judgments. Despite this, as well as multiple calls from the Committee of Ministers for Mr. Kavala's release, his conviction was upheld on 28 September 2023.

The Turkish authorities' refusal to secure Osman Kavala's immediate release as ordered by the Court, instead compounding the violations found in the Court's judgments of 2019 and 2022 by upholding Mr. Kavala's aggravated life sentence, amounts to a sustained and deliberate failure to take the individual measures required by these two judgments, gravely disregarding Türkiye's commitments under the Convention. Domestic judicial authorities have entirely failed to refer to the Court's 2019 and 2022 judgments in their decision to uphold Osman Kavala's conviction. Subsequently, state authorities strongly criticised calls by the Parliamentary Assembly of the Council of Europe ("PACE") for the judgment implementation, evidencing Türkiye's lack of good faith and the political nature of Osman Kavala's ongoing detention.

The present submission recalls that the Court's finding of a violation of Article 18 in conjunction with Article 5§1 in *Kavala v Turkey* vitiates any action resulting from the charges related to the Gezi Park events and the attempted coup. The NGOs ask this Committee to call once again for the immediate release of Osman Kavala; to stress that the ECtHR's two judgments plainly apply to Osman Kavala's conviction and aggravated life sentence; and to strongly condemn judicial authorities' decision to uphold this conviction and sentence. They also urge this Committee to affirm its endorsement of the PACE resolution of 12 October 2023; condemn domestic authorities' bad faith allegations that the PACE pursues political motives; recall the Turkish authorities' binding obligation under Article 46 of the Convention; intensify its efforts to ensure continued engagement with this case; and identify the implementation of these judgments as one of the main conditions for maintaining constructive co-operation with Türkiye.

Regarding the implementation of general measures to put an end to similar violations, to provide redress for such violations, and to prevent other similar violations from reoccurring,

the NGOs highlight the continued instrumentalisation of criminal law to silence human rights defenders and suppress scrutiny and criticism of the state. Turkish authorities have consistently failed to adhere to international standards on states' heightened responsibilities in safeguarding human rights defenders due to their pivotal role in a democratic society. The legitimate exercise of Convention rights such as freedom of expression and freedom of assembly and association is repeatedly being linked to violent events and serious criminal offenses through a manifestly unreasonable interpretation of criminal law and evidentiary standards. In these proceedings against real or perceived dissenting voices, the basic tenets of legality and of a fair trial are systematically violated. The NGOs also underline Turkish authorities' persistent failure to adhere to Convention standards and to implement key ECtHR judgments finding that an individual's detention pursued an ulterior purpose, or that judicial authorities' interpretation and application of criminal law violated the essence of the right to a fair trial and the principle of legality.

The NGOs ask this Committee in this respect to urge Turkish authorities to bring an end to punitive prosecutions and misuse of criminal law against human rights defenders and adopt a concrete policy and targeted legislation on the protection of human rights defenders against any form of harassment or persecution and for the creation of a safe and enabling environment for them to pursue their activities. The NGOs provide further recommendations on amending broad and vaguely worded anti-terrorism and national security legislation; addressing non-implementation of ECtHR judgments and ensuring respect for Convention standards; and monitoring and strengthening respect of legality and fair trial rights.

The submission also underlines intensifying issues surrounding judicial independence and impartiality in Türkiye. It discusses the lack of structural independence of the Council of Judges and Prosecutors; the deeply polarised system of judicial appointment; and politically motivated decisions regarding promotions, transfers, disciplinary measures and the dismissal of judges and prosecutors. The NGOs describe, furthermore, the lack of structural independence of the Constitutional Court and the increasingly intense pressure it has faced over cases concerning perceived dissidents. Finally, they point to continuing attempts by the President and his governing coalition to influence criminal proceedings.

To address these systemic issues, the NGOs urge the Committee of Ministers to request that Türkiye address serious shortcomings in the independence and impartiality of the judiciary by reforming the method of appointment of the Council of Judges and prosecutors, in line with international standards, and modifying the problematic appointment system for judges and prosecutors. Türkiye must also be asked to ensure that judges and prosecutors are protected from politically motivated decisions against them by addressing this submission's recommendations under this heading. These include ensuring that such decisions are based on objective criteria and that affected individuals have access to an effective remedy before an independent judicial body, as well as strengthening judges' security of tenure and granting them functional immunity both in law and in fact.

The NGOs' recommendations further detail specific measures to strengthen the independence of the Constitutional Court and the effectiveness of the individual application mechanism before that Court, including preventing or ceasing any criminal proceedings against members of the Constitutional Court for their decisions. Finally, the NGOs urge this Committee to emphasise that it is imperative for government and state officials to desist from all forms of interference in the administration of justice, including overt comments on ongoing proceedings and covert instructions to members of the judiciary.

II. INTRODUCTION AND CHRONOLOGICAL OVERVIEW OF DEVELOPMENTS

1. This communication aims to provide the Committee of Ministers ("this Committee") of the Council of Europe with information and recommendations concerning the state of implementation of individual and general measures required by the European Court of Human Rights' ("the Court" or "ECtHR") judgments of *Kavala v Turkey* (Application no. 28749/18, Judgment of 10 December 2019) and *Proceedings under Article 4646§4 in the case of Kavala v Türkiye* [GC] (Application no. 28749/18, 11 July 2022). It does so in light of action plans submitted by the Turkish Government and relevant developments in Türkiye. This communication is submitted jointly by the Turkey Human Rights Litigation Support Project, Human Rights Watch, and the International Commission of Jurists ("the NGOs"), ahead of this Committee's 1492nd meeting.
2. The case concerns the arrest and pre-trial detention of businessperson and human rights defender Osman Kavala, involved in setting up numerous non-governmental organisations and civil-society movements active in the areas of human rights, culture, social studies, historical reconciliation and environmental protection in Türkiye. Arrested on 18 October 2017, Mr. Kavala was accused of 'attempting to overthrow the constitutional order and the Government through force and violence' within the context of the Gezi Park events of 2013 (Article 312 of the Turkish Criminal Code (TCC)) and 'to overthrow the constitutional order' within the context of the attempted coup in July 2016 (Article 309 TCC).
3. On 10 December 2019, the Court found that Osman Kavala's arrest and pre-trial detention had taken place in the absence of a reasonable suspicion that he had committed an offense, as the facts relied on could not reasonably be considered behaviour criminalised under domestic law and as those facts were largely related to the exercise of Convention rights as a human rights defender (violation of Article 5§1 of the Convention). The Court held that Mr. Kavala's detention pursued an ulterior purpose, namely to silence him, and was likely to have a dissuasive effect on the work of human rights defenders in general (violation of Article 18 taken in conjunction with Article 5§1). Moreover, it found a violation of Article 5§4 due to the excessive length of judicial review of Mr. Kavala's detention. Under Article 46, the Court held that the continuation of Mr. Kavala's pre-trial detention would entail a prolongation of the violation of his Convention rights and that

the State was required to take every measure to put an end to his detention and to secure his immediate release.

4. Despite this judgment, Osman Kavala was not released. This Committee therefore issued an interim resolution in December 2020 recalling the Court's findings and urging the Turkish authorities to assure Mr. Kavala's immediate release.[1] In December 2021, this Committee issued another interim resolution, serving formal notice on Türkiye of its intention to initiate infringement proceedings under Article 46§4 of the Convention.[2] In February 2022, in accordance with Article 46§4 of the Convention, it referred to the Court the question as to whether Türkiye had failed to fulfil its obligation under Article 46§1.[3] Despite this, on 25 April 2022, the Istanbul 13th Assize Court issued a widely criticised judgment, the NGOs and different experts, sentencing Mr. Kavala to aggravated life imprisonment on charges of attempting to overthrow the Government (under Article 312 of the TCC) for his alleged role in the 2013 Gezi Park protests.[4]

5. In the *Kavala v Türkiye (Proceedings under Article 46§4)* judgment of 11 July 2022, the Grand Chamber found that Türkiye had violated Article 46§1. It noted that Mr. Kavala had been held in pre-trial detention for over four years on the same grounds that had been held in the initial judgment to be insufficient to justify the suspicion that he had committed a criminal offence, and that in April 2022, he had been convicted and sentenced to aggravated life imprisonment under Article 312 of the TCC on this basis. The Court was, therefore, unable to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the earlier *Kavala* judgment, or in a way that would make practical and effective the protection of Mr. Kavala's Convention rights.

6. Disregarding this unprecedented infringement judgment of the Court, on 28 September 2023, the Court of Cassation upheld the conviction and sentence of Osman Kavala, which became final. In its most recent decision on this case, at its meeting of 5-7 December 2023, this Committee "expressed profound regret that the applicant's conviction […] became final, despite the European Court's findings that the criminal proceedings against him constituted a misuse of the criminal justice system, undertaken for the purpose of reducing him to silence, and also despite the Committee's numerous calls urging for the

[1] Interim Resolution CM/ResDH(2020)361, Execution of the judgment of the European Court of Human Rights, Kavala against Turkey (Adopted by the Committee of Ministers on 3 December 2020 at the 1390th meeting of the Ministers' Deputies).
[2] Interim Resolution CM/ResDH(2021)432, Execution of the judgment of the European Court of Human Rights, Kavala against Turkey (Adopted by the Committee of Ministers on 2 December 2021 at the 1419th meeting of the Ministers' Deputies).
[3] Interim Resolution CM/ResDH(2022)21, Execution of the judgment of the European Court of Human Rights, Kavala against Turkey, (Adopted by the Committee of Ministers on 2 February 2022 at the 1423rd meeting of the Ministers' Deputies).
[4] Proceedings under Article 46 (4) in the case of Kavala v. Türkiye [GC] (Application no. 28749/18) para. 11. See also, Human Rights Watch, 'Turkey: Life Sentence for Rights Defender Osman Kavala: Kavala, 7 Co- Defendants Convicted; Outrageous Miscarriage of Justice' (26 April 2022) (https://www.hrw.org/news/2022/04/26/turkey-life-sentence-rights-defender-osman-kavala) .

applicant's immediate release".[5] It "strongly exhorted, once again, all the relevant Turkish authorities to ensure that Türkiye's obligations under the Convention and its Constitution are honoured by ensuring the applicant's immediate release".[6]

7. Regarding the general measures required by the Court's judgments of 10 December 2019 and 11 July 2022, this Committee reiterated in its most recent decision the need for Turkish authorities to take all necessary measures to address "*pervasive problems regarding the independence and impartiality of the Turkish judiciary*".[7] In its action plans, however, the Government simply reiterates that the independence and impartiality of the judiciary are sufficiently guaranteed under the current legal framework, without addressing the specific concerns highlighted by this Committee and the Court, including the lack of structural independence of the Council of Judges and Prosecutors and undue influence of the executive over the judiciary.[8]

8. The present communication addresses Türkiye's failure to take the individual measures required by the Court in its judgment of December 2019 and its historic infringement proceedings judgement of July 2022 finding a violation of Article 46§1. The refusal to secure Osman Kavala's immediate release as ordered by the Court, instead compounding the violations found by the Court by upholding his aggravated life sentence, constitutes an extremely grave disregard of its obligations under the Convention. This communication will then describe Turkish authorities' failure to adopt general measures required in this case, indicating instead a deepening systemic crisis surrounding judicial independence and impartiality in Türkiye, which has given rise to widespread violations similar to those found by the Court with respect to Osman Kavala. The communication will set out a number of recommendations to this Committee in its supervision of the implementation of the Court's judgments in *Osman Kavala*, which are also supervised in relation to the *Selahattin Demirtaş (No. 2)* case.

III. INDIVIDUAL MEASURES

The continuing detention, final conviction, and aggravated life sentence of Osman Kavala amount to a sustained and deliberate failure to implement the Court's judgments

9. In its judgment of July 2022, the Grand Chamber held, concerning the Court's *Kavala* judgment of 2019, that "[the Court's] finding of a violation of Article 18 taken together with Article 5 in the Kavala judgment vitiated any action resulting from the charges related to the Gezi Park events and the attempted coup" (paras. 145 and 172 of the

[5] 1483rd meeting (DH), December 2023 - H46-37 Kavala v. Türkiye (Application No. 28749/18), CM/Del/Dec(2023)1483/H46-37.
[6] Ibid.
[7] 1483rd meeting (DH), December 2023 - H46-37 Kavala v. Türkiye (Application No. 28749/18), CM/Del/Dec(2023)1483/H46-37. See also previous decisions since 1398th meeting (DH) 9-11 March 2021 - H46-33 Kavala v. Turkey (Application No. 28749/18), CM/Del/Dec(2021)1398/H46-33.
[8] See 1475th meeting (September 2023) (DH) - Action plan (07/07/2023) - Communication from Türkiye concerning the case of Kavala v. Türkiye (Application No. 28749/18), DH-DD(2023)841, pp. 3-5.

judgment).[9] In light of this finding, the Court of Cassation's decision on 28 September 2023 to uphold Mr. Kavala's conviction and aggravated life sentence unequivocally constitutes a continuing violation of his rights and of Türkiye's obligations under the Convention.[10] Relying on Mr. Kavala's support of peaceful and lawful civil society organisations to justify its decision, the Court of Cassation altogether fails to mention the ECtHR's two judgments on the detention of and proceedings against him (Annex 1).[11]

10. In October 2023, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution calling for the immediate release of Osman Kavala, urging member and observer states to consider imposing targeted sanctions on the authorities responsible for his continuing detention and recalling the Assembly's ability to challenge the credentials of the Turkish delegation.[12]

11. In response, rather than seeking to implement the resolution, the Turkish Ministry of Foreign Affairs issued a press statement qualifying the Resolution as a "historic mistake", "aimed at gaining visibility" and "instrumentalising judicial processes for politics", which would "be remembered with remorse in the future".[13] The Ministry's attempt to threaten the PACE, delegitimise its resolution and dissuade domestic authorities from implementing the Court's judgments are entirely incompatible with Türkiye's obligation to implement in good faith its obligations under the Convention, and further support the political nature of Mr. Kavala's ongoing detention.

12. Since the ECtHR's judgment of December 2019, this Committee has issued no less than 20 decisions urging the Turkish authorities to release Osman Kavala or condemning their failure to do so. In previous communications to this Committee within the scope of its examination of this case, the NGOs have repeatedly denounced Türkiye's actions to avoid implementing the Court's judgments regarding Osman Kavala, including by providing false and misleading arguments to this Committee, and stressed that Mr. Kavala's conviction and ongoing detention amount to a continuation of the violations identified by the Court, in flagrant disregard for his rights and for the Convention system.[14]

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[9] 1483rd meeting (DH), December 2023 - H46-37 Kavala v. Türkiye (Application No. 28749/18), CM/Del/Dec(2023)1483/H46-37. See also previous decisions since 1398th meeting (DH) 9-11 March 2021 - H46-33 Kavala v. Turkey (Application No. 28749/18), CM/Del/Dec(2021)1398/H46-33.

[10] The Court of Cassation, together with the Council of State, underwent at least four structural reforms in 2011, 2014, 2016 and 2017 which significantly changed its organisational framework, number of members and functioning. For details, see Rule 9.2 submission by Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Project on the Implementation of Kavala v. Turkey (Application no. 28749/18), 29 May 2020, para. 41.

[11] Court of Cassation, File no. 2023/12611, Decision of 28 September 2023.

[12] Resolution 2518 (2023), Call for the immediate release of Osman Kavala, Adopted on 12 October 2023.

[13] See https://www.mfa.gov.tr/no_-256_-avrupa-konseyi-parlamenter-meclisi-tarafindan-ulkemize-iliskin-kabul-edilen-tavsiye-ve-karar-hk.en.mfa

[14] See 1443rd meeting (September 2022) (DH) - Rules 9.2 and 9.6 - Communication from NGOs (Human Rights Watch; International Commission of Jurists; Turkey Human Rights Litigation Support Project) (01/09/2022) and reply from the authorities (09/09/2022) in the case of Kavala v. Türkiye (Application No. 28749/18), DH-DD(2022)953.

13. The NGOs reiterate that it is this Committee's, other Council of Europe organs', and member and observer states' fundamental role to act decisively to ensure that this serious threat to the Convention system is treated seriously and brought to an end. They therefore urge this Committee to continue to engage with this case in any relations and talks with Türkiye.

IV. GENERAL MEASURES

1. Instrumentalisation of criminal law to silence human rights defenders and suppress scrutiny and criticism of the state

14. In *Kavala*, the Court found, under Article 18 in conjunction with Article 5, that Mr. Kavala's detention had pursued an ulterior purpose, namely to reduce him to silence as a human rights defender, and that the measures against him were likely to have a dissuasive effect on the work of human rights defenders (paras. 224 and 232). It considered that the restriction in question affected "the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest" (para. 231).

15. Domestic judicial practice in recent years shows that the attacks on human right defenders have only increased. The legitimate exercise of Convention rights has been increasingly portrayed as connected with violent events and criminal offenses, with the ulterior purpose of silencing or dissuading human rights defenders, civil society, opposition politicians, the media, and other alternative or dissenting voices. As the NGOs and different experts have repeatedly demonstrated, judicial authorities rely on an expansive interpretation of vaguely formulated national security legislation, combined with extremely weak or altogether non-existent evidence, to initiate proceedings against and detain perceived government critics on the basis of their legitimate activities.[15] Widespread infringements of the basic tenets of legality and of the right to liberty and to a fair trial have given judicial authorities the ability to turn the law into a shackle on public scrutiny of state policies, opening wide the door for state authorities to perpetrate human rights violations with impunity.

16. In the past year alone, examples of abusive criminal proceedings and/or detention have included (to name only a few among scores of cases), proceedings against a human rights defender for denouncing deficiencies in the proceedings against the prime suspect in the 2021 murder of Deniz Poyraz (a member of the opposition Peoples' Democratic Party,

[15] 1377bis meeting (1-3 September 2020) (DH) - Rule 9.2 - Communication from NGOs (Human Rights Watch, the International Commission of Jurists and the Turkish Human Rights Litigation Project) (29/05/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and others group), DH-DD(2020)501, §§27-32; Venice Commission, Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey, CDL AD(2016)002,15 March 2016; Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Report following her visit to Turkey from 1 to 5 July 2019, CommDH(2020)1, §32. See also *Işıkırık v Turkey*, App. no. 41226/09, 14 November 2017; *İmret v Turkey (no. 2)*, App no. 57316/10, 10 July 2018; *Bakır and Others v. Turkey*, App no. 46713/10, 10 July 2018.

HDP) and the initiation of criminal proceedings against Ms. Poyraz's father for "terrorist propaganda";[16] against an opposition member of parliament for denouncing unlawful killings allegedly committed by the Turkish Armed Forces;[17] against a journalist for authoring an article on alleged corruption within certain domestic courts;[18] and against another journalist for a book written about the former Minister of Interior, which contains allegations of criminal activities and ties with the Turkish mafia and Gülenists.[19] Amongst recent trends are an increase in prosecutors' use against journalists of the vague and overbroad charges of "spreading disinformation" and "making a public official into a target for terrorist organizations," in several cases the latter being used in reaction to legitimate reporting on the rotation of judges and prosecutors.[20]

17. The clear politically-driven agenda behind the criminal processes described above - against human rights defenders, but also politicians, journalists, and other perceived dissidents - is also apparent from the timing of proceedings and detention, as noted by the Court regarding the detention of Osman Kavala. Indeed, in the weeks preceding the presidential and parliamentary elections of May 2023, hundreds of journalists and opposition politicians were detained on the basis of alleged terrorist offenses across Türkiye.[21]

18. In their submission dated 29 May 2020, the NGOs emphasized the significant failure of Turkish authorities to adhere to a comprehensive set of international standards (paras. 74-76 of the judgment), which outline states' 'particular,' 'heightened,' or 'reinforced' responsibilities in safeguarding human rights defenders. [22] The persistent persecution of human rights defenders and other critical voices not only affects the public's perception of human rights but also inevitably creates a chilling effect on the protection of human rights, including the right to democratic participation, and the right to freedom of expression. This underscores the urgent need for rigorous oversight of Türkiye's treatment of these groups given their pivotal role in a democratic society.

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[16] See https://bianet.org/haber/savci-yi-hukuken-elestiren-eren-keskin-e-hapis-talebi-274694

[17] See https://medyascope.tv/2023/09/18/sezgin-tanrikulu-hakkinda-hazirlanan-fezleke-cumhurbaskanligina-gonderildi/

[18] See https://www.mlsaturkey.com/en/journalist-tolga-sardans-arrest-highlights-rising-press-censorship-in-turkey; and Turkey: Journalist Arrested Over Judicial Corruption Article | Human Rights Watch (hrw.org).

[19] See https://www.article19.org/resources/turkey-we-condemn-ongoing-judicial-harassment-of-journalist-baris-pehlivan/; and https://www.birgun.net/makale/baris-pehlivan-ve-baris-terkoglu-ndan-suleyman-soylu-kitabi-ss-427260

[20] See « Kurdish journalist Fırat Can Arslan faces 3 years in prison (bianet.org) » and «Turkey's journalists in the firing line for « targetting officials » », report by PEN-Norway -Journalists-CU-Eng.pdf (norskpen.no).

[21] See https://fom.coe.int/en/alerte/detail/107639248 ; https://bianet.org/haber/journalists-lawyers-politicians-detained-across-turkey-in-raids-targeting-pro-kurdish-groups-277727 ; https://bianet.org/haber/gazeteci-vekil-adaylarindan-tutuklamalara-tepki-erdogan-in-bitmeyen-ozgurluk-dusmanligi-277905

[22] Rule 9.2 submission by Human Rights Watch, the International Commission of Jurists and the Turkey Human Rights Litigation Project on the Implementation of Kavala v. Turkey (Application no. 28749/18), 29 May 2020, paras. 58, 59, https://hudoc.exec.coe.int/?i=DH-DD(2020)501E

2. Widespread failure to implement ECtHR judgments and adhere to Convention standards

19. Turkish judicial authorities' repeated abuse of criminal proceedings, unreasonable interpretation of criminal provisions, and failure to respect core procedural rights reveals a clear defiance towards ECtHR judgments and the standards in its case-law. According to statistics from the Department for the Execution of Judgments, Türkiye has a staggering 126 leading ECtHR judgments (alongside 332 repetitive cases) that are still pending implementation.[23] This record marks Türkiye as having the singleworst implementation performance for leading cases among the 46 Council of Europe member states.

20. A compelling example of Türkiye's resistance to comply with ECtHR rulings is the continuing arbitrary detention of former HDP co-chairs and members of parliament, Selahattin Demirtaş and Figen Yüksekdağ Şenoğlu. Despite the Court's explicit ruling under Article 46 of the Convention, which demanded their immediate release, they remain in detention. [24] Mr. Demirtaş's application to the Constitutional Court has been pending since November 2019, despite landmark ECtHR judgments and this Committee's decisions. [25] Research reveals that similar applications by other HDP parliamentarians challenging proceedings against them have been pending for over three times the maximum period considered as prolonged by the ECtHR in *Yüksekdağ Şenoğlu and others*.[26]

21. In another example, *Alparslan v Turkey* and *Baş v Turkey,* the Court found that the pre-trial detention of a judge on the basis of alleged membership of a terrorist organisation (Gülenists) violated Article 5§1 of the Convention on account of the unreasonable extension of the concept of *in flagrante delicto* by judicial authorities, which "negate[d] the procedural safeguards which members of the judiciary are afforded in order to protect them from interference by the executive".[27] However, in *Yıldırım Turan,* the

[23] See https://www.coe.int/en/web/execution/turkey

[24] *Selahattin Demirtaş (no. 2) v Turkey* [GC], Application no. 14305/17, Judgment of 22 December 2020, § 442; *Yüksekdağ Şenoğlu and others v Turkey,* Application no. 14332/17, Judgment of 8 November 2022, § 655.

[25] See Committee's repeated calls for Turkish authorities to ensure a speedy decision on this issue: 1428th meeting (DH), March 2022 - H46-37 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), CM/Del/Dec(2022)1428/H46-37; 1436th meeting (DH), June 2022 - H46-32 Selahattin Demirtaş (No. 2) v. Turkey (Application No. 14305/17), CM/Del/Dec(2022)1436/H46-32; 1443rd meeting (DH), September 2022 - H46-29 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2022)1443/H46-29; 1451st meeting (DH), December 2022 - H46-39 Selahattin Demirtaş v. Turkey (No. 2) (Application No. 14305/17), CM/Del/Dec(2022)1451/H46-39; 1468th meeting (DH), June 2023 - H46-33 Selahattin Demirtaş (No. 2) group v. Turkey (Application No. 14305/17), CM/Del/Dec(2023)1468/H46-33.

[26] For instance, an application lodged to the Constitutional Court by Osman Baydemir in 2018, to challenge his conviction pursuant to the 2016 constitutional amendment and resulting in the revocation of his parliamentary mandate, remained pending until February 2023, when it was declared inadmissible (on the grounds the Court of Cassation had not yet issued a decision regarding his application from 2019) (see Constitutional Court, *Osman Baydemir (3),* App. no. 2018/10290, Judgment of 8 February 2023). Osman Baydemir, who was elected as MP for the period of 2015-2018, was thus unable to run in the June 2018 elections, as well as the May 2023 ones. Other examples include the revocation of the mandates of MPs Idris Baluken and Selma Irmak following their conviction: their applications to the Constitutional Court have been pending since 2018 and 2020 respectively.

[27] ECtHR, *Alparslan Altan v Turkey,* App. No. 12778/17, 16 April 2019, §112; *Baş v Turkey,* App no. 66448/17, Judgment of 3 March 2020, §153.

Constitutional Court rejected this finding by affirming that the ECtHR did not have the power to make a determination concerning the compatibility of a detention measure with domestic law.[28] It concluded that the detention of the applicant, a judge, based on judicial authorities' interpretation of "*in flagrante delicto*" could not be considered arbitrary and rejected the applicant's claim of a violation of his right to liberty and security as manifestly ill-founded.

22. The recent Grand Chamber judgment of *Yüksel Yalçınkaya v Türkiye* provides a further evidence of the serious and systemic breaches of Convention rights by domestic judicial authorities in criminal proceedings relying on counterterrorism or national security laws.[29] The Court found that the applicant's conviction for membership of a terrorist organisation (Article 314 of the Turkish Criminal Code) based on his use of the ByLock encrypted messaging application and membership of a trade union violated Article 6, Article 7, and Article 11 of the Convention.[30] The ECtHR observed that judicial authorities' expansive and unforeseeable interpretation of the domestic law, departing from the legal requirements of intent and attaching objective liability to the use of ByLock, were systemic, reflected in the 8,000 applications in its docket concerning convictions based on the use of ByLock.[31] However, no steps have been taken so far to implement this judgment.[32]

23. In the same vein, the Constitutional Court defied the ECtHR's December 2019 *Kavala* judgment in its decision of December 2020, where it concluded that there was no violation of Mr. Kavala's rights.[33] The NGOs consider that the Court of Cassation's judgment of 28 September 2023, upholding the conviction and aggravated life sentence of Osman Kavala and several other Gezi Park trial defendants, is directly connected to the Constitutional Court's previous failure to render a judgment in line with ECtHR standards.

24. This can be traced through the Court of Cassation's intentional omission of the ECtHR's *Kavala* and Article 46§4 judgments in its decision. The appeal court goes farther than that by equating human rights advocacy with crimes against national security, ignoring the ECtHR's observations on the lawful and non-violent nature of the activities that Osman Kavala supported, and confirming Turkish authorities' tendency to ignore international law and standards on the protection of human rights defenders.[34] Indeed, in describing the activities of the NGOs which Osman Kavala supported, the Court of Cassation claims that

[28] Constitutional Court, *Yıldırım Turan*, App no. 2017/10536, Inadmissibility decision of 4 June 2020, §119 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/10536).
[29] ECtHR, *Yüksel Yalçınkaya v Türkiye* [GC], App no. 15669/20, Judgment of 26 September 2023.
[30] Ibid.
[31] Ibid., §414.
[32] See Rule 9.2 Communication in the case of Yüksel Yalçınkaya v. Türkiye, 31 October 2023, https://hudoc.exec.coe.int/?i=DH-DD(2023)1389E
[33] Constitutional Court, *Osman Kavala (2)*, App no. 2020/13893, 29 December 2020, (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/13893).
[34] See 1377bis meeting (1-3 September 2020) (DH) - Rule 9.2 - Communication from NGOs (Human Rights Watch, the International Commission of Jurists and the Turkish Human Rights Litigation Project) (29/05/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and others group), DH-DD(2020)501, §31; UN Special Rapporteur on terrorism, E/CN.4/2006/98, §59.

organisations like the Open Society Foundation use "subjects of the utmost innocence" like abuse against children, violence against women, or environmental protection to "create points of resistance in various segments of society".[35] The Court of Cassation asserts that these organisations pit these "unconnected" segments of society against the current government alleging "that the latter constitutes an obstacle to freedoms and must be changed", thereby "attempting to eliminate all governments they see as obstacles to their goals through mass uprisings."[36]

25. In the same decision, the Court of Cassation upheld the conviction of detained parliamentarian Can Atalay concerning the Gezi Park events.[37] In doing so, the Court of Cassation continued disregard the ECtHR's findings in its *Kavala* judgments; explicitly refused to apply the Constitutional Court's jurisprudence precluding a decision by judicial authorities to set aside constitutional parliamentary immunity;[38] and failed to make any reference to judgments by the ECtHR finding violations of Articles 5, 10, and Article 3 of Protocol no. 1 by Türkiye due to the detention of elected parliamentarians.[39] Instead, it made abstract references to general principles in the case-law of the ECtHR concerning foreseeability of restrictions on rights, in an apparent attempt to provide its findings with a veneer of legitimacy, while ignoring concrete judgments against Türkiye.[40] As the European Parliament has highlighted, the Gezi Park trial is "emblematic" of the "political instrumentalisation of the judicial system" to repress freedoms of expression and of association.[41] It is a clear rejection of the core tenets of pluralism and democracy, which constitute cornerstones of the Convention system and must, therefore, be subject of rigorous scrutiny.[42]

3. Captured judiciary[43]

i. Lack of structural independence of the Council of Judges and Prosecutors (CJP)

[35] Court of Cassation, File no. 2023/12611, Decision of 28 September 2023, p. 8.
[36] Ibid.
[37] Court of Cassation, File no. 2023/12611, Decision of 28 September 2023, pp. 45-50.
[38] Ibid., p. 47.
[39] See in particular, ECtHR, *Selahattin Demirtaş v Turkey (no.2)*, App no. 14305/17, Grand Chamber Judgment of 22 December 2020, and *Yüksekdağ Şenoğlu and others,* App no. 14332/17 and 12 others, Judgment of 8 November 2022.
[40] Court of Cassation, File no. 2023/12611, Decision of 28 September 2023, p. 49.
[41] European Parliament resolution of 13 September 2023 on the 2022 Commission Report on Türkiye (2022/2205(INI)), para. 10 (https://www.europarl.europa.eu/doceo/document/TA-9-2023-0320_EN.html).
[42] ECtHR, *Refah Partisi and others v Turkey* [GC], App no. 41340/98 and 3 others, Judgment of 3 February 2003, §§86-87.
[43] In 2016, the International Commission of Jurists noted that "inappropriate political influence on the judiciary is by no means a new phenomenon in Turkey. It is clear that in recent decades, the judiciary has been a battle ground for different political interests […] This deeply rooted tradition of politicization has laid the ground for recent moves towards a more direct capture of the judiciary, by the executive itself, not only by political interests associated with or allied to the government." (International Commission of Jurists, "Turkey: the Judicial System in Peril", briefing paper, 2016, p. 10, https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf).

26. In its action plans, the Government misleadingly contends that the reform of the CJP in 2017 addressed previous recommendations by the Venice Commission for at least four members of the CJP to be elected by Parliament, to strengthen the independence of that body.[44] The Government, however, omits a crucial part of this recommendation: the Venice Commission advised that "at least the four members now appointed by the President or representing the executive ex officio (the Undersecretary), be elected by Parliament, preferably with a qualified majority".[45]

27. Not only did the constitutional amendment of 2017 fail to transfer the power to appoint members from the President to Parliament, it radically reduced the number of members of the CJP (from 22 to 13) and increased the ratio of members directly appointed by the President to nearly half (6 out of 13 members). [46] The remaining 7 members are appointed by the Grand National Assembly, which is dominated by the political parties of the coalition led by the President.[47]

28. While in 2010, the Venice Commission observed that a substantive part of the members of judicial councils was elected by the judiciary itself,[48] not a single member of the CJP has been elected by the judiciary following the constitutional amendment of 2017. The NGOs recall that according to European standards, "not less than half the members of [judicial] councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".[49]

29. In *Demirtaş (no.2)* [GC] and *Yüksekdağ Şenoğlu and others*, the Court noted that:

> *The Venice Commission expressed the view that the proposed new composition of the Supreme Council was "extremely problematic". It pointed out that under the new constitutional system, the President was not a neutral branch of power but belonged to a political faction. Furthermore, bearing in mind the prospect of the President's party enjoying a majority in Parliament, which was practically guaranteed under the system of simultaneous elections, the Venice Commission took the view that the composition of the Supreme Council would seriously endanger the independence of the judiciary, because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. […]* (emphasis added).[50]

[44] 1475th meeting (September 2023) (DH) - Action plan (07/07/2023) - Communication from Türkiye concerning the case of Kavala v. Türkiye (Application No. 28749/18), DH-DD(2023)841, p. 4.
[45] Venice Commission, Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, Opinion no. 600 / 2010, 20 December 2010, §35 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)042-e).
[46] Venice Commission Turkey Opinion No. 875/2017, 13 March 2017, §114 (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e).
[47] Ibid.
[48] Ibid., §31.
[49] Committee of Ministers, Appendix to Recommendation CM/Rec(2010)12 on the independence, efficiency and responsibilities of judges, Article 27.
[50] ECtHR, *Selahattin Demirtaş v Turkey (no.2)*, App no. 14305/17, Grand Chamber Judgment of 22 December 2020, §434; *Yüksekdağ Şenoğlu and others,* App no. 14332/17 and 12 others, Judgment of 8 November 2022, §§637-638.

It is clear, therefore, that the current system of appointment of the CJP members does not sufficiently guarantee its independence. The NGOs view this as a key structural problem with judicial independence that requires extensive reform by Türkiye, including changes to the constitution and legislation, to properly address the findings in the *Kavala* judgment.

ii. Deeply polarised judicial appointment system

30. The adverse impact on judicial independence of the executive's control over judiciary has intensified since 2017, including in respect of judicial appointments. No real safeguards are currently in place to ensure that judges and prosecutors' recruitment is conducted fairly, in line with international standards.[51] Law No. 2802 on Judges and Prosecutors provides for a system of a written exam followed by an oral exam (*mülakat*)-based appointment governed by the Ministry of Justice (Articles 8, 9 and 9A). However, the oral exam is conducted by an exam committee predominantly consisting of the officials from the Ministry of Justice (5 members), one member from the CJP and one from the Justice Academy (a state institution responsible for running trainings for judges and prosecutors). All state institutions which are part of the exam committee are either directly part of the executive or under its effective control and influence.

31. The susceptibility to manipulation of this system by the executive and bias against candidates seen as not supportive of the government is clear.[52] Reports have consistently indicated a systematic practice in the recruitment of judges and prosecutors, with a notable preference for individuals who have previously been associated with or supported the ruling coalition parties, AKP and MHP.[53] Additionally, there is growing concern about the inclusion of individuals from from fundamentalist religious groups which risks bringing religious doctrine into secular law in these positions.[54]

32. In its 2023 Türkiye report the European Commission took account of these concerns and repeated its assessment that "[t]he lack of objective, merit-based, uniform and pre-established criteria for recruiting and promoting judges and prosecutors" is an important issue in the area of 'functioning of judiciary'.[55] In a 2015 report, the Council of Europe Group of States against Corruption (GRECO) formulated a number of recommendations to Türkiye to ensure that judicial independence is effectively guaranteed in the country in

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[51] See https://artigercek.com/guncel/hukukcular-degerlendirdi-mulakatlar-denetimsiz-haklari-korunamaz-hale-getiriyor-266623h#google_vignette

[52] ICJ, Turkey: the Judicial System in Peril - A Briefing Paper, Geneva, June 2016, p.15.

[53] See, https://bianet.org/haber/gezi-davasinin-yargici-akp-li-cikti-erdogan-in-yargiya-guveni-yukseldi-260997; https://sputniknews.com.tr/20170501/chpli-yarkadas-atanan-hakimlerin-hepsi-akpli-gensoru-verecegiz-1028302460.html; and https://www.cumhuriyet.com.tr/haber/cemaat-gitti-akpliler-geldi-733282

[54] See, https://www.yargiclarsendikasi.org/post/Ba%C4%9F%C4%B1ms%C4%B1z%20ve%20tarafs%C4%B1z%20yarg%C4%B1%20hayali; https://www.evrensel.net/haber/445641/chpli-antmen-sordu-adalet-bakanligi-hsk-ve-yargitayi-tarikatlar-ele-mi-gecirdi; and https://www.dw.com/tr/15-temmuz-g%C3%BClencilerin-yerine-kimler-geldi/a-62477855

[55] European Commission, Türkiye 2023 report, p. 24.

line with the Council's standards.[56] The recommendations include strengthening "the involvement and the responsibility of the judiciary in respect of the process of selecting and recruiting candidates to become judges/prosecutor" against the dominant role of the Ministry of Justice in the process.[57] Since then, GRECO has recorded further deterioration, instead of improvements, in the situation on the ground.[58]

33. The NGOs underline that the goal of ensuring judicial independence in Türkiye cannot be achieved without a thorough review of the current appointment system for judges and prosecutors in line with international standards and abolishing the executive's absolute control over it. In this vein, the Government must, in close collaboration with the relevant Council of Europe institutions, review the current legislation to bring the system and its operation in line with the international standards.

iii. Politically charged decisions regarding promotions, transfers, disciplinary measures and the dismissal of judges and prosecutors

34. In its action plans, the Government highlights that a legislative amendment of 2020 added to the rules on the promotion of judges and prosecutors that *"account will be taken of whether the persons concerned caused a finding of violation by the European Court of Human Rights or the Constitutional Court, as well as the nature and gravity of the violation, and the efforts of the persons concerned to safeguard the rights enshrined in the European Convention on Human Rights and the Constitution"*.[59] Yet, in practice, failure to abide by ECtHR and Constitutional Court judgments has constituted no obstacle to promotion and judges may even appear to be rewarded for refusal to apply Convention standards.

35. The rapid ascension in recent years of Judge A. G. provides a striking example of promoting judges who demonstrate disregard for Convention rights and ECtHR decisions. Judge A. G. presided the Istanbul 14th Assize Court, responsible for sentencing Selahattin Demirtaş to 4 years and 8 months in prison in 2018 regarding a political speech from 2013. In October 2020, the Istanbul 14th Assize Court refused to implement an order by the Constitutional Court for the suspension of the proceedings against MP Kadri Enis Berberoğlu (for alleged espionage and assistance to Gülenists) and a re-trial to redress the violation of his rights by the failure by courts to respect the constitutional safeguard of parliamentary inviolability afforded to him by his status as elected parliamentarian. In January 2021, the Constitutional Court ruled that this failure to implement its judgment

[56] GRECO, Fourth Evaluation Round on Corruption prevention in respect of members of parliament, judges and prosecutors, 16 October 2015, http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c9d29

[57] Ibid, p. 33.

[58] See https://www.coe.int/en/web/greco/evaluations/turkiye

[59] 1475th meeting (September 2023) (DH) - Action plan (07/07/2023) - Communication from Türkiye concerning the case of Kavala v. Türkiye (Application No. 28749/18), DH-DD(2023)841, §29.

constituted a new violation of Mr. Berberoğlu's rights.[60] Still, proceedings against him continued until September 2023.[61] In the meantime, in September 2021, the CJP promoted A. G..[62] In June 2022, Judge A. G. was appointed Deputy Minister of Justice;[63] and in August 2023, he became deputy head of the CJP.[64]

36. Another notable example of the expedited promotion of government-compliant judges and prosecutors is the appointment of the former Istanbul Chief Public Prosecutor İ. F. to the Constitutional Court membership in 2021 through an 'anomalus' process.[65] Mr. İ. F. was involved in the prosecution of several controversial criminal cases, including the Gezi Park case, in which the Constitutional Court or the ECtHR found violations of human rights.[66] Yet after only twenty days in the office at the Court of Cassation - an unprecedentedly short tenure - the President appointed him to the Constitutional Court.[67]

37. Disciplinary proceedings are also commonly used as a tool to persecure judges who fail to align with government interests. In its infringement proceedings judgment concerning Osman Kavala, the ECtHR noted that the CJP had started an examination to establish whether it was necessary to open a disciplinary investigation against the judges who acquitted Mr. Kavala on 18 February 2020, before that acquittal was quashed (para. 168). These measures were used by domestic authorities to punish judges for ensuring the cessation of the violation of the rights of Mr. Kavala, although this was required by the ECtHR judgment of 2019. The Grand Chamber considered this circumstance relevant in finding that national authorities had not complied with their obligation to act in good faith in executing a final binding judgment (para. 168).

38. Furthermore, it remains common practice for the CJP to reassign or transfer judges as a disguised sanction to avoid or punish decisions perceived to jeopardise the Government's interests or to be in favour of perceived dissidents.[68] This is reflected in a marked increase in transfers in recent years. Whereas in 2010, only 190 judges and prosecutors were

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[60] Constitutional Court, *Kadri Enis Berberoğlu (3)* [Plenary Assembly], App no. 2020/32949, Judgment of 21 January 2021.
[61] Istanbul 14th Assize Court, File no. 2023/60, Judgment of 13 September 2023.
[62] See https://www.duvarenglish.com/turkeys-judicial-board-promotes-judge-who-failed-to-implement-constitutional-court-ruling-news-58995
[63] See https://www.duvarenglish.com/erdogan-appoints-judge-of-politically-motivated-cases-as-deputy-justice-minister-news-60896
[64] See https://www.turkishminute.com/2023/08/29/judge-notorious-for-convicting-dissident-put-charge-of-turkeys-top-judicial-board/
[65] See Kemal Gözler, 'Elveda Anayasa Mahkemesi: İrfan Fidan Olayı', 23 January 2021: https://www.anayasa.gen.tr/irfan-fidan-olayi.html
[66] Other cases concerned the Academics for Peace, journalists Can Dündar, Erdem Gül, Şahin Alpay, Atilla Taş, and politician Kadri Enis Berberoğlu.
[67] Rule 9.2 submission by the Turkey Human Rights Litigation Support Project, ARTICLE 19, Human Rights Watch, the International Commission of Jurists, and the International Federation for Human Rights (collectively "the NGOs") providing additional observations on the implementation of *Selahattin Demirtaş v. Turkey (No.2)* (Application no. 14305/17), 4 November 2021, paras. 31, 32.
[68] See Stockholm Center for Freedom, "Turkey's Judicial Council: Guarantor or Annihilator of Judicial Independence?", Report of March 2021, pp. 49-53 (https://stockholmcf.org/wp-content/uploads/2021/03/Turkish-Judicial-Council-HSK-Report.pdf). See also ICJ, Turkey: the Judicial System in Peril - A Briefing Paper, Geneva, June 2016, p.18.

subject to a transfer, this number was 3,423 in July 2023. This included Judge Ayşe Sarısu Pehlivan, against whom disciplinary proceedings were previously taken for criticising the 2017 reform of the CJP, leading the ECtHR to find a violation of Article 10 in June 2023 – just one month before her transfer.[69] Among those transferred in 2023 was also Judge Sercan Karagöz, who voted against the majority in the Istanbul 30th Assize Court's decision to impose an aggravated life on Osman Kavala for 'attempting to overthrow the Government'.[70] As highlighted in the NGOs' previous communications, this practice sends signals to judges and prosecutors that they might be replaced anytime if they act against the will of the political branches of government.[71] The NGOs recall that universal and European standards preclude transfers against the will of judges, except in certain exceptional cases for reasons not pertinent here.[72]

39. Under Article 159 of the Constitution, dismissals are the only type of disciplinary decision against judges and prosecutors open to judicial review. Yet ECtHR case-law suggests that judicial authorities must have access to judicial review by an independent judicial body concerning all decisions affecting them. The ECtHR has thus held that the absence of judicial review of a decision to transfer a judge to another court in a lower judicial district impaired the very essence of the right of access to a court.[73] It ruled that the CJP could not be considered an independent judicial body for the purposes of judicial review.[74] Similarly, it has found that the inability of a candidate judge, after completion of training, to seek judicial review of a decision refusing to appoint him to judicial office entailed a violation of Article 6.[75]

40. The dismissal of thousands of judges and prosecutors for alleged links with "terrorist organisations" since 2016, mostly without an individual investigation, has also been deeply problematic for judicial independence.[76] Dismissals based on emergency powers continue to the present day, despite the end of the state of emergency in 2018.[77] Although dismissed judges and prosecutors can in theory request judicial review of their dismissal by administrative courts (under Article 11(2) of Law no. 7075), only 7% of the 4788 cases adjudicated by 26 October 2022 by the Council of State - the final court of appeal - were

[69] ECtHR, *Sarisu Pehlivan v Türkiye*, App no. 63029/19, Judgment of 6 June 2023; https://www.cumhuriyet.com.tr/turkiye/hsk-kararnamesine-izmir-barosundan-itiraz-kuvvetler-ayriligi-ilkesine-aykiri-2100527.

[70] See https://www.cumhuriyet.com.tr/turkiye/hsk-kararnamesine-izmir-barosundan-itiraz-kuvvetler-ayriligi-ilkesine-aykiri-2100527.

[71] 1377bis meeting (1-3 September 2020) (DH) - Rule 9.2 - Communication from NGOs (Human Rights Watch, the International Commission of Jurists and the Turkish Human Rights Litigation Project) (29/05/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and others group), DH-DD(2020)501, §42.

[72] Venice Commission, Report on the Independence of the Judicial System Part I: the Independence of Judges, CDL-AD(2010)004 (16 March 2010), §43.

[73] ECtHR, *Bilgen v. Turkey*, App no. 1571/07, Judgment of 9 March 2021, §97.

[74] Ibid., §§74-75.

[75] ECtHR, *Oktay Alktan v Türkiye*, App no. 24492/21, Judgment of 20 June 2023. The Court made similar findings regarding disciplinary proceedings in *Sarisu Pehlivan v Türkiye* (App no. 63029/19, Judgment of 6 June 2023, §50).

[76] Ibid., §43.

[77] See, for instance, https://www.aa.com.tr/tr/gundem/hsknin-15-hakim-ve-savciyi-meslekten-ihrac-karari-resmi-gazetede/2590064

decided in favour of plaintiffs.[78] This statistic raises serious doubts as to whether this avenue can be considered as offering a reasonable prospect of success for judges and prosecutors dismissed after the attempted coup. The NGOs recall that under well-established international standards on judicial independence, judges may be subject to suspension or removal only for reasons of incapacity or behaviour the renders them unfit to discharge their duties.[79]

41. Finally, criminal proceedings against judges and prosecutors serve as another tool of executive control over the judiciary. In the case of *Turan and 426 others v Turkey*, the Court found a violation of Article 5§1 concerning the detention of no less than 427 judges and prosecutors, due to judicial authorities' expansive interpretation of the concept of "*in flagrante delicto*".[80] However, the Constitutional Court has rejected the ECtHR's previous findings to the same effect.[81] With respect to procedural safeguards, the GRECO recommended that the power of the Minister of Justice to grant permission for the lifting of functional immunity of judges and prosecutors be transferred to the judiciary.[82]

42. In 2023, Türkiye was ranked 139th out of 142 countries in the Rule of Law Index of the World Justice Project regarding freedom of the criminal justice system from government influence.[83] The NGOs submit that the practices described above show that Türkiye plainly fails to meet the standards laid out in this Committee's 1994 Recommendation on the independence, efficiency and role of judges, which provides that "all decisions concerning the professional career of judges should be based on objective criteria" and that "there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above". [84] The European Commission's 2023 report on Türkiye points to "a general lack of transparency" in implementing the criteria for demotion, disciplinary measures and dismissals.[85]

4. The Constitutional Court: structural independence issues and intensifying pressure in cases concerning perceived dissidents

43. Several important issues throw into doubt the effectiveness of the individual application process to the Constitutional Court. First, the current method of appointment of Constitutional Court members falls short of ensuring their independence from the

[78] Press release of the Council of State, 26 October 2022.
[79] Eg. UN Basic Principles on the Independence of the Judiciary, Principle 18, among others.
[80] ECtHR, *Turan and others v Turkey,* App no. 75805/16 and 426 others, Judgment of 23 November 2021.
[81] Constitutional Court *Yıldırım Turan*, App no. 2017/10536, Inadmissibility decision of 4 June 2020, §119 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/10536).
[82] GRECO, Fourth Evaluation Round on Corruption prevention in respect of members of parliament, judges and prosecutors, Second Interim Compliance Report on Turkey (October 2020), §85.
[83] See https://worldjusticeproject.org/rule-of-law-index/country/2023/Turkiye/Criminal%20Justice
[84] Recommendation no. R(94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), Principle I.2.c.
[85] European Commission's 2023 report on Türkiye, p. 22.

executive, with the appointment of 12 out of 15 members being in the hands of the President.[86] Second, as far as dealing with systemic human rights violations, particularly in politically sensitive cases, the Constitutional Court's judgments have been subject to serious and unwarranted delays. Third, those judgments have in some notable cases departed from an approach aligned with the ECtHR case-law and the Convention standards.[87] These include the Constitutional Court's *Osman Kavala (2)* failing to comply with the ECtHR's judgment and its refusal to abide by the ECtHR's findings concerning the detention of judges on the basis of an unreasonable extension of the concept of "*in flagrante delicto"*, as mentioned earlier in this submission.[88] Fourth, significant challenges have also arisen from the lower courts' non-implementation of Constitutional Court judgments when a violation is found in these cases. This latter aspect is analysed in greater detail below.

44. Under Article 153 of the Constitution, Constitutional Court judgments are binding on all organs of the state. Yet executive, legislative, and judicial authorities have displayed increasing defiance towards Constitutional Court judgments concerning arbitrary criminal proceedings and detention since the attempted coup of 2016. In 2018, the domestic courts refused to implement decisions of the Constitutional Court ordering the release from pre-trial detention of journalists Şahin Alpay and Mehmet Altan, arguing that the Constitutional Court's decisions were not binding upon them.[89] In *Şahin Alpay v Turkey* and *Mehmet Hasan Altan v Turkey*, the ECtHR observed that "*[f]or another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to the fundamental principles of the rule of law and legal certainty"*.[90] It held in each case that "*the applicant's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the [lower court], raises serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention".*[91]

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[86] Under Article 146 of the Turkish Constitution, three Constitutional Court members are appointed by Parliament, and "the President chooses three members of the Court of Cassation and two members of the Council of State among three candidates nominated by their General Assembly for each vacancy from among their Chairmen and Members; three members, of which at least two lawyers, from among three candidates nominated by the Council of Higher Education from among faculty members working in the fields of law, economics and political sciences of higher education institutions that are not its members; and four members from among senior executives, freelance lawyers, first-class judges and prosecutors, and rapporteurs of the Constitutional Court who have served as rapporteurs for at least five years" (emphases added). See https://verfassungsblog.de/recognizing-court-packing/ .

[87] Commissioner for Human Rights of the Council of Europe, Report Following Her Visit to Turkey From 1 to 5 July 2019, CommDH(2020)1, paras. 93-105.

[88] TCC, *Yıldırım Turan,* App no. 2017/10536, Inadmissibility decision of 4 June 2020.

[89]ECtHR, Ş*ahin Alpay v Turkey*, 16538/17, 20 March 2018; *Mehmet Hasan Altan v Turkey*, App no. 13237/17, 20 March 2018.

[90] ECtHR, *Şahin Alpay v Turkey*, 16538/17, 20 March 2018, §118; *Mehmet Hasan Altan v Turkey*, App no. 13237/17, 20 March 2018, §139.

[91] *Şahin Alpay* (supra), §121; *Mehmet Hasan Altan* (supra), §142.

45. Failure to implement Constitutional Court judgments has not been limited to the judiciary. In 2021, the Constitutional Court issued a pilot judgment finding that a conviction under Article 220(6) of the TCC ('committing a crime on behalf of a terrorist organization without being a member of the organisation') did not meet the requirement of legality given the provision's overbroad wording, which failed to provide sufficient guarantees against arbitrary application.[92] It asked Parliament to review that provision, and deciding to suspend the examination of cases raising the same structural issue for one year – during which period some of the applicants were being detained.[93] Parliament took no action to repeal or amend Article 220(6), leading the Constitutional Court to find a violation of the rights of 103 individuals on the basis of the application of this provision against them.[94]

46. In the past three years, open rejection of judgments from the Constitutional Court on the prosecution and detention of opposition parliamentarians have placed a further strain on the effectiveness of an individual application to the Constitutional Court. Domestic courts thus refused to abide by two successive judgments from the Constitutional Court finding that the proceedings against and detention of MP Kadri Enis Berberoğlu were unlawful because they breached his parliamentary immunity.[95] Although these judgments ordered the cessation of the proceedings, these continued until the end of Mr. Berberoğlu's mandate.[96]

47. Similarly, in upholding the conviction and 18-year sentence of MP Can Atalay (elected in May 2023) in the Gezi Park trial -the same case Mr. Kavala has been convicted for-, the Court of Cassation explicitly refused to comply with jurisprudence of the Constitutional Court precluding the interpretation of the Constitution such as to allow judicial authorities to set aside parliamentary immunity.[97] It alleged that the Constitutional Court did not have the authority to make such a finding.[98] Following this decision, the Constitutional Court found, on 25 October 2023, that the continued proceedings against and detention of Can Atalay, despite his election as MP, violated his right to be elected and conduct political activities and his right to liberty and security.[99] It ordered a retrial, the suspension of the

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[92] Constitutional Court, *Hamit Yakut* [Plenary Assembly], App no. 2014/6548, Judgment of 10 June 2021.
[93] Ibid.
[94] See https://www.gazeteduvar.com.tr/tbmm-pilot-karara-uymadi-hak-ihlali-kararlari-verilmeye-basladi-haber-1622034 . Several other examples include the pilot judgment of *Keskin Kalem* (App no. 2018/14884, Judgment of 27 October 2021), which Parliament failed to implement by amending Article 9 of Law no. 5651.
[95] Constitutional Court, *Kadri Enis Berberoğlu (2)*, App no. 2018/30030, Judgment of 17 September 2020 [Plenary Assembly] (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/30030); *Kadri Enis Berberoğlu (3),* App no. 2020/32949, Judgment of 21 January 2021 [Plenary Assembly] (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/32949)
[96] See Istanbul 14th Assize Court, File no. 2023/60, Judgment of 13 September 2023.
[97] Court of Cassation, File no. 2023/12611, Decision of 28 September 2023, pp. 45-50; and https://www.birgun.net/haber/prof-dr-kaboglu-yargitay-in-can-atalay-hukmunu-degerlendirdi-anayasaya-iskence-eden-bir-karar-472974. See also Constitutional Court, *Ömer Faruk Gergerlioğlu*, App. No. 2019/10634, 1 July 2021 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/10634); Constitutional Court, *Leyla Güven*, App. No. 2018/26689, 7 April 2022 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/26689).
[98] Ibid.
[99] Constitutional Court, *Can Atalay (2)* [Plenary Assembly], App no. 2023/53898, Judgment of 25 October 2023, §§89-93 and §§107-108 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/53898).

execution of Atalay's sentence, his release from detention, and suspension of proceedings against him through his retrial.[100]

48. A very serious backlash by powerful political actors against the Constitutional Court is currently underway in Türkiye as a result of the Atalay case. Although the Constitutional Court considered the Istanbul 13th Assize Court should eliminate the consequences of the violations it had identified in the case,[101] that court referred the case back to the Court of Cassation.[102] On 8 November 2023, the Court of Cassation ruled explicitly that it would not implement the Constitutional Court's decision (Annex 2).[103] Moreover, it took the unprecedented step of filing a criminal complaint against the individual members of the Constitutional Court who had found violations of Atalay's rights in October 2023, on the basis that they "violated the Constitution and acted outside of their powers in an unlawful manner".[104]

49. The NGOs The NGOs draw attention to President Erdoğan's wildly inappropriate comment on this decision that "the Constitutional Court has made many mistakes one after another […] The Constitutional Court cannot and should not underestimate the step taken by the Court of Cassation on this matter." He signalled possible constitutional and legal amendments to limit the scope of the individual application to the Constitutional Court.[105] This was followed by a statement published by the Court of Cassation claiming that "[t]he Constitutional Court makes decisions that drag the legal system into chaos and ignores the will of the constitutional maker." In addition, **"the mechanism of individual application, which was hoped to be a convenient tool for solving the real existing structural problems of the Turkish judicial system, has strayed from its path and become a systemic problem that weakens the judicial system."** [106]

50. Following these developments, Mr. Atalay brought a further application to the Constitutional Court, arguing that the ongoing failure of the lower courts to implement the Constitutional Court's judgment constituted a continuing violation of his right to be elected and conduct political activities, his right to liberty and security and his right to bring an individual application to the Constitutional Court (Article 148 of the Constitution). In its second judgment on the case, the Constitutional Court confirmed these violations and ordered, once again, the Istanbul 13th Assize Court to start a re-trial process, order a stay of execution of Mr. Atalay's sentence, suspend the criminal proceeding against him pending the end of his term as an MP, and release him from prison.[107] Yet, the Istanbul 13th Assize Court once again sent the file to the Court of

[100] Ibid., §117.
[101] Ibid., §118.
[102] See https://www.bbc.com/turkce/articles/cd1jq15070xo .
[103] Court of Cassation, File no. 2023/12611, Decision of 8 November 2023.
[104] Ibid., p. 23 (Annex 2); see also https://www.bbc.com/turkce/articles/c72q6d5d9j2o
[105] See https://www.aljazeera.com/news/2023/11/10/erdogan-criticises-top-turkey-court-stoking-judicial-crisis
[106] See https://www.duvarenglish.com/court-of-cassation-targets-constitutional-court-after-judicial-crisis-in-turkey-news-63304
[107] Constitutional Court, *Can Atalay (3)* [Plenary Assembly], App. no. 2023/99744, 21 December 2023 (https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/99744)

Cassation for a decision. The latter court reiterated its previous decision refusing to implement the Constitutional Court's clear orders and alleged that the high court's judgment "aligned with the statements of terrorist organizations".[108]

51. The NGOs underline the executive's undeniable role -coupled by the support from within the judiciary and legislature under its control- in the failure to implement Constitutional Court judgments, including in the proceedings against MP Can Atalay. As the International Committee of Jurists (ICJ) has previously noted: "representatives of the executive have publicly refused to accept or implement certain decisions of the courts and have strongly criticized the judiciary and judicial decisions as politically biased against the Government. Such actions undermine the judiciary's credibility, in a manner that risks representing the independent exercise of judicial power as political conspiracy against the Government".[109]

52. The NGOs further highlight that prosecuting members of the Constitutional Court due to their rulings in the Atalay case is blatantly incompatible with European standards on judicial independence, under which judges must never be subject to criminal responsibility or other sanction with regard to good faith interpretation of law, assessment of facts or weighing of evidence.[110] The Venice Commission thus advises that judges should benefit from functional immunity, i.e. "immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes", to protect them from undue external influence.[111] The ECtHR has also held that it is necessary "to shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently".[112]

5. Influence of the President and his governing coalition over criminal proceedings

53. In the *Kavala* judgment, the Court took into account that the charges against Osman Kavala were brought after speeches by the President targeting Mr. Kavala, accusing him of destroying the country and supporting terrorism (para. 229). It noted a correlation between the accusations in these speeches and the wording of the indictment, filed about three months later (para. 229). The NGOs have provided several other examples, in their previous communications, of President Erdoğan's and other high-level politicians' active and visible intervention in criminal processes concerning politicians, human rights defenders, journalists and other people who express contested views on matters of public

[108] Court of Cassation, File no. 2023/12611, Decision of 3 January 2024.
[109] ICJ, Turkey: the Judicial System in Peril - A Briefing Paper, Geneva, June 2016, p. 11.
[110] Committee of Ministers, Recommendation CM/Rec(2010)12 on "Judges: independence, efficiency and responsibilities" (adopted by the Committee of Ministers of the Council of Europe on 17 November 2010), §68.
[111] Venice Commission, Report on the Independence of the Judicial System Part I: the Independence of Judges, CDL-AD(2010)004 (16 March 2010), §61.
[112] ECtHR, *Ernst v. Belgium*, App no. 33400/96, Judgment of 15 July 2003, §85.

concern, especially those that may be critical of the government.[113] They have highlighted that such direct intervention always has negative repercussions for the defendant.[114]

54. The President's recent remarks concerning the Constitutional Court's judgment finding a violation of MP Can Atalay's rights (see above, para. 49) provide further evidence of continuing influence and pressure on criminal proceedings in the Gezi Park case. In addition, the harsh criticism by the Turkish Ministry of Foreign Affairs of the October 2023 Resolution of the PACE on the continuing detention of Osman Kavala carries a strong risk of dissuading judicial authorities from issuing Convention-compliant judgments and of strengthening fears of reprisals within the judiciary.[115]

55. Similar patterns of interference can be observed in many other cases, including the ongoing detention of politician Selahattin Demirtaş, in breach of the Grand Chamber's *Demirtaş v Turkey (no.2)* judgment. In the run-up to the presidential and parliamentary elections of May 2023, President Recep Tayyip Erdoğan publicly stated that "while we are on duty, Selo [Demirtaş] cannot be released".[116] The President has similarly interfered in recent proceedings against opposition MP Sezgin Tanrıkulu due to his criticism of the Turkish Armed Forces. A criminal investigation was launched over Mr. Tanrıkulu's statements, including allegations that the army was responsible for the 2016 coup attempt and abuses against civilians in the pre-dominantly Kurdish south-east, for "insulting the Turkish nation" and "incitement to hatred and enmity among the public".[117] A few days later, President Erdoğan affirmed that Mr. Tanrıkulu's "insults and slanders" would "not go unpunished," and that the MP was "hand in hand" with terrorist organisations like the PKK.[118] In a subsequent public statement, Mr. Erdoğan qualified Tanrıkulu as "so-called MP but a terrorist scum" and spoke about the investigation against him as follows: "as a state and as the judiciary, we have a duty to teach them the necessary lesson".[119] In October, a request for the lifting of Tanrıkulu's parliamentary immunity was sent to Parliament for its approval.[120]

56. The President has openly acknowledged the pressure exercised by the executive over the judiciary. Thus, criticizing the acquittal and release from detention in 2020 of Lt. Gen. Metin İyidil, previously sentenced on coup-related charges, Erdoğan stated: "*This has*

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[113] See 1377bis meeting (1-3 September 2020) (DH) - Rule 9.2 - Communication from NGOs (Human Rights Watch, the International Commission of Jurists and the Turkish Human Rights Litigation Project) (29/05/2020) in the case of Kavala v. Turkey (Application No. 28749/18) (Mergen and others group), DH-DD(2020)501, §§46-55.

[114] Ibid.

[115] See https://www.mfa.gov.tr/no_-256_-avrupa-konseyi-parlamenter-meclisi-tarafindan-ulkemize-iliskin-kabul-edilen-tavsiye-ve-karar-hk.en.mfa

[116] See https://www.hurriyet.com.tr/gundem/cumhurbaskani-erdogandan-onemli-aciklamalar-42259475

[117] See https://tr.euronews.com/2023/09/09/hakkinda-sorusturma-acilan-chp-milletvekili-sezgin-tanrikulu-aihm-kararlariyla-kendini-sav

[118] See https://www.duvarenglish.com/erdogan-says-chp-mp-tanrikulu-will-be-punished-over-his-remarks-on-turkish-military-news-62978

[119] See https://bianet.org/haber/erdogan-threatens-tanrikulu-we-have-a-duty-to-teach-them-the-necessary-lesson-284022

[120] See https://www.duvarenglish.com/turkish-parliament-receives-proposal-seeking-to-lift-immunity-of-chp-mp-tanrikulu-news-63082

been a very upsetting step for our judiciary, and the interesting thing here is of course we had given them instructions [referring to the judges]. The severity of the situation is that the persons who issued the acquittal decision are 'FETOists.' […] Justice is always served sooner or later. Think about it, they dare acquit a person who was given life imprisonment. How come a court could take such a step? It is incomprehensible. Thankfully, our Ministry of Justice and prosecutors took the necessary steps and apprehended him in an operation, and he will start to serve his sentence again. As you know he is now in prison".[121]

57. The above examples of attacks by the President or other high level members of government and their allies against individuals perceived as critics or political opponents, as well as members of the judiciary who exercise their functions in a manner perceived as contrary to the Government's interests, reveal the extent of the pressure and control that the executive -dominated by the President and the political parties of the governing coalition- exerts over judges and prosecutors. The European Commission has found, in its most recent reports on Türkiye, that such pressure undermines respect of the principle of the presumption of innocence and the right to a fair trial, including in cases concerning human rights defenders.[122] Against this backdrop, the NGOs consider that the high-level political statements on the importance of human rights and judicial independence that are mentioned in the Government's action plans appear to constitute mere window dressing.

V. RECOMMENDATIONS

Regarding individual measures, the NGOs urge the Committee of Ministers to:

i. Call once again for the immediate release of Osman Kavala, as required both by the ECtHR's *Kavala* judgment and its highly exceptional finding of a violation of Article 46 § 1 in July 2022;

ii. Stress that the ECtHR's judgements clearly apply to Osman Kavala's conviction and aggravated life sentence, which rely on the same basis as already addressed in these judgments and found to have constituted a cover for the ulterior purpose of silencing Mr. Kavala as a human rights defender;

iii. Strongly condemn the failure of all organs of the Turkish judiciary, including the Court of Cassation, failure to acknowledge and implement the ECtHR's judgments by deciding to uphold Osman Kavala's conviction and aggravated life sentence in September 2023;

iv. Affirm the Committee's endorsement of the PACE Resolution of 12 October 2023 calling for the immediate release of Osman Kavala, condemn domestic authorities'

[121] See https://www.haberler.com/cumhurbaskani-erdogan-eski-korgeneral-metin-12831515-haberi/
[122] European Commission, Türkiye 2023 Report, p. 16; European Commission, Türkiye 2022 Report, p. 16.

bad faith allegations that the Resolution pursues political motives as evidencing yet another attempt to avoid implementing the Court's binding judgments, and recall the authorities' binding obligation to implement the Court's judgments under Article 46 of the Convention; and

v. Intensify its efforts to ensure that Council of Europe institutions and member and observer states continue to engage with this case in any relations and talks with Türkiye.

Regarding general measures, the NGOs urge Türkiye to take account of the following recommendations in its action plan and the Committee of Ministers to request that Türkiye address these recommendations:

1. *Protect human rights defenders and end the judiciary's instrumentalisation of criminal law to silence and suppress their scrutiny:*

i. Adopt a concrete policy and targeted legislation on the protection of human rights defenders against any form of harassment or persecution, including through arbitrary arrest and detention, bring an end to punitive prosecutions and misuse of criminal law against them and create a safe and enabling environment for them to pursue their activities;

ii. Amend overbroad and vaguely worded articles of the Turkish Criminal Code and Law No. 3713 on the Prevention of Terrorism such as "attempted overthrow of the Government by force and violence," "attempted overthrow of the constitutional order" and other offenses categorised as "crimes against the state" to meet the requirements of clarity, specificity and foreseeability inherent in *nullum crimen sine lege* and, where relevant, explicitly link criminalised behaviour to the commission of violent acts;

iii. Take all necessary steps to address domestic judicial authorities' non-implementation of ECtHR judgments and its substantial case-law under Articles 10 and 11 of the Convention in cases against Türkiye;

iv. Pursue a concrete strategy to end the current judicial paradigm equating the legitimate and non-violent exercise of Convention rights, such as criticism of State organs and scrutiny of state policies, with criminal behaviour or with incitement to hatred, violence, or intolerance, and monitor indictments and judicial decisions within the scope of such a strategy; and

v. Monitor and strengthen judicial authorities' respect of the principle of legality and rights of liberty and fair trial in their interpretation and application of criminal law, particularly through their application of foreseeable and clearly pre-defined criteria, reliance on sufficiently strong and verifiable evidence within the scope of these criteria, and reasoned examination of defendants' arguments based on their Convention rights and ECtHR case-law.

2. *Ensure the structural independence of the Council of Judges and Prosecutors (CJP), change the problematic appointment system for judges and prosecutors and protect judges and prosecutors from politically charged and influenced decisions against them:*

vi. Modify the method of appointment and composition of the CJP in line with the recommendations of the Venice Commission and international standards, including by ensuring that at least half of the members of the CJP are elected by the judiciary and that all members currently appointed by the President are instead appointed by Parliament;

vii. Revise the deficient mechanism for appointing judges and prosecutors, curtail the role of the Ministry of Justice in the procedure, and strengthen the involvement of the judiciary in the recruitment and selection of prospective judges and prosecutors;

viii. Ensure, in law and in fact, that decisions concerning judges and prosecutors, including their appointment, promotion, removal from a case, transfer, and disciplinary measures against them, are transparent and based on objective criteria, in line with international standards on judicial independence;

ix. Strengthen the guarantees in law and practice for the security of tenure of judges and prosecutors, including by ensuring that transfer against their will is limited to exceptional cases, based on objective and predefined criteria, and that judges and prosecutors may be suspended or removed only for reasons of incapacity or behaviour the renders them unfit to discharge their duties;

x. Ensure access to an effective remedy before an independent judicial body for all decisions concerning judges and prosecutors, including appointment, transfer, and disciplinary measures;

xi. Implement the ECtHR's judgments in *Alparslan Altan v Turkey*, *Baş v Turkey* and *Turan and 426 others v Turkey* on the unreasonable extension by the domestic courts of the concept of "*in flagrante delicto*" used to justify the prosecution and detention of judges;

xii. Transfer the power of the Minister of Justice to grant permission for the lifting of functional immunity of judges and prosecutors to the judiciary; and

xiii. Provide the Committee with statistics and examples of promotions grounded in prosecutors' or judges' respect for judgments of the ECtHR and Constitutional Court, in application of the rules on the promotion of judges and prosecutors.

3. *Strengthen the effectiveness of the individual application mechanism before the Constitutional Court:*

xiv. Implement reforms to the process of appointing Constitutional Court judges with the aim of reducing the President's predominant involvement and providing an active role to the judiciary and elected representatives guided by transparent and

objective criteria-based rules that align with international standards for judicial independence;;

xv. Ensure that the Constitutional Court processes and concludes cases involving arbitrary criminal proceedings against human rights defenders and other groups for their legitimate activities speedily and in a manner consistent with the provisions of the Convention and the ECtHR's case-law;

xvi. Ensure that the Constitutional Court undertakes a proactive role in the implementation of the ECtHR judgments;

xvii. Ensure that domestic authorities implement judgments of the Constitutional Court finding violations of individuals' rights due to arbitrary criminal proceedings and detention, without exception;

xviii. Provide the Committee with recent examples of decisions by domestic courts applying the Constitutional Court's jurisprudence precluding the judicial removal of parliamentary immunity, including decisions on the ongoing detention of parliamentarians;

xix. Ensure that the executive refrains from targeting the Constitutional Court and its Convention compliant decisions, in accordance with the principle of separation of powers and the independence of the judiciary, and that all domestic authorities refrain from statements and actions undermining the jurisdictional authority of the Constitutional Court in the context of individual application mechanism; and

xx. Prevent or cease any criminal proceedings against members of the Constitutional Court based on the Atalay judgments of 25 October 2023 and 21 December 2023 and ensure that judges benefit from functional immunity.

4. *Ensure that members of the executive refrain from attempting to influence criminal proceedings:*

xxi. Emphasise that it is imperative that government and state officials desist from all forms of interference in the administration of justice, including overt comments on ongoing proceedings and covert instructions to members of the judiciary, in order to uphold the independence of the judiciary and the impartiality of judicial decision making.

LIST OF DOCUMENTS

Annex 1: Court of Cassation, File no. 2023/12611, Decision of 28 September 2023.

Annex 2: Court of Cassation, File no. 2023/12611, Decision of 8 November 2023.

Annex 3: Court of Cassation, File no. 2023/12611, Decision of 3 January 2024.