LIFE MEMORY FREEDOM ASSOCIATION (YBÖ)

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Introduction

About the Report Author Organization

1. The Life Memory Freedom Association (YBÖ) is an independent civil society organization specializing in the defense and promotion of human rights in Türkiye. Founded in 2008, it operates as a legal entity. The association has prepared a report on the United Nations Human Rights Committee's decision in the case of Alakuş/Türkiye (CCPR//C/135/D/3736/2020).[1] Additionally, YBÖ has translated several other decisions into Turkish, including Alakuş/Türkiye (CCPR//C/135/D/3736/2020), İsmet Özçelik, Turgay Karaman, and I.A./Türkiye (CCPR/C/125/D/2980/2017), Mümüne Açıkkollu/Türkiye (CCPR/C/136/D/3730/2020), Şeyma Türkan (CCPR/C/123/D/2274/2013), and Cenk Atasoy and Arda Sarkut/Türkiye (CCPR/C/104/D/1853-1854/2008).[2] Apart from its other human rights activities, the association provides legal support for applications to the UN Human Rights Mechanisms and prepares reports on the decisions issued.

Objective and Subject Matter

2. The purpose of this report is to highlight the lack of implementation of the decisions by the Committee and the Working Group on Arbitrary Detention concerning counterterrorism measures, the prohibition of torture and cruel, inhuman, or degrading treatment or punishment, the right to liberty and security, access to justice, the right to a fair trial, and the freedom of thought, conscience, and religion. This report aims to demonstrate that these decisions are not being considered by domestic judicial bodies and national human rights institutions, and to contribute to ensuring that the State Party fulfills its obligations under international human rights law.

3. The report addresses the decisions of the Constitutional Court, the Court of Cassation, the Regional Courts of Appeal, the First Instance Courts, and national human rights institutions.

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[1] See available at: https://yasambellekozgurluk.org/eskisehirden-cenevreye-hak-arayisi-mukadder-alakus-raporu/

[2] See available at: [2] https://yasambellekozgurluk.org/turkiye-basvurulari-ile-ilgili-birlesmis-milletler-insan-haklari-komitesi-tarafindan-verilmis-tum-kararlar/

Methodology and Plan

4. In the report, after identifying the State Party's obligations under international human rights law within the scope of the objective and subject matter, the relevant decisions of the Constitutional Court, the Court of Cassation, the Regional Courts of Appeal, and the First Instance Courts are examined. The Constitutional Court has been reviewing individual applications since 2012 and has built up a significant body of case law. Summarizing the existing legislation and judicial decisions in the individual application rulings of the Constitutional Court has made these decisions an important source that sheds light on the legal situation in the country. Additionally, the direct examination of individual applications on the basis of human rights has further increased the significance of these decisions. However, as will be seen in the sub-sections, there are serious issues regarding the consistency and effectiveness of the Constitutional Court's individual application decisions with both international human rights law and within its own case law.

5. The study will evaluate the implementation of sample decisions by the Committee and the Working Group on Arbitrary Detention within the scope of judicial case law and national human rights institutions' decisions, and it will conclude with recommendations for solving the problems identified through the examination of case law and statistics.

International Obligations and Constitutional Framework

6. The State Party is a party to the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol. Article 90 of the Constitution states that international agreements duly put into effect have the force of law. It is not possible to challenge these agreements on the grounds that they are unconstitutional. In the event of a conflict between international agreements on fundamental rights and freedoms, which have been duly put into effect, and domestic laws, the provisions of the international agreements shall prevail. The implementation of the Committee and the Working Group on Arbitrary Detention's decisions by the State Party is a legal obligation arising from international law and the Constitution. However, as will be explained below, the State Party does not act in accordance with its international and constitutional obligations.

National Official Human Rights Institutions

7. In document CCPR/C/TUR/QPR/2, the Committee requested the State Party to report on "other significant developments in the legal and institutional framework for the promotion and protection of human rights, including steps taken to implement the Human Rights Action Plan, since the adoption of the Committee's previous Concluding Observations." In document CCPR/C/TUR/2, the State Party provided various information on the activities of the Turkish Human Rights and Equality Institution (TİHEK) and the Ombudsman Institution (KDK).

8. A study on TİHEK[3] noted that the institution lacks significant work in many areas within its mandate, has not drawn the attention of the executive branch to human rights violations occurring in certain parts of the country, has not proposed initiatives to end such situations, and has not issued critical statements on human rights issues in the country or criticized the executive branch's stance and necessary response. The study also noted that TİHEK has focused more on cooperation with the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation rather than with intergovernmental organizations setting human rights standards such as the United Nations and the Council of Europe, that its cooperation with public institutions, professional organizations, universities, and NGOs involved in combating discrimination is quite inadequate, that it has not conducted any work to monitor the implementation of international human rights treaties, that the institution is dominated by a highly conservative viewpoint and has deviated from the principle of the universality of human rights in its activities, that it has worked against certain international conventions such as the Istanbul Convention, that it has not contributed to the preparation of the reports the State is required to submit under international human rights treaties, that it has not conducted any work on monitoring and assessing issues related to the implementation of court decisions on violations of the prohibition of discrimination, that the institution does not have a pluralistic structure, that its members are far from reflecting social diversity, and that the composition of its members is entirely contrary to gender equality. It also noted that the members have no experience in human rights, the prohibition of discrimination, or the civil society field, and that a very significant portion of the members have no experience in the specified areas, that the institution lacks sufficient workspace, budget, and staff.

9. TİHEK's 2024-2028 Strategic Plan[4] identifies the insufficient number of expert staff and the insufficient financial resources as two fundamental risks accepted in relation to all activities.

10. In the 2022-2024 Strategic Plan published by the Ombudsman Institution (KDK)[5], it was determined that there were shortcomings in moving the applications to the investigation-research stage, that the process for reviewing applications was not clearly defined and was not carried out uniformly, that case law unity was not always ensured in the institution's decisions, that a rights-based approach was not prioritized during investigations and the preparation of decisions, that the principles of good governance and human rights were not sufficiently observed in administrative practice, that the amicable settlement procedure had not been fully institutionalized, that the positive attitude of the administration towards compliance with decisions was not at the desired level, that the institution's awareness and recognition in society were insufficient, that the staff needed to improve the qualifications required by their duties, and that the employees' connection with the institution was weak.

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[3] See available at: https://www.esithaklar.org/wp-content/uploads/2021/04/ESHID-ulusal-insan-haklari-kurumlari-TR.pdf

[4] See available at: [4] https://www.tihek.gov.tr/public/editor/uploads/rEZpT1eI.pdf

[5] See available at: https://paylasim.ombudsman.gov.tr/dokuman/documentuploads/2022-2026-stratejikplan/2022-2026-stratejikplan.pdf

11. Research conducted on the decision sections on the websites of TİHEK and KDK did not find any data indicating that the decisions of the Committee and the Working Group on Arbitrary Detention were referenced, implemented, or taken into consideration.

12. In the Committee's decision in the case of Alakuş/Türkiye (CCPR//C/135/D/3736/2020), a prison visit report prepared by TİHEK and submitted by the State Party as part of its defense was not considered credible.

Counterterrorism Measures

13. In document CCPR/C/TUR/QPR/2, the Committee asked the State Party to respond to "reports that the definitions of terrorist offenses are excessively vague and broad, and that the legal framework does not provide procedural safeguards..." In document CCPR/C/TUR/2, the State Party responded that "the fundamental law regarding counterterrorism in Türkiye is the Anti-Terrorism Law No. 3713. The law defines the concept of terrorism, a terrorist, and acts constituting a terrorist offense, and regulates the procedures for investigation, prosecution, trial, and execution of sentences for terrorist offenses clearly, comprehensively, and predictably, in accordance with the Constitution and ICCPR."

14. In domestic law, the First Instance Courts, the Regional Courts of Appeal, the Court of Cassation, and the Constitutional Court[6] find no violation of international or national law in convicting and sentencing individuals for membership in a terrorist organization based on evidence such as the use of ByLock, depositing money in Bank Asya, or membership in a union.[7]

15. In the Alakuş/Turkey decision (CCPR/C/135/D/3736/2020), the Committee concluded that sentencing based on such evidence for membership in a terrorist organization violated the right under Article 15(1) of the Covenant. In a recent decision, the European Court of Human Rights (ECHR)[8] ruled that the terrorist organization, of which the applicant was accused of being a member, was not classified as a terrorist organization at the time of the alleged acts. Furthermore, the said acts did not meet the requirements under domestic law for the crime of membership in a terrorist organization, the specific intent was not established, and legal certainty and foreseeability were not achieved, ultimately leading to a violation

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[6] See available at: Adnan Şen, B.No: 2018/8903, 15/4/2021 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/8903 ;Ali Bozkurt, B.No: 2019/19367, 16/3/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/19367 ;Muhammed Fatih Akdeniz, B.No: 2018/10093, 30/3/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/10093 ; Şuayib Evin, B.No: 2019/24412, 26/7/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/24412 ; Uğur Özcan, B.No: 2021/12137, 26/7/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/12137 ; Kağan Danışan, B.No: 2019/22114, 27/7/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/22114 ;Mehmet Bayduman, B.No: 2018/25188, 16/11/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/25188 ;A.Y., B.No: 2019/38819, 19/1/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/38819 ;Bahadır Tok, B.No: 2020/6258, 12/7/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/6258 ; Mustafa Aslan, B. No:2020/38950, 12.06.2024 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/38950 .

[7] See available at: https://www.amnesty.org/en/wp-content/uploads/2021/07/EUR4442692021ENGLISH.pdf

[8] Yüksel Yalçınkaya/Türkiye [BD]

of the principle of "no crime and punishment without law." In this decision, all relevant domestic laws, including the jurisprudence of the Constitutional Court, were reviewed, indicating the existence of a systemic and widespread problem, and the State Party was invited to provide a structural solution. As of the date of the decision, the number of applications made to the ECHR with similar complaints was 8,000, and according to the ECHR's estimation, the total number of individuals affected by the same sanction was 100,000. Moreover, these applications are not just similar but of the same nature. Therefore, the systemic problems identified by the ECHR are of a nature that will affect tens of thousands of trials. However, approximately 11 months have passed since the decision, and no legal steps have been taken towards its implementation, nor have any judicial solutions been proposed.[9]

16. The applicant, Alakuş, submitted the violation decision regarding him to the Constitutional Court in his ongoing application, requesting that it be taken into consideration. However, the Constitutional Court did not refer to or evaluate this decision in its ruling. On the other hand, in its decision dated March 15, 2023, Mukadder Alakuş (Application No: 2020/19153), the Constitutional Court ruled that the applicant's right to participate in the hearing had been violated.[10] Following this violation decision, Alakuş's detention was terminated, and a retrial was initiated. Upon retrial, the Manisa 3rd High Criminal Court sentenced the applicant, Alakuş, to a heavier sentence than the one imposed before the violation decision, with a sentence of 8 years and 9 months of imprisonment under decision E:2023/89 K:2024/19. No justification was provided for the increase in the sentence. The First Instance Court did not make any evaluation regarding the violation decision.

17. There is no example in the decisions of the Appeal Courts or the Court of Cassation that shows the Alakuş/Turkey decision (CCPR/C/135/D/3736/2020) being applied or considered.

Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

18. In document CCPR/C/TUR/QPR/2, the Committee requested information from the State Party regarding allegations of torture and cruel, inhuman or degrading treatment or punishment. In response, the State Party submitted document CCPR/C/TUR/2, stating that all necessary measures had been taken concerning the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and that legal and administrative protection had been provided.

19. In the decision Mümüne Açıkkollu/Turkey (CCPR/C/136/D/3730/2020), the Committee concluded that, in light of the State Party's failure to effectively explain visible signs of ill-treatment observed on various occasions and its inability to demonstrate that serious investigations had been conducted, due weight should be given to the applicant's allegations, and that the State Party had violated Articles 6 and 7 of the Covenant.

20.It is estimated that a large number of applications have been made to the

[9] See available at: https://www.academia.edu/121748755/Y%C3%BCksel_Yal%C3%A7%C4%B1nkaya_T%C3%BCrkiye_A%C4%B0HM_Tarihinin_En_B%C3%BCy%C3%BCk_Buzda%C4%9F%C4%B1

[10] See available at: https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/19153

Constitutional Court regarding allegations of ill-treatment in domestic law. According to the statistics published on the Constitutional Court's website in 2024, the Constitutional Court has issued 1,069 violation decisions concerning allegations of ill-treatment.[11] However, there is no data on the total number of applications made regarding the prohibition of ill-treatment or how many were found inadmissible. Many independent human rights organizations have shared allegations of ill-treatment with the public.[12]

21. However, there are significant problems concerning the implementation of the Constitutional Court's violation decisions regarding the prohibition of ill-treatment. For example, in a retrial conducted following a violation decision by the Constitutional Court on the prohibition of ill-treatment[13], the same decision that was the subject of the violation was issued by the First Instance Court.[14] The appeal against this decision was rejected,[15] leading to the necessity of a new application to the Constitutional Court regarding the violation, for which the Constitutional Court has not yet made a decision. Judicial processes concerning ill-treatment violation allegations are excessively lengthy and ineffective.

22. In the jurisprudence of the First Instance Courts, Appeal Courts, Court of Cassation, and the Constitutional Court, no decision referring to the Mümüne Açıkkollu/Turkey (CCPR/C/136/D/3730/2020) decision or showing that it has been applied or considered has been found. There is no publicly disclosed information concerning the implementation of the said decision.

Liberty and Security of Person

23. In document CCPR/C/TUR/QPR/2, the Committee requested the State Party to clarify "…(b) the measures taken to ensure that detainees' rights to challenge their detention are continuously upheld…". In response, the State Party submitted document CCPR/C/TUR/2, stating that "…The suspect or accused may request release at any stage of the investigation and prosecution phases. The court decides on the continuation of the suspect's detention. These decisions can be appealed. The right to appeal is available not only in the first-instance courts but also before the Regional Court of Appeal and the Court of Cassation…".

24. In the Alakuş/Turkey decision (CCPR/C/135/D/3736/2020) and the İsmet Özçelik, Turgay Karaman, and I.A./Turkey decision (CCPR/C/125/D/2980/2017), the

[11] See available at: https://anayasa.gov.tr/tr/yayinlar/istatistikler/bireysel-basvuru/

[12] See available at: https://www.hrw.org/world-report/2024/country-chapters/turkey#dcac54; https://ihd.org.tr/en/wp-content/uploads/2024/07/js20240626_Torture.pdf;https://www.amnesty.org/en/latest/news/2023/04/turkiye-police-and-gendarmerie-commit-abuses-in-earthquake-zon/ ;

[13] See available at: Doğukan Bilir, B.No:2014/15736, 29.05.2019 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/15736

[14] Eskişehir 3. Ağır Ceza Mahkemesi E:2019/652 K:2021/61 sayılı kararı.

[15] Eskişehir 4. Ağır Ceza Mahkemesi D.İş 2021/378.

Committee concluded that detention based on evidence such as the use of ByLock and depositing money in Bank Asya violated Article 9 of the Covenant.

25. There are significant issues concerning the grounds for detention accepted in domestic law and the effectiveness of appeals against detention. The unforeseeable and factually unfounded definition of armed terrorist organization membership includes tens of thousands of individuals who should not be subjected to criminal investigation and detention. Such practices result in a severe and systematic violation of the right to liberty and security. In two decisions, the ECHR[16] concluded that detention based on ByLock usage and depositing money in Bank Asya violated the right to liberty and security. The ECHR reached this conclusion by reasoning that even if the allegations mentioned above were proven, it would not have been foreseeable for the applicants to be accused of and detained for membership in a terrorist organization. The ECHR also emphasized that the connection between these actions and terrorism could not be established in a manner convincing to an impartial observer. Particularly in allegations concerning ByLock usage, the issuance of detention orders without providing and evaluating data such as the dates, content, and context of the communications indicates that the detention was not based on reasonable suspicion and was not adequately and properly justified. Furthermore, appeals against detention orders and individual applications to the Constitutional Court are ineffective. In the Constitutional Court's jurisprudence, there is no evaluation of the foreseeability of detention based on these actions. Although some decisions of the Constitutional Court[17] mention ByLock communication content, it is generally and widely observed that ByLock usage, even when such data is not present, is deemed sufficient grounds for detention.[18] Depositing money in the bank is also considered sufficient for detention.[19] Moreover, it has been observed that the Constitutional Court has not taken into account the aforementioned ECHR decisions issued in 2021 and 2022, and these decisions have been disregarded.

26. In a broader context, it is observed that the individual measures of the European Court of Human Rights (ECtHR) regarding violations of the right to liberty and security have not been fulfilled[20], and applicants have not been released despite violation rulings.[21] On the other hand, it is apparent that there are significant issues regarding the implementation of the violation rulings by the Constitutional Court concerning the right to liberty and security. For instance, in response to an application related to the detention of a member of parliament, the Constitutional

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[16] Akgün/Türkiye; Taner Kılıç (2)/Türkiye

[17] Aydın Yavuz vd, B.No:2016/22169, 20.06.2017 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/22169 ; Metin Evecen, B.No:2017/74404/04/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/744 .

[18] Neslihan Aksakal, B.No:2016/42456, 26/12/2017 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/42456 ; Aynı Yönde:Emrullah Tayıpoğlu, B.No:2017/21511,04/04/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/21511 ;Mehmet Arı, B.No.:2016/22732, 10/01/2019 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/22732 ;İsmail Solmaz, B.No:2017/15251,12/02/2020 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/15251 ; Şeyma Tekin, B.No:2018/34362, 15/06/2021 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/34362 .

[19] Metin Evecen, B.No:2017/744 04/04/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/34362

[20] Kavala/ Türkiye [BD], Selahattin Demirtaş/Türkiye (2) [BD].

[21] See available at: https://hudoc.exec.coe.int/?i=004-55161 ; https://hudoc.exec.coe.int/?i=004-56539 .

Court issued a violation ruling[22], but this ruling was legally disregarded by a decision of the 3rd Criminal Chamber of the Court of Cassation. Furthermore, in the same decision, a criminal complaint was filed against the members of the Constitutional Court[23] for issuing the violation ruling. Although the Constitutional Court subsequently issued another violation ruling[24], this decision has also not been implemented, and the detained parliament member remains in custody.

27. No decisions have been found in the jurisprudence of First Instance Courts, Courts of Appeal, or the Court of Cassation that refer to or indicate the application or consideration of the Human Rights Committee's decisions in the cases of Alakuş v. Turkey (CCPR/C/135/D/3736/2020) and İsmet Özçelik, Turgay Karaman, and I.A. v. Turkey (CCPR/C/125/D/2980/2017). The applicant, Alakuş, has not received any compensation for arbitrary detention, nor has there been any official apology. Alakuş still faces the threat of criminal prosecution. There is no publicly available information regarding the implementation of the decision concerning İsmet Özçelik, Turgay Karaman, and I.A.

28. There is no publicly shared information indicating the execution of decisions issued against the State Party by the Working Group on Arbitrary Detention. No decisions from the jurisprudence of the First Instance Courts, Courts of Appeal, the Court of Cassation, or the Constitutional Court that refer to, apply, or consider these decisions have been found.

29. In the document CCPR/C/TUR/QPR/2, the Committee requested the State Party to provide information about "the capacity of the prison system, the number of inmates, and efforts to reduce overcrowding." In response, the State Party, in document CCPR/C/TUR/2, provided information stating that "with the addition of Article 105/A to the Law on the Execution of Penalties and Security Measures on April 11, 2012, a supervised release measure for conditional early release from penal institutions was introduced and has been implemented for well-behaved convicts who have one year or less remaining before their conditional release... The amendment to Article 110 of the Law on April 15, 2020, raised the upper limit of prison sentences that can be converted to house arrest for children, those unable to sustain themselves alone due to severe illness or disability in penal institution conditions, women who have not yet completed six months after giving birth, and those sentenced to three years or less of imprisonment or whose sentence has been converted from a judicial fine to imprisonment... To eliminate overcrowding, 204 new penal institutions with a capacity of 153,305 have been built, and the construction of 61 new prisons with a capacity of 47,884 is ongoing."

30. In its decision on the case of Alakuş v. Turkey (CCPR/C/135/D/3736/2020), the Committee concluded that the conditions under which the applicant was held in prison violated Article 10(1) of the Covenant. There are significant issues arising from

[22] See available at: Şerafettin Can Atalay (2), B.No:2023/53898, 25.10.2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/53898

[23] See available at: Yargıtay 3. Ceza Dairesi E:2023/12611 08.11.2023, https://im.haberturk.com/images/others/2023/11/08/Serafettin_Can_Atalay_degisik_is.pdf

[24] See available at: Şerafettin Can Atalay (3), B.No:2023/99744, 21.12.2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2023/99744

the overcrowding of prisons and the conditions of accommodation.[25]

31. National law does not specifically regulate the conditions under which detainees are held. There are regulations regarding the conditions of imprisonment for convicts, but the scope of these regulations is extremely limited. Minimum standards for the accommodation, sleeping arrangements, hygiene, nutrition, lighting, and heating/cooling conditions of individuals in prisons have not been determined in detail.

32. Especially due to the trials related to the attempted coup on July 15, 2016, prisons have become overcrowded. The accommodation of individuals deprived of their liberty under conditions that do not meet human dignity is widespread and systematic. The root cause of this problem lies in the criminal investigations and prosecutions, particularly those related to terrorism, where the factual basis is not demonstrated and the reasoning is inadequate, leading to the imprisonment of tens of thousands of people.

33. As far as can be determined, the vast majority of individual applications to the Constitutional Court regarding the conditions of detention have resulted in inadmissibility decisions. The primary reason for these decisions is that individual applications were made without first exhausting the necessary administrative and judicial remedies, and the applications were not properly or adequately justified. There is widespread ignorance regarding administrative and judicial remedies concerning prison conditions. It is of great importance that detainees are informed about the administrative and judicial remedies concerning prison conditions and that the prisons are subjected to oversight by independent institutions and organizations on a legal basis.

34. On the other hand, in a violation decision issued in 2023 for an application made in 2018,[26] the Constitutional Court also ruled that applications to the execution judgeships regarding the conditions of detention were, in practice, an ineffective remedy. The exact number of individual applications regarding the conditions of detention is unknown, but it is estimated to be high. The rejection of these applications five years after they were made, on the grounds that other remedies had not been exhausted, indicates that the Constitutional Court does not provide an effective domestic remedy for issues related to the prohibition of ill-treatment arising from conditions of detention.

35. Furthermore, until 2023, the Constitutional Court frequently issued inadmissibility decisions even in individual applications made after the exhaustion of administrative and judicial remedies. It is observed that the Constitutional Court's jurisprudence is not aligned with international regulations and the case law of the ECtHR. Inhuman conditions of detention were explicitly expressed in a dissenting

[25] See available at: https://ozgurlukicinhukukcular.org/tr/detay/marmara-bolgesi-hapishaneleri-hak-ihlalleri-raporu--ocak---haziran-2024

[26] İsmail Kılıç, B.No: 2018/36933, 2/3/2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/36933

opinion in one decision.[27]

36. Since 2023, the Constitutional Court, in a limited number of rulings, has subjected prison conditions to rigorous scrutiny. In one inadmissibility decision resulting from these reviews[28], it was determined that although the detention conditions were inhumane, they did not reach the minimum threshold required for a violation ruling due to the duration and the amenities provided (such as a garden, visitation, and gym). In the case under consideration, the applicant was held for 22 days in a 3.95 square meter area, 182 days in a 4.13 square meter area, and 305 days in a 4.31 square meter area. The total period spent in these areas amounts to 509 days. It is unacceptable to consider the 509-day period as insignificant. Additionally, it is notable that having the detainee sleep on a floor bed was not considered problematic. It is observed that the other facilities provided were not sufficient to alleviate the overcrowding issue. When this situation is considered alongside the inconsistency in case law and the significant, albeit unknown, number of applications to the Constitutional Court and the corresponding inadmissibility rulings, it points to the existence of a widespread and systematic problem.

37. There is no example in the decisions of Enforcement Courts, Heavy Penal Courts, Appeal Courts, the Court of Cassation, or the Constitutional Court that shows the implementation or consideration of the Alakuş v. Turkey (CCPR/C/135/D/3736/2020) decision regarding overcrowded prison conditions and accommodation issues.

Access to Justice and the Right to a Fair Trial

38. In the document CCPR/C/TUR/QPR/2, the Committee requested the State Party to respond to "…the allegations that the defendants' rights to be present at their trial were denied…". In the document CCPR/C/TUR/2 submitted by the State Party, no explanation was provided on this issue.

39. In the Alakuş v. Turkey (CCPR/C/135/D/3736/2020) decision, the Committee concluded that there was a violation of Article 14 (3) (b), (d), and (e) of the Covenant because the applicant did not have adequate time and facilities to prepare a defense, was unable to question witnesses, and was not allowed to attend the hearing in person.

40. In its decision dated 15 March 2023 in the case of Mukadder Alakuş, Application No: 2020/19153, the Constitutional Court ruled that the applicant's right to attend the hearing was violated. Following this violation ruling, the detention of Alakuş was terminated, and a retrial was initiated. In the retrial, the Manisa 3rd Heavy Penal Court, in its decision E:2023/89 K:2024/19, re-imposed the same sentence that had been given prior to the violation ruling. The first instance court did not make any assessment regarding the violation decision issued by the Committee. While the

[27] Mehmet Hanifi Baki, B.No: 2017/36197, 27/6/2018
[28] Cengiz Yetkin, B.No: 2019/39068, 14/6/2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/39068

procedural violation rulings are positive in terms of ensuring the renewal of trials, when the renewed trial is a copy of the trial before the violation ruling, it does not achieve any outcome other than prolonging the judicial process. There is no example where a different ruling was made in the retrial following a violation ruling concerning the right to attend the hearing in person. The implementation of the right to attend the hearing in person seems ineffective, especially in judicial processes related to terrorism charges, in terms of examining the substance of the violation.

41. Although not all are known, the significant number of applications to the Constitutional Court and the violation rulings issued clearly indicate the existence of widespread and systematic problems concerning the right to attend hearings. It is estimated that this problem is much more significant at the level of first-instance courts.

42. In domestic law, merely serving the indictment to the defendant is deemed sufficient, which does not comply with international standards. In terms of the right to have adequate time and facilities to prepare a defense, the lack of provisions in domestic law that foresee providing the suspect or defendant with a complete copy of the investigation or case file is a significant shortcoming. Considering that courts are not bound by the indictment and can deviate from it in many aspects, such as evaluating evidence or legal qualification, it cannot be said that a system that only foresees the service of the indictment is suitable for ensuring the right to adequate time and facilities to prepare a defense. Expecting the defendant to obtain the file or requiring the defendant to request it is unacceptable. On the other hand, the exceptions introduced for catalog crimes, especially terrorism offenses, are noteworthy.[29] The ability to restrict access to the file based on general and abstract reasons, such as jeopardizing the purpose of the investigation, is highly problematic. It is frequently observed that decisions restricting access to the file are made without concrete justification.[30] Since statistics on this issue are not published, it is difficult to determine the extent of the problem. However, the prevalence of terrorism investigations suggests that the problem is of significant magnitude. Moreover, the overly broad definition of terrorism offenses exacerbates the problem. The exceptions introduced for catalog crimes, especially terrorism offenses, in domestic law concerning the right to benefit from legal assistance are also noteworthy. There is not even a requirement to provide a concrete reason for restricting the right to legal assistance during the investigation phase in criminal procedure. While the inability to take statements or limiting the duration to one day may alleviate the issues caused by the regulation, it cannot be said that they eliminate them. Practices such as recording meetings held in prison, holding them in the presence of an official, seizing documents, and limiting the date and duration of meetings are highly problematic; they severely violate the right to have adequate time and facilities to prepare a defense.

[29] 5275 sayılı Ceza ve Güvenlik Tedbirlerinin İnfazı Hakkında Kanunun Avukat ve noterle görüşme hakkı başlığını taşıyan 59. Maddesi

[30] 5271 sayılı Ceza Muhakemesi Kanununun Müdafi ile görüşme başlığını taşıyan 153. Maddesi

43. On the other hand, the Constitutional Court issues inadmissibility decisions concerning ongoing trials before first-instance courts in terms of the right to have adequate time and facilities to prepare a defense. There are various issues related to these decisions. In particular, when trials are ineffective in terms of the applicants' participation or when the right to defense is severely violated, waiting for the judicial process to conclude is meaningless for the applicant. There is no assessment on this issue in the Constitutional Court's case law.[31]

44. It is a significant problem that despite not having adequate time and facilities, detailed defenses are made or that it is not shown what deficiency existed in the defense. In some cases, it is not communicated that failing to make a defense will be considered a waiver of the right to defense, yet it is still accepted as such.[32]

45. Another issue is the restriction of access to the case file, which is deemed appropriate on the grounds that the general information about the file is known.[33] Furthermore, in instances where such problems are raised as a complaint, the courts' failure to see an issue in this regard does not comply with international standards and the case law of the European Court of Human Rights (ECHR). The burden of proving that the right to have adequate time and facilities for the preparation of the defense has been fulfilled lies with the state. Reversing the burden of proof, requiring the applicant to prove that the right was not exercised, is erroneous.[34] Particularly in cases where the trial results in a conviction, the lack of adequate time and facilities alone undermines the fairness of the trial. It is undoubtedly important how the outcome is obtained, just as much as the outcome itself.

46. It cannot be said that the case law of the Constitutional Court is consistent within itself. The number of violation rulings made by the Constitutional Court concerning the right to have adequate time and facilities for the preparation of the defense is few. In the reasoning of these decisions, it is understood that there is no evaluation related to showing what the deficiency in the defense was, which is often seen in inadmissibility decisions, and that the mere fact that no time was provided for

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[31] Özcan Özkan, B.No: 2014/12702, 7/2/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/12702 ; Aynı yönde: Ömer Ulukapı, B.No: 2017/17771, 17/7/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/17771 ; İbrahim Arslan, B.No:2014/20413, 25.12.2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/5978 ; Ali Fuat Yılmazer vd (3), B.No: 2015/1150, 3/4/2019 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/1150 ; Ali Uğur Aras, B.No: 2016/76720, 25/9/2019 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/76720 ;A.A., B.No: 2017/18699, 8/6/2021 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/18699 ;Erkal Gündoğdu, B.No: 2021/218, 23/5/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/218 .

[32] Cihan Yeşil, B.No: 2013/8635, 6/5/2015 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/8635 .

[33] [33] Ersin Ekmekçi ve Sinan Ekmekçi, B.No: 2013/6068, 18/11/2015 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/6068 ; Abdulvahap Aydemir ve Yusuf Candemir, B.No: 2013/7349, 1/12/2015 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/7349 ; Burhan Carlı B.No:2014/8781, 9/3/2017 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/8781 .

[34] Adle Deniz Sürer vd, B.No: 2015/1655, 15/1/2020 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/1655 .

the defense is considered sufficient.[35] Although the reasoning of violation decisions is more in line with international standards and practices, it is clear that it creates a contradiction with the numerous inadmissibility decisions. Consequently, it is observed that the Constitutional Court's case law regarding the right to have adequate time and facilities for the preparation of the defense is not in line with international standards.

47. Concerning the right to examine and cross-examine witnesses, the issue is not that the matter is insufficiently regulated in domestic law; the issue arises from its implementation. It is believed that practices that clearly contradict domestic rules and, therefore, international standards, constitute a widespread and systematic problem.

48. It is understood that a significant number of applications have been made to the Constitutional Court regarding the right to examine and cross-examine witnesses. Inadmissibility decisions due to erroneous applications also draw attention under this heading. Applications related to cases that are still pending or where the appellate review (appeal and cassation applications) has not yet been completed are found inadmissible due to the non-exhaustion of domestic remedies. There are various problems with these decisions. In particular, waiting for the conclusion of the legal process in situations where the trial is ineffective in terms of the applicants' participation or where the right to defense is severely violated is meaningless for the applicant. There is no evaluation of this matter in the case law of the Constitutional Court.[36]

49. It is highly problematic that the right to examine and cross-examine witnesses is not examined due to the ruling of the deferral of the announcement of the verdict.[37] Considering that the regulation on the deferral of the announcement of the verdict has been annulled by the Constitutional Court, the inadmissibility decisions made in this context severely violate the right to examine and cross-examine witnesses.

50. The case law of the Constitutional Court holds that if a witness statement is the sole or decisive evidence, if the witness is not examined during the trial, and if no relevant, necessary, and sufficient justification is provided for not examining the witness, and if no means are provided to remedy this situation, the right to examine and cross-examine witnesses is violated. This approach is also in line with international standards and ECHR case law. However, violation decisions indicating that witnesses can be heard via video conference through the SEGBİS system are problematic.[38] Except for extraordinary circumstances, examining a witness face-to-

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[35] Bilal Güney,B.No: 2019/24514, 21/9/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/24514 ; Adem Ateş, B.No: 2019/9769, 23/11/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/9769 .

[36] Dursun Çiçek, B.No: 2012/1108, 16/7/2014 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2012/1108 ; Muzaffer Şah, B.No: 2014/234, 11/3/2015 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/234 ;Hüseyin Uğur ve Diğerleri, B.No: 2014/2996, 18/7/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/2996 ; Muhammet Ömeroğlu, B.No: 2014/657, 17/5/2016 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/657 .

[37] Seçkin Sökmez, B.No: 2014/16328, 27/12/2017 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/16328 ;S.T. B.No: 2014/19931, 24/5/2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/19931

[38] Uğur Özcan, B.No: 2021/12137, 26/7/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2021/12137 ; Metin Akdemir (2), B.No: 2020/3964, 21/9/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/3964 ; Bekir Yalım, B.No: 2020/22265, 22/11/2022 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/22265 ;Sinan Bulut,

face, in the same courtroom as the defendant, can be much more effective in uncovering the truth. It cannot be said that video conference methods meet the principles of face-to-face and direct examination.

51. Although not fully known, the number of applications made to the Constitutional Court and the number of inadmissibility and violation decisions issued clearly demonstrate the existence of widespread and systematic problems regarding the right to examine and cross-examine witnesses. It is estimated that this problem is much larger at the level of lower courts.

52. There is no example showing that the ruling in the Alakuş/Turkey (CCPR/C/135/D/3736/2020) decision concerning the right to participate in a hearing in person, the right to have adequate time and facilities for the preparation of the defense, and the right to examine and cross-examine witnesses, has been implemented or taken into account by the First Instance Courts, Appellate Courts, or the Court of Cassation, nor in the decisions of the Constitutional Court.

Freedom of Religion or Belief

53. In the document CCPR/C/TUR/QPR/2, the Committee requested the State Party to explain the steps taken to "recognize and regulate conscientious objection to compulsory military service." In the document CCPR/C/TUR/2 submitted by the State Party, it was stated that "there is no regulation concerning conscientious objection within the scope of military service, nor is there any work to repeal Article 318 of the Turkish Penal Code."

54. In its decision in the case of Cenk Atasoy and Arda Sarkut/Turkey (CCPR/C/104/D/1853-1854/2008), the Committee concluded that the suppression of individuals who refuse to be conscripted into compulsory military service because their conscience or religion prohibits the use of arms is incompatible with Article 18(1) of the Covenant. The ECHR has also issued several rulings[39] finding violations due to the non-recognition of the right to conscientious objection.

55. Conscientious objection is not recognized as a right in domestic law. Serious and multi-faceted human rights violations stemming from the non-recognition of the right to conscientious objection are being experienced.[40] In one of its decisions, the Court of Cassation[41] clearly ruled that conscientious objection is not

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B.No: 2019/14914, 10/5/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/14914 ;Salih Çokal, B.No: 2020/5651, 11/5/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/5651 ; Abdülkerim Kahraman, B.No: 2020/37267 11/5/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/37267 ; İbrahim Çetin, B.No: 2020/15908, 24/5/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/15908 ; Hüseyin Şükrü Ölmez, B.No: 2018/23403, 12/7/2023 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/23403 ; Hakan Turan, B.No: 2020/28006 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/28006 .

[39] Erçep/Türkiye; Savda/Türkiye ve kararlarda anılan diğer kararlar.

[40] The Association for Conscientious Objection , Conscientious Objection to Military Service in Turkey, https://drive.google.com/file/d/1OgQUzlHlEhMWZ_RfLfZRVnoniOo5_aIw/view

[41] Yargıtay 7. Ceza Dairesi E:2021/15422 K:2023/2575,20.03.2023.

recognized as a right in national law and that defendants cannot base their defense on the right to conscientious objection.

56. No decision was found in the case law of the First Instance Courts, Appellate Courts, the Court of Cassation, or the Constitutional Court that references or shows that the decision in Cenk Atasoy and Arda Sarkut/Turkey (CCPR/C/104/D/1853-1854/2008) has been implemented or taken into account. There is no publicly available information regarding the execution of the aforementioned decision.

57. On the other hand, within the scope of freedom of religion, it is seen that the Committee's decision in the case of Şeyma Türkan (CCPR/C/123/D/2274/2013)[42] was taken into account in a Constitutional Court ruling. Although this is a positive example of a Committee decision being considered, it is observed that the practice is generally inconsistent.

Other Issues Related to Committee Decisions and Views

58. Apart from the non-implementation and lack of precedent of Committee decisions and views, it is observed that they are also subject to other issues.

59. It has been observed that decisions and opinions are not provided to prisoners who are attempting to access Committee decisions and opinions for their defense, and that this issue has been brought before the Constitutional Court through individual applications. In three decisions by the Constitutional Court[43], it was stated that "…1. The application concerns the claim that the freedom of communication was violated due to the confiscation of a letter deemed objectionable. 2. The applicant was detained at the Osmaniye Type T1 Closed Penal Institution (Penal Institution) on charges of membership in the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY) at the time of the application. 3. With a decision dated 16/7/2019 by the Penal Institution, it was decided to deliver four photographs contained in a letter sent by his spouse, but to confiscate a fifteen-page photocopy document (Committee Opinion) related to the United Nations Human Rights Committee's opinion dated 28/5/2019 and numbered 2980/2017, due to its objectionable content. The reasoning for the decision pointed out Article 123 of the now-repealed Regulation on the Administration of Penal Institutions and the Execution of Penalties and Security Measures, published in the Official Gazette dated 6/4/2006 and numbered 26131, stating that it was unclear where the document was obtained from and that it was not related to the applicant. The applicant argued that the confiscation of the contents of the letter, which he wanted to use as a means of defense in the ongoing criminal proceedings against him, was unlawful and filed a

[42] Sara Akgül, B.No:2015/269,22.11.2018 https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/269
[43] Erdal Özkan, B.No:2019/32317, 02.11.2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/32317 ; Aynı yönde:Ali Onaylı, B.No:2019/26373, 13.04.2023, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/26373 ; Umut Şengöz, B.No:2019/32643, 04.07.2022, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/32643 ;

complaint with the Osmaniye Enforcement Judge (Enforcement Judge) on 17/7/2019. The Enforcement Judge rejected the complaint on 18/7/2019, on the grounds that the Penal Institution's decision was in accordance with procedure and law. The applicant appealed this decision to the Osmaniye 1st High Criminal Court (High Criminal Court) with a petition dated 23/7/2019. The High Criminal Court rejected the appeal on 9/9/2019, stating that the Enforcement Judge's decision was in accordance with procedure and law. 4. With a decision dated 19/7/2019 by the Penal Institution, it was decided to confiscate a fifteen-page photocopy document related to the Committee Opinion sent by the applicant's lawyer, due to its objectionable content. The reasoning for the decision pointed out Article 123 of the Regulation, stating that it was unclear where the document was obtained from and that it was not related to the applicant. The applicant argued that the confiscation of the contents of the letter, which he wanted to use as a means of defense in the ongoing criminal proceedings against him, was unlawful and filed a complaint with the Enforcement Judge on 22/7/2019. The Enforcement Judge rejected the complaint on 23/7/2019, on the grounds that the Penal Institution's decision was in accordance with procedure and law. The applicant appealed this decision to the High Criminal Court with a petition dated 25/7/2019. The High Criminal Court rejected the appeal on 9/9/2019, stating that the Enforcement Judge's decision was in accordance with procedure and law…. 12. In the concrete case, there is no doubt about the legal basis and legitimate aim of the interference with the applicant's freedom of communication due to the confiscation of the letter (for a detailed explanation, see Ahmet Temiz, §§ 46, 55; Muhittin Pirinççioğlu (3), §§ 45, 47). However, the administration and the lower courts decided not to deliver the photocopy document related to the Committee Opinion, stating that it was unclear where it was obtained from and that it was not related to the applicant. Although such control would impose a burden on the administration (Mehmet Fatih Göksan (2), Application No: 2017/38886, 8/9/2020, § 63), in the concrete case, the photocopy document consisted of only fifteen pages. Moreover, it is understood that the applicant was being tried while detained on charges of membership in FETÖ/PDY, and that the said document was related to the Committee Opinion on "arbitrary detention, arrest, and access to justice," and that the applicant stated he would benefit from this content in making an application to the Constitutional Court and the European Court of Human Rights. In this context, it is necessary to justify based on concrete evidence which expressions in the letter found objectionable pose a threat to the security of the penal institution (Bülent Çelebi, Application No: 2018/3397, 16/12/2020, § 47). The administration of the penal institution did not find any scribbles or secret communication signs on the text. It is understood that neither the administration nor the lower courts provided an evaluation of why these documents were considered objectionable and did not put forward a relevant and sufficient justification based on concrete information regarding how these documents would constitute encryption or organizational communication (Ali Onaylı, Application No: 2019/26373, 13/4/2023, § 17). Therefore, since the intervention did not meet a pressing social need, it was concluded that it was not in accordance with the requirements of a democratic society…."

60. The applications were made in 2019, with one decision being made in 2022 and two in 2023. The Constitutional Court rendered its decisions after more

than three and four years. In this regard, it is understood that the Constitutional Court does not constitute an effective legal remedy.

61. The obstruction of access to Committee decisions and opinions for relevant individuals clearly demonstrates the negative nature of the approaches taken by domestic authorities.

Conclusion and Recommendations

62. The decisions of the United Nations Human Rights Committee and the Working Group on Arbitrary Detention are not being implemented by the State Party. Detailed information should be requested from the State Party regarding the execution of the decisions of the United Nations Human Rights Committee and the Working Group on Arbitrary Detention. The State Party should fulfill its obligations arising from international human rights law. In this context;

63. TİHEK and the Ombudsman Institution should be restructured in accordance with international standards, developed institutionally and financially, and enabled to function as independent national human rights institutions.

64. The unpredictable and overly broad definitions of terrorist offenses should be abandoned.

65. The right to retrial should be granted to those prosecuted for terrorist offenses within the scope identified by the European Court of Human Rights in the Yüksel Yalçınkaya decision.

66. Allegations of ill-treatment should be effectively investigated, and those responsible should be punished; an official apology should be made to the victims, and compensation should be paid.

67. The capacity and living conditions of prisons should be improved.

68. The right to personal liberty and security should be recognized in accordance with international standards, and arbitrary detentions should be ended.

69. The right to access justice, to be present at trial, to have sufficient time and facilities to prepare a defense, and to question witnesses should be ensured.

70. The right to conscientious objection should be recognized, and legislation should be enacted on this issue.

71. The decisions of the United Nations Human Rights Committee and the Working Group on Arbitrary Detention, as well as the judgments of the European Court of Human Rights, should be implemented. Information regarding the execution of the decisions should be shared with the public. Access to the decisions of the United Nations Human Rights Committee and the Working Group on Arbitrary Detention should be provided to all relevant persons.