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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3736/2020*,**,***

Communication submitted by:	Mukadder Alakus (represented by her husband, Fatih Alakus and by counsel, Kurtulus Bastimar)
Alleged victims:	The author
State party:	Türkiye
Date of communication:	23 December 2019 (initial submission)[1]
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 8 April 2020 (not issued in document form)
Date of adoption of Views:	26 July 2022
Subject matter:	Conditions of detention; access to health care in prison, arbitrary detention
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Right to life; torture and ill-treatment; arbitrary arrest and detention; conditions of detention; right to a fair trial
Articles of the Covenant:	6, 7, 9, 10, 14, 15, 18, 19, 21, 22, 25, 26 and 27
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1. The author of the communication is Mukadder Alakus, a national of Türkiye born in 1971 who is currently held in Eskisehir Type L Closed Prison. She claims that the State party has violated her rights under articles 6, 7, 9, 10, 14, 15, 18, 19, 21, 22, 25, 26 and 27 of the Covenant. The Optional Protocol entered into force for Türkiye on 24 November 2006. The

* Adopted by the Committee at its 135th session (27 June-27 July 2022).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Shuichi Furuya, Carlos Gómez Martínez, Marcia V. J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Kobauyah Kpatcha Tchamdja, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

*** The text of individual opinions by Committee members Carlos Gómez Martínez and Vasilka Sancin, (partially dissenting) and Hernán Quezada Cabrera (dissenting) are annexed to the present decision

[1] Supplemented on 6 April 2020.

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author is represented by her husband, Mr. Fatih Alakus and by counsel, Mr. Kurtulus Bastimar.

Facts as presented by the author

2.1 The author is a teacher suffering from spondyloarthritis, psoriatic arthritis, gallstones, dental problems, chronic asthma and bronchitis, and has undergone operations on her meniscus. Her spondyloarthritis condition requires considerable medical supervision, including regular medication, physiotherapy and visits to specialist doctors.

2.2 The author was accused of being a member of the Gülen movement, considered as the Fetullah Terrorist Organization (FETO) by the State party, and taken into police custody on 4 September 2018. She remained one day in detention without food, water or medication. On 5 September 2018, she was transferred to Eskisehir Type H Prison. The criminal charges of membership of a terrorist organization brought against her were based on the facts that she had deposited money in Bank Asya accounts, she downloaded the Bylock application on her phone, and attended a peaceful rally. The author submits she was unable to adequately express herself during the court proceedings, which took place through a video conference system called SEGBIS.

2.3 On 28 December 2018, the Manisa Penal Court sentenced the author to seven years and six months of imprisonment. She appealed against this decision before the Izmir Regional Court of Justice, which, on 22 March 2019, confirmed the first instance decision. The author then appealed to the Court of Cassation, which on 11 February 2020 confirmed this decision.

2.4 The author's condition deteriorated as she was forced to sleep on a mattress on the floor and was unable to access her medication during several months following her arrest. Her knee condition required the special assistance from inmates in order to use the toilets, which she could no longer benefit from due to COVID-19 isolation measures. She also experienced constant pain and vomiting episodes due to her gallstones. Her chronic asthma and bronchitis also worsened because of the lack of sanitary conditions.

2.5 Between September and October 2018, the author submitted to the prison administration weekly requests to visit a specialist doctor, which remained unanswered. On 30 October 2018 and 8 November 2018, she sent petitions to the Manisa Penal Court regarding her conditions of detention, lack of access to medication and treatment, and also requesting conditional release for medical reasons, to no avail.

2.6 On 23 November 2018, the author's counsel petitioned the prison administration requesting treatment for the author's spondyloarthritis. On 30 November 2018, she was taken to Eskisehir Odunpazari State Hospital, where she saw a generalist doctor before returning to the prison that day. On 3 December 2018, she was forced to sign a release statement indicating that her health problems had been resolved after her visit to hospital. The author began taking Xanax and Duxet, as consequence of the psychological distress for not receiving medical treatment. She was taken to Eskisehir City Hospital following episodes of pain and vomiting because of gallstones and administered painkillers upon her return to prison.

2.7 On 23 September 2019, the author's husband requested the prison administration to allow a specialist doctor to visit his wife. On 5 October 2019, he sent another request to the Communication Office of the Presidency, requesting adequate treatment for his wife. Following this request, the prison administration committed to provide the author with the medical treatment she required, which, however, never materialized.

2.8 On 20 October 2019, a doctor formally diagnosed her with gallstones and recommended she got operated. The author, nevertheless, decided to opt out from the surgery as she was concerned with the lack of hygiene and access to medicine after the operation within the detention facility.

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2.9 In addition to these requests submitted to the prison authorities regarding her detention conditions and health situation, the author filed complaints related to this matter before the Manisa Penal Court, the Area Court of Appeal and the Court of Cassation.[2]

Complaint

3.1 The author claims a violation of her rights under articles 6, 7, 9, 10, 14, 15, and 18 to 27 of the Covenant. She claims that her conditions of detention put her life at risk and amount to inhuman and degrading treatment, in violation of articles 6, 7 and 10 of the Covenant. The prison is overcrowded and there is not enough food or access to hot water for all inmates. Drinking water for detainees is distilled from the ceiling. The unhygienic conditions of detention and her lack of access to adequate medical treatment and food have deteriorated her medical condition and increased her risk of death. She argues that conducting medical examinations within her unhygienic and unequipped prison cell in the presence of prison staff, amounts to inhuman and degrading treatment. The author further maintains that the State party deliberately denies political prisoners access to medical care as an intentional act of cruelty to extract information[3].

3.2 The author claims that her arrest and detention breached article 9 of the Covenant as they were merely based on her using the Bylock application[4], which is not a crime under law. In addition, she was detained without solid evidence to suggest a strong suspicion of committing a criminal offense. She also maintains that her arrest warrant did not include facts or evidence which would justify her pre-trial detention during almost four months.

3.3 Regarding her claims under article 14, the author submits that she was brought before the judge without having been notified of the charges against her and without having adequately prepared her defense with her attorney. She was however, forced to sign statements drafted by the police stating that she had been notified of the charges and had adequately prepared her defence. She further alleges violations of the principle of equality of arms, as she was not permitted to call and examine witnesses, to access the entire case file, and could not adequately express herself because of her displaced dentures and the conduction of court proceedings through SEGBIS. Furthermore, the author maintains that the judge's negative remarks on FETO during the trial and suggesting to her counsel that she should confess in court, show the judge's prejudice regarding her innocence. Lastly, the author claims that the courts did not provide reasoning to justify the rejections of her attempt to challenge the lawfulness of her detention.

3.4 The author claims that her rights under article 15 of the Covenant and the principle of legality were violated, as she was convicted for facts which were not defined as crimes under domestic law. Charges were brought against the author for downloading the Bylock application, sharing information, having a Bank Asya account and attending a peaceful rally, which e not prohibited under domestic law.

3.5 The author submits that the accusations against her concerned legal activities, protected under articles 18, 19, 21, 22, 25, 26 and 27 of the Covenant. She claims that, although she did not download or use this application, these are nonetheless legal activities protected under articles 19 to 26 of the Covenant. The author contends that holding an account at Bank Asya is perfectly legal and protected under articles 21, 25, 26 and 27 of the Covenant.

State party's observations on admissibility and the merits

4.1 In a note verbale dated 7 December 2020, the State party submitted its observations on admissibility and the merits., It submits that the author was taken into custody by order of the Turgutlu Magistrate's Office for suspicion of membership of an armed terrorist

[2] The author submits that the prison administration denied her request for copies of these various proceedings in order to attach them to the present communication.

[3] The author refers to the cases of Halime Gulsu and Nesrin Gencosman, both accused of links with the Gulen Movement and died in prison, reportedly, due to deprivation of medication.

[4] The author denies downloading or using the Bylock application and claims that the phone line belonged to one of her colleagues.

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organization. The following day, her defense statement was taken in the presence of an appointed lawyer, and she was subsequently arrested for strong suspicion of crime. The author was charged with the offense of "being a member of an armed terrorist organization" based on conversation records within the Bylock encrypted program exclusively used by FETO members, deposits to a FETO affiliated bank, and her participation in activities organized by FETO.[5] She was sentenced to seven years and six months of imprisonment, in accordance with article 314/2 of the Turkish Penal Code. The State party notes that the author's application before the Constitutional Court, lodged on 4 June 2020 is currently pending[6].

4.2 On admissibility, the State party submits that the author has failed to exhaust domestic remedies, as her individual application before the Constitutional Court[7] is currently pending and was lodged after submitting the present communication. The State party notes that the author's claims under articles 18, 19, 21, 22, 25 and 27 of the Covenant have not been raised before any domestic authority, including in the application to the Constitutional Court.

4.3 In response to the allegation on domestic remedies, the State party refers to judgements of the European Court of Human Rights[8], which have considered the Constitutional Court's individual application procedure as an effective remedy. The State party notes that the author only expresses mere doubts as to the prospects of success of a remedy in order to support her claims. On the length of proceedings before the Constitutional Court, the State party submits that measures have been adopted following the declaration of the state of emergency to reduce the length of review of applications, despite the unforeseeable backlog created by the coup attempt of July 2016. The State party points to the Inquiry Commission on State of Emergency Measures, which reviews applications concerning administrative acts under the Decree-Laws in the context of the state of emergency. The Compensation Board under Law No. 6384, regarded as an effective remedy by the European Court of Human Rights[9], provides compensation to applications to the Constitutional Court which concern the non-enforcement or lengthy enforcement of judicial decisions.

4.4 The author's allegations regarding *inter alia* her lack of legal assistance and representation, poor detention conditions, coercion to sign statements and lack of access to medical care are presented without evidence. The State party notes that no facts and explanations are provided as to how the author's rights under articles 18, 21, 22, 25 and 27 were violated, which should be declared inadmissible for lack of substantiation.

4.5 The State party considers that the communication constitutes an abuse of the right of submission for using offensive and politically motivated language and submitting misleading claims. The author claims she could not adequately prepare her defense and was forced to sign documents, whilst omitting that she was represented throughout judicial proceedings and that all her statements were taken in her lawyer's presence. The State party also rejects the author's claims concerning the denial of medical care, and submits that she was provided with medication and treated by specialist doctors.

4.6 On the author's claims under articles 6, 7 and 10 of the Covenant, the State party submits that the author was examined upon her arrival to prison. She was recommended surgery to remove her gallstones, which she refused on 28 December 2019. She was examined, treated and provided with medication by the prison infirmary nine times. She was treated by Eskisehir State Hospital three times and treated by the prison dentist four times. Regarding the author's claim concerning the provision of inadequate food, the State party submits that, on 30 March 2020, the prison doctor recommended she received an appropriate

[5] The State party does not provide documentary evidence in support of these charges brought against the author.

[6] The application to the Constitutional Court raises claims under articles 10 (equality before the law), 7 (right to life), 19 (right to personal liberty and security), 36 (right to fair trial), and 38 (no punishment without law) of the Constitution.

[7] Enshrined in article 148 of the Constitution and Law no. 6216.

[8] European Court of Human Rights, Hasan Uzun v. Turkey (10755/13); Mercan v. Turkey (56511/16); Zihni v. Turkey (59061/16); Catal v. Turkey (2873/17).

[9] Ibid, Müdür Turgut et al. v. Turkey (4860/09).

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diet considering her gallstones. Moreover, the State party notes that nothing in her health records indicates that her conditions resulted from food deprivation. On her conditions of detention, the State party submits that prison cells comply with international standards and are open to regular inspection. The author has not lodged any formal complaint before any authority regarding allegations of torture and ill-treatment or with regard to the lack or quality of food. The State party also notes that she failed to seek interim measures before the Constitutional Court to allege the denial of health care and subsequent risk to her life.

4.7 With regard to the author's claims under articles 9 and 14 of the Covenant, the State party submits she was immediately informed of the reasons of her arrest and of her rights. Her statement was subsequently taken in her lawyer's presence. Regarding the use of SEGBIS for the court proceedings, the State party argues that this did not impair the author's right to a fair trial, as it did not prevent her from accessing, presenting and challenging evidence or interacting with the courtroom. Furthermore, the author did not request to attend the court hearings in person. The State party notes that the European Court of Human Rights has found that conducting court hearings through video conference systems does not violate the right to a fair trial if the defendant can adequately see, hear, participate and is not disadvantaged whilst making his or her defense.[10]

4.8 The author's detention was based on Article 100/3 of the Code of Criminal Procedure, which provides grounds for detention when there exists a strong suspicion of offenses against the constitutional order and its functioning.[11] In light of the charges and the absolute risk of absconding in the author's case, the State party argues that alternatives would have been inadequate. Furthermore, the lawfulness of her detention was regularly reviewed by the respective domestic court and the author was able to appeal her conviction decision and to file an individual application before the Constitutional Court. On the independence of judges, the State party submits that the Constitution clearly states that the legislative and executive powers cannot instruct judges.[12] The author's claims concerning her alleged coercion to accept drafted statements and that her lawyer and herself were denied access to the case file are unfounded, and were not formally denounced before any domestic authority.

4.9 The State party refutes the allegations under article 15, as the author was charged and condemned for a criminal offense[13] specified under law. In addition, FETO was officially recognized by the authorities as a terrorist organization[14].

4.10 On the author's claims under articles 18, 19, 21, 22 and 25, the State party refutes that the author was limited in her freedom of thought, conscience and religion, as the facts, evidence and charges brought against her only concerned her membership to an armed terrorist organization. It also notes that the author contests she downloaded and used the Bylock application, but not the evaluation made of such evidence. It submits that the Court of Cassation and Constitutional Court have established that the download and use of the Bylock application is crucial evidence of FETO membership, as the application was not available for download at that time and was exclusively installed by FETO members using an external drive. The State party further argues that the author's claims under article 22 are unsubstantiated. The "Gulen movement" is not a legally established association. As an armed terrorist organization, FETO can neither be recognized as an association for the purposes of article 22. Lastly, the State party considers the author's claims under article 25 irrelevant and unsubstantiated, and that there is no indication of discriminatory treatment towards the author within the meaning of article 27 of the Covenant.

Author's comments on the State party's observations

5.1 On 31 December 2020, the author submitted comments on the State party's observations. She, first, asserts that although her application to the Constitution Court was

[10] Ibid, Golubev v. Russia (26260/02); Asciutto v. Italy (35795/02).
[11] This includes offenses under articles 309-315 of the Turkish Penal Code.
[12] Article 138 of the Constitution.
[13] Article 314 Turkish Penal Code.
[14] By decision of the National Security Council, FETO was listed as a terrorist organisation. The Court of Cassation rule on 24 Aril 2017 that FETO was an armed terrorist organisation.

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lodged after submitting her communication, this was nevertheless prior to the Committee's examination of the admissibility of the communication[15].

5.2 The author reiterates that she has exhausted all available domestic remedies and argues that the individual application procedure before the Constitutional Court is an ineffective and unreasonably prolonged remedy. The author submits, that the Court itself has considered it an extraordinary remedy,[16]which therefore is ineffective and does not require exhaustion[17]. She further argues that the judgements of the European Court mentioned by the State party are irrelevant to her case as they concern the availability of remedies against dismissals in virtue of Decree Laws in the context of the state of emergency

5.3 The author reiterates her claim that an individual application to the Constitutional Court does not offer reasonable prospects of success, pointing to cases where lower courts ignored the judgements of the Constitutional Court. This led the European Court to rule that there are serious doubts as to the effectiveness of this remedy in cases concerning pre-trial detention. Therefore, she argues that she cannot be expected to exhaust this remedy, which should not be considered effective under article 5(2)(b) of the Optional Protocol.

5.4 Regarding the length of the individual application proceedings before the Constitutional Court, the author refers to the Committee's jurisprudence, which considered this remedy as unreasonably prolonged.[18] Considering the number of pending applications and applications processed annually by the Constitutional Court, the author contends it would take it one year and a half to review her application, in addition to the two years since her first efforts to exhaust domestic remedies.

5.5 The author refutes that submitting a compensation application to the Compensation Board would constitute an effective remedy. This procedure concerns applications lodged to the European Court, which, falls outside the scope of her case. As the remedy sought by the author is her release, she argues that a claim for compensation would not be effective or offer any reasonable prospects of success in this sense. The author notes that the Committee[19] and the European Court of Human Rights[20] have rejected the State party's inadmissibility claim for failure to file a compensation claim under Article 141 of the Code of Criminal Procedure on similar grounds, considering that this remedy would not end the author's pre-trial detention. Although the European Court found that an application to the Compensation Board could provide redress in a case concerning the right to property, this ruling cannot be applied to applications seeking the termination of deprivation of liberty.

5.6 The author refutes that her communication constitutes an abuse of the right of submission, as it was submitted to the Committee within the required deadline. Her allegations were not abusive nor politically motivated, but supported by the findings of UN Working Group on Arbitrary Detention (WGAD), and aimed at highlighting that followers of the Gülen Movement are considered political opponents and detained on a discriminatory basis.[21]

5.7 The author rejects the State party's allegation that her claims are unsubstantiated, and argues that she provided explanations throughout domestic proceedings as to how her rights under the Covenant were violated, which are further developed in her comments on the merits. She reiterates that her arrest and detention were in breach of article 9 (1) and (2) of the Covenant and contrary to domestic law, as no evidence demonstrated a strong suspicion of committing a crime, but rather concerned legally permitted activities protected by the Covenant. With regard to articles 9 (2) and 14(3)(a) of the Covenant, the author reiterates that she was not provided, at the time of her arrest, with specific information regarding the charges brought against her beyond the general legal basis for her arrest.

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[15] European Court of Human Rights, Osman Kavala v. Turkey (28749/18).
[16] 2017 Annual report of the Constitutional Court.
[17] *Akmatov v. Kyrgyzstan,* (CCPR/C/115/D/2052/2011).
[18] *Özçelik et al. v. Turkey,* (CCPR/C/125/D/2980/2017).
[19] *Özçelik et al. v. Turkey,* (CCPR/C/125/D/2980/2017).
[20] European Court of Human Rights, *Sahin Alpay v. Turkey* (16538/17); *Mehmet Hasan Altan v. Turkey* (13237/17); *Dermitas v. Turkey* (14305/17).
[21] UN Working Group on Arbitrary Detention, Opinion No. 47/2020; ibid, Opinion No. 53/2019.

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5.8 The author reiterates that, despite having requested to be present at her trial, this was denied and she was connected to the courtroom through SEGBIS, in violation of article 14 (3)(d) of the Covenant. She also reiterates all the claims raised under articles 14 (3)(b), (e) and (g) of the Covenant in her initial submission and argues that the failure to provide a proper standard of health care may also violate fair trial guarantees under article 14.[22]

5.9 The author reiterates that, although she denies using the Bylock application, the deprivation of liberty on the basis of the mere use of Bylock is arbitrary as it results from the exercise of rights protected under article 19 of the Covenant.[23] In a similar vein, the author reiterates that having a Bank Asya account is a legal activity protected under articles 21 and 22 of the Covenant.[24]

5.10 Although the author denies the accusations made against her, she reiterates that holding a Bank Asya account and using the Bylock application were not defined as crimes, when she was arrested and later convicted and sentenced, and that her detention on this basis violates article 15 of the Covenant.[25]

5.11 The author reiterates that her conditions of detention amounted to a violation of article 7 because she stayed in an overcrowded cell[26], had to sleep on the floor, did not have access to hot water and to toilets adapted to her knee condition. The author submits that, the State party's measures for the decongestion of prisons have resulted insufficient. She highlights several judgements of the European Court of Human Rights finding a violation of the prohibition of torture for conditions of detention similar to hers.[27]

5.12 The author refutes the State party's observations with regard to her claims under article 6 of the Covenant. The health report annexed to the State party's observations fails to provide detailed information on the author's chronic rheumatism. The author claims that despite the diet indications included in the report, the prison administration never acted thereupon and she was never provided with the required diet. The author also claims that she never underwent a comprehensive medical exam, including by a rheumatologist, so that the corresponding medical care could be provided as a result.

5.13 The author refutes the State party's allegation that she failed to exhaust domestic remedies regarding her claims under articles 18, 19, 21, 22, 25 and 27. She challenged the accusations of having a Bank Asya account, which she claims is protected under articles 21, 25, 26 and 27 of the Covenant, in her applications before the 3rd Heavy Penal Court of Manisa, the Izmir Regional Court of Justice and the Court of Cassation.

5.14 Lastly, the author rejects that her claims pertaining to the denial of medical care, lack of water and food, and poor conditions of detention are unsubstantiated. The author reiterates the numerous unanswered petitions requesting medical care that were submitted to the prison administration. The subsequent petitions filed to the Presidential Communication Centre, and the 3rd Heavy Penal Court of Manisa concerned the lack of medical care, medicine and water in order to take a shower.

State party's additional observations

6.1 On 7 May 2021, the State party submitted additional observations on the admissibility and merits of the complaint reiterating its inadmissibility for non-exhaustion of domestic remedies, in light of the author's pending application before the Constitutional Court. As to the effectiveness of this particular remedy, the State party submits that the Court's judgements are legally enforceable, binding on all organs of the State and, therefore, cannot be disregarded by relevant authorities. The State party highlights, that in the *Uzun* case, the European Court of human Rights concluded that the procedure before the Constitutional

[22] Ibid, *Civil and Political Rights, including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention*, (UN Doc. E/CN.4/2005/6).

[23] Ibid, Opinion No. 30/2020, par. 87.

[24] Ibid, Opinion No. 2/2020, pars. 72 and 73.

[25] The author refers to *Özçelik v. Turkey*, Communication No. 2980/2017, (CCPR/C/125/D/2980/2017).

[26] The author submits that she stays in a prison cell designed for seven with fourteen other people.

[27] European Court of Human Rights, *J.M.B. et al. v. France* (967/15); *Torregiani et al. v. Italy* (43517/09); *Sulejmanovic v. Italy* (22635/03).

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Court afforded an appropriate mechanism for the protection of human rights and should be exhausted[28]. The State party considers the European Court judgements cited by the author irrelevant to the author's particular situation and misleading, as in her case, her individual application is still pending.

6.2 The State party rejects the author's claim regarding the unreasonable delay of the individual application procedure and considering that she has not attempted to exhaust this remedy. A delay of six months, counting since the date of the author's second submission to the Committee, should not be considered as an unreasonable delay in light of the Committee's jurisprudence.[29]

6.3 The State party maintains the unsubstantiated nature of the author's claims alleging that she was not informed of the reasons of her arrest and not provided with medical care and that it provided evidence to the contrary in its initial observations. Furthermore, it regrets the author's irrelevant examples of other cases or information regarding the general conditions of detention in Türkiye, which fail to deal with the specifics of her case and represent an abuse of the individual communications procedure.

6.4 The State party submits that, on 16 January 2020, Eskisehir State Hospital Medical Board reported that the author's medical condition did not require the deferral of the enforcement of her prison sentence. It reasserts that the author is not in an overcrowded cell and continues to be provided with adequate medical care and food.

6.5 The State party contends that the author's reference to Opinions of the WGAD to support her claims under article 9 of the Covenant is misleading and irrelevant. It further reiterates that the author never challenged the indictment against her. With regard to the use of SEGBIS for court proceedings, the State party argues that this was not in breach of article 14. It also refutes the author's allegation that she had requested to attend court proceedings.

6.6 Regarding the author's claims under articles 15, 18, 19, 21, 22, 25 and 27, the State party submits that the author was not charged with using the Bylock application or holding a Bank Asya account, but for the offense of membership of an armed terrorist organization, under article 314 of the Turkish Penal Code. The State party reiterates that both these activities were considered as crucial evidence by domestic courts to prove her offense, alongside six witness statements which identified the author as a member of FETO.

Author's additional comments on the admissibility and merits

7.1 On 17 June 2021, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to grant the author's request to submit further information and evidence dated 8 June 2021. On the non-enforceability of the judgements of the Constitutional Court, the author reiterates that this was also raised by the European Court in the *Altan*, *Alpay* and *Koçintar* cases.[30]

7.2 The author rejects the State party's argument that the unreasonable prolongation of a remedy should only be analysed within the scope of the particular remedy, without considering the delay of judicial proceedings prior to lodging an individual application to the Constitutional Court. She argues that applying to further remedies could be considered unreasonably prolonged in light of the duration of the previous remedies sought[31]. She also disagrees with the comparison made by the State party with the *Zündel v. Canada* case, as in contrast, she has provided explanations as to why her application to the Constitutional Court would be unreasonably prolonged.

7.3 The author refutes the State party's allegations that her claims regarding the denial of medical care are unsubstantiated. She informs that, on 9 March 2021, she submitted a petition to the Communication Centre of the Presidency requesting to receive sufficient medical treatment and to be treated in a well-equipped hospital. On 18 January 2021, she filed a

[28] European Court of Human Rights, *Uzun v. Turkey* (10755/13).
[29] The State party refers to *Zündel v. Canada* (U.N. Doc. CCPR/C/89/D/1341/2005).
[30] Europen Court of Human Rights, *Sahin Alpay v. Turkey* (16538/17); *Mehmet Hasan Altan v. Turkey* (13237/17); *Koçintar v. Turkey,* (77429/12).
[31] *Quereshi v. Denmark*, (U.N. Doc. CERD/C/66/D/33/2003).

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petition to the Constitutional Court regarding the denial of medical treatment and how this negatively impacted her ability to express herself in court and make her defense. In this petition, she also claims she was forced to withdraw her petitions to the prison administration requesting medical treatment for her Rheumatoid Arthritis and that she was strip-searched several times, in violation of article 7 of the Covenant. Regarding this latter complaint, the author brought this to the attention of the Chief Public Prosecutor's Office in Eskisehir on 2 March 2021, which, on 17 May 2021 declined to initiate an investigation.

7.4 The author claims that she had explicitly requested to attend the court hearings in-person in her submissions to the Manisa 3rd Heavy Penal Court and the Court of Cassation. The Izmir Regional Court of Justice justified the use of SEGBIS for the author's trial due to the high number of cases regarding terrorism-related offenses. Furthermore, the author objects that in her particular case, her trial through SEGBIS provided fair trial guarantees. She claims that the bad connection impeded her from properly hearing and that she was not allowed to intervene or ask questions. She was denied access to the recording of the trial by Manisa 3rd Heavy Penal Court, which informed that the trial had, in fact, not been recorded.

State party's additional observations

8.1 In a note verbale dated 15 October 2021, the State party submitted additional observations. On the effectiveness of the remedy before the Constitutional Court, the State party argues that the Court's judgements were effectively enforced in the cases the author refers to and that the European Court of Human Rights has repeatedly found this remedy to be effective regarding complaints of persons deprived of their liberty.[32] It further submits that the Constitutional Court examines applications without discrimination and that it has ruled in favour of persons prosecuted for membership to FETO.

8.2 The State party maintains that the author's application to the Court cannot be considered as unreasonably delayed and that her reference to the *Özçelik* case is misleading in this sense, as the Committee did not consider the remedy as unduly prolonged, but rather noted the State party's failure to argue otherwise.

8.3 The State party provides evidence of the medication prescribed to the author from 6 September 2018 to 13 March 2019 as well as the dental operation performed by the State hospital. It considers the author's claims regarding the denial of medical care as ill-intentioned, recalling that she refused the cholecystectomy operation offered to her.

8.4 With regard to the author's petition to the Constitutional Court on 18 January 2021, the State party argues that the author fails to support her claims with evidence. Furthermore, it notes that the petition was filed after the author had submitted her comments to the Committee and that they had not been raised before. The State party also informs that the author applied for interim measures before the Constitutional claiming her medical condition posed a serious threat to her life, which were denied on 8 January 2021.

8.5 The claims raised in her husband's petition to the Communication Centre of the Presidency on 9 March 2021 are raised for the first time before the Committee, which proves that the author had not exhausted domestic remedies prior to submitting the present communication. It refutes the allegations regarding strip-searches, which per se do not constitute a violation of article 7 of the Covenant, as was found by the Eskisehir Chief Public Prosecutor's Office on 17 May 2021. The Prosecutor's Office also found that the author had never requested psycho-social assistance. The State party submits that the author's requests to have her hair cut in the absence of video surveillance was denied for security reasons and does not breach article 7 of the Covenant. She was also denied access to certain books on similar grounds and as prescribed by law.[33]

8.6 The State party reiterates that the author's petition dated 14 January 2018 did not request her attendance to the court hearings, but rather to face the witnesses, which was made possible through SEGBIS. It further argues that it was in the author's interest for the hearings to be held online. The State party notes that she requested the SEGBIS recordings of the court

[32] *Mehmet Hasan Altan v. Turkey* (13237/17); *Koçintar v. Turkey,* (77429/12).

[33] Law no. 5275.

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hearings a year and a half after the last hearing took place. Under the relevant domestic regulation, SEGBIS recordings are transcribed and handed to the parties upon their request, as in the author's case. It submits that the author's failure to promptly request the SEGBIS recording and forward these complaints to the authorities demonstrates her lack of good faith, which supports its claim that the communication constitutes an abuse of the right of submission.

8.7 With regard to the author's claims under articles 6, 7 and 10 of the Covenant, the State party points to the Visit Report dated February 2021 of the Human Rights and Equality Institution of Turkey to the prison where the author is currently being held, which reveals the unfounded nature of her allegations.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee takes note of the State party's submission that the communication should be considered an abuse to the right of submission under article 3 of the Optional Protocol, since the author uses abusive and political remarks, and presents misleading claims. The Committee finds that the material before it does not show that the author presented her communication in a bad faith, and that she provided all the information and documents at her disposal. In the circumstances of the present communication, the Committee does not find that the author abused her right of submission under article 3 of the Optional Protocol.

9.4 The Committee notes the State party's submission that the communication should be considered inadmissible on the grounds of non-exhaustion of domestic remedies, as the author's application to the Constitutional Court is still pending. It further notes the State party's submission that the European Court of Human Rights has held, in cases concerning the deprivation of liberty of persons, that an individual application before the Constitutional Court constitutes an effective remedy.[34]

9.5 The Committee notes the author's argument that filing an individual application before the Constitutional Court is not an effective remedy as: (a) it does not offer reasonable prospects of success for her release, owing to the non-enforcement of the Court's judgements by lower courts; (b) the process would be unreasonably prolonged considering the author's first attempt to exhaust remedies before domestic courts on 4 September 2018 and the Constitutional Court's backlog. The Committee notes in this regard, the author's argument that the Court would take one year and a half to process her application. The Committee notes the State party's argument that, according to the Constitution, the Court's judgements are binding on all organs of the State and that lower courts have begun retrial or ordered the release of applicants following its judgements. It further notes the State party's argument that the author's application, lodged on 4 June 2020 cannot be considered as unduly prolonged, and that the delay of the separate criminal proceedings should not be regarded in evaluating whether the remedy is unreasonably prolonged. The Committee observes that at the time of the consideration of the communication, two years had lapsed since the author had lodged her application to the Constitutional Court. In the circumstances, and following its jurisprudence, the Committee does not find that a delay of two years to consider a constitutional action is unduly prolonged.[35] On the other hand, following its jurisprudence,[36]

[34] European Court of Human Rights, *Hasan Uzun v. Turkey* (10755/13); *Mercan v. Turkey* (56511/16); *Zihni v. Turkey* (59061/16); *Catal v. Turkey* (2873/17).

[35] *M.G.C. v. Australia*, (CCPR/C/113/D/1875/2009); *Zündel v. Canada* (U.N. Doc. CCPR/C/89/D/1341/2005).

[36] *Özçelik et al. v. Turkey,* (CCPR/C/125/D/2980/2017).

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the Committee also notes that the European Court of Human Rights has expressed concern as to the effectiveness of this remedy in pre-trial detention cases, due to the non-implementation, by lower courts, of the Constitutional Court's findings in two cases in which the Court had found violations.[37] The Committee further notes that it would be for the Government to prove that the remedy of an individual complaint to the Constitutional Court was effective, both in theory and in practice, in cases concerning the right to liberty and security.[38] The Committee finds that, in the circumstances of the author's case, the State party has not shown that an individual complaint to challenge the author's detention before the Constitutional Court would have been effective, in practice.

9.6 The Committee notes the State party's submission that the author has failed to exhaust domestic remedies by not raising her claims under articles 18, 19, 21, 22, 25 and 27 before a domestic authority. The Committee notes the author's argument that holding a Bank Asya account is a protected activity under articles 21, 25, 26 and 27 of the Covenant, and that she argued before domestic courts that it could not be considered to constitute a crime. The Committee, however, notes that in the present case, the author has not provided any specific information or substantiation of having raised particular claims regarding the violation of her rights protected under 18, 19, 21, 22, 25, 26 and 27 before relevant domestic authorities and recalls that authors of communications must exercise due diligence in the pursuit of available remedies.[39] The Committee accordingly, finds this part of the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

9.7 The Committee takes note of the author's claims alleging she was coerced to sign drafted statements, to confess her guilt and that she was not promptly informed of the reasons of her arrest or of the charges brought against her. The Committee observes, however, that those claims do not appear to have been raised at any point in the domestic proceedings. That part of the communication, raising issues under articles 9(2), 14 (3) (a) and (g) of the Covenant, is accordingly declared inadmissible for failure to exhaust all domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

9.8 The Committee notes the State party's submission that the communication, in its entirety, should be declared inadmissible for lack of substantiation.

9.9 The Committee, considers the author's allegations that she was denied access to medication, treatment and therapy throughout her detention, and also notes the many petitions she sent to several domestic authorities in this regard. It also considers her claims that she was subjected to strip searches and haircuts in the presence of camera surveillance. The Committee notes, however, that the State party refutes these allegations, and provides copies of the prescriptions and list of medications administered to the author in 2018, 2019 and 2020, as well as proof of dental operations performed on her. It also notes that the author rejected the offer to be operated to remove her gallbladder stones and that she does not provide information or evidence to refute the State party's claims regarding her transfers to hospital and treatments received by the prison infirmary. It further notes that the author fails to provide information to indicate if and why the strip searches and other treatments whilst in detention were arbitrary or unreasonable and amounted to cruel, inhuman or degrading treatment.

9.10 The Committee recalls that at any rate the State party remains responsible for the life and well-being of its detainee.[40] In the light of the proof provided by the State party of the dental and medical treatments and medicines provided and prescribed to the author, as well as the author's failure to produce documentary evidence in support of her allegations, the Committee, however, cannot conclude that the author was denied access to medical care or subjected to cruel, inhuman or degrading treatment whilst in detention, which would

[37] European Court of Human Rights, *Mehmet Hasan Altan v. Turkey* (application No. 13237/17), 20 March 2018, para. 142 and *Şahin Alpay v. Turkey* (application No. 16538/17), 20 March 2018, para. 121.

[38] Ibid.

[39] See, inter alia, *V.S v. New Zealand* (CCPR/C/115/D/2072/2011), para. 6.3, *García Perea v. Spain* (CCPR/C/95/D/1511/2006), para. 6.2; and *Zsolt Vargay v. Canada* (CCPR/C/96/D/1639/2007), para. 7.3.

[40] See, *Fabrikant v. Canada*, Communication No. 970/2001, (CCPR/C/79/D/970/2001); *Lantsova v. Russian Federation*, Communication No. 763/1997, (CCPR/C/74/D/763/1997).

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constitute a violation of her rights under articles 6 and 7 of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate, for the purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.11 On the author's claim that the first instance court judge had made negative and partial comments towards her, the Committee recalls that a judge's impartiality must be presumed in the absence of proof to the contrary and that there should be ascertainable objective facts in order to raise such doubts.[41] In the absence of any further pertinent information on file, however, the Committee considers that the author has failed to sufficiently substantiate these allegations, under article 14(1), with regard to the impartiality of the judge. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol

9.12 The Committee, however, considers that the author has sufficiently substantiated her other claims under articles 9, 10, 14 and 15 of the Covenant for the purposes of admissibility and proceeds with its consideration of the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

10.2 The Committee notes the author's claim under articles 9(1), of the Covenant regarding the unlawful and arbitrary nature of her arrest and detention. It takes note of the author's claims that her arrest and detention were solely based on her alleged use of the Bylock application, on holding a Bank Asya account and on her participation in a peaceful rally, without solid evidence to suggest a strong suspicion that she had committed a criminal offense; her arrest warrant did not include facts or evidence which would justify her pre-trial detention during such a long period. It notes the State party's argument that the author was not charged with using Bylock or holding a Bank Asya account, although the State party acknowledges this evidence was considered crucial by domestic courts (para 6.6), but rather because of her participation in FETO activities confirmed by six witness statements. It also notes the State party's submission that the author's detention was grounded in Article 100/3 of the Code of Criminal Procedure, given the strong suspicion of committing the offense of membership of a terrorist organization and the absolute risk of absconding.

10.3 The Committee recalls that the notion of "arbitrariness" must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[42] The Committee, observes that the State party has only provided a partial copy of the court hearing of 28 December 2018, without providing any further documentation, such as an arrest warrant or detention order, regarding the evidence held against the author that would justify her detention. In these circumstances, the Committee considers that the State party has not demonstrated that the author's detention met the criteria of reasonableness and necessity. The Committee therefore finds that the authors' detention amounted to a violation of her rights under article 9 (1) of the Covenant.

10.4 In respect of article 15(1) of the Covenant, the Committee notes the author's claim that she was convicted for acts which were not defined as crimes nor prohibited under domestic law, such as downloading the Bylock application, sharing information through that application, having a Bank Asya account and attending a peaceful rally. The Committee notes the State party's argument that the author was charged and condemned for her membership to an armed terrorist organisation, which is a crime, specified under law.[43] It further notes, that the Court of Cassation has found that "the involvement of any individual" with the Bylock application "beyond any doubt proves the linking of the individual to the terrorist organization", (…) "since the Bylock messaging app is a communication network,

[41] *Lagunas Castedo v. Spain*, (CCPR/C/94/D/1122/2002), par. 9.7; *Jenny v. Australia,* (CCPR/C/93/D/1437/2005).

[42] General Comment 35 (2014), para. 12.

[43] Article 314 Turkish Penal Code.

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exclusively designed and developed to fulfil the communication needs of the FETÖ terrorist organization".[44]

10.5 The Committee recalls its jurisprudence to the effect that it is incumbent on the courts of States parties to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[45]

10.6 The Committee recalls that the principle of legality in the field of criminal law, as one of the fundamental principles of the rule of law, requires both criminal liability and punishment to be limited to clear and precise provisions in the law at the time the act or omission took place.[46] In doing so, the Committee limits itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the Turkish Penal Code or under international law.[47] The Committee observes that article 314, paragraph 1 of the Turkish Penal Code, defines the crime of membership of an armed terrorist organization as "any person who establishes or commands an armed organization with the purpose of committing the offences listed in parts four and five of this chapter".[48] In light of this broad definition, and in the absence of information from the State party regarding the existence of domestic legal provisions which clarify the criteria used to establish the acts constitutive of the crime defined under article 314, paragraph 1, of the Penal Code, the Committee cannot conclude that the author's alleged use of the Bylock application and Bank Asya account amounted to sufficiently clear and predictable criminal offenses at the time the acts took place. The Committee considers that, as a matter of principle, the mere use or download of a means of encrypted communication or bank account cannot indicate, in itself, evidence of membership of an illegal armed organisation, unless supported by other evidence, such as conversation records.[49] In the absence of documentary evidence provided by the State party, the Committee finds, in these circumstances, that the rights of the author under article 15(1) have been violated . 10.4 The Committee notes the author's allegations that she was not provided with food, water or medication whilst in police custody and was detained in an overcrowded cell in Eskisehir Type L Prison and Eskisehir H-Type Prison, where she shared a cell, which could hold seven people, with fourteen other inmates. It also notes the author's claims that she slept on a mattress on the floor, lacked a medically-recommended diet lacked hot water and accessible toilets considering her particular health condition. The Committee notes the State party's argument that the physical conditions at Eskisehir Type L Prison are not characterized by over-crowdedness and comply with international standards, as the author stays in a ward with seven bedrooms each measuring 8,83 square meters. It notes the State party's referral to the Visit Report of the Human Rights and Equality Institution of Turkey to the detention facility, which demonstrates the unfounded nature of the author's claims.

10.5 As to the conditions of detention in general, the Committee observes that certain minimum standards must be observed regardless of a State party's level of development

[44] Court of Cassation, E. 2017/16-956, K. 2017/370.

[45] See e.g.: *Baltasar Garzón v. Spain,* Communication No. 2844/2016, para 5.15; Ramón Gimenez v. Paraguay, Communication No. 2372/2014, para. 7.13.

[46] General Comment 29 (2001), para. 7

[47] *Baumgarten v. Germany*, Communication No. 960/2000, para. 9.3; *Baltasar Garzón v. Spain,* Communication No. 2844/2016, para 5.14.

[48] Turkish Penal Code, article 314, para. 1. The author was sentenced to seven years and 6 months of imprisonment in accordance with article 314, paragraph 2, which stipulates that "any person who becomes a member of the organization defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five to ten years"

[49] *Mutatis mutandis* European Court of Human Rights, *Akgün v. Turkey* (19699/18), para. 173.

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included in Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum Rules for the Treatment of Prisoners.[50] The Committee observes that, the State party has not provided any information to refute the author's allegations regarding her conditions of detention in police custody and in Eskisehir Type H Prison. It notes that the State party's information regarding the available floor space at Eskisehir Type L Prison is presented in general terms, without providing information about the number of inmates the author shares her prison cell with nor the specific floor space available to her. The Committee further notes that the State party has not refuted the author's allegation regarding her sleeping conditions, her effective lack of access to an adequate diet and the inaccessibility of the toilets, considering her knee condition and the absence of a caretaker. The Committee considers that, in the circumstances of the present case, and in particular in the light of the general nature of the information provided by the State party, due weight must be given to the author's allegations. The Committee recalls that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.[51] In the circumstances as described, and in the absence of further relevant information or explanations by the State party, the Committee concludes and that several minimum requirements were not met and that the State party violated the rights of the author under article 10 (1).

10.6 The Committee notes the author's allegations under articles 14 (3) (b), (d) and (e), that she was unable to adequately prepare her defense; she was denied access to the entire case file; she was not permitted to call and cross-examine witnesses; she was not allowed to attend her trial in-person despite her request dated 14 December 2018; the conduct of proceedings online and her displaced dentures impeded her from correctly expressing herself. The Committee takes note of the State party's formal refutation that the author had requested to attend her trial, and that the use of SEGBIS did not breach the author's fair trial guarantees as it did not disadvantage her in accessing, presenting and challenging evidence or interacting with the courtroom. It takes note that the State party refutes the allegations regarding the denial to grant her access to the case file and the lack of independence or impartiality of the judge. It also notes, that the State party only provides a partial copy of the court hearings, which took place on 28 December 2018. The Committee observes, however, that the State party has not provided sufficient explanations or documentary evidence, such as full transcripts of the judicial proceedings in order to substantiate its refutations of the author's allegations regarding her right to a fair trial.

10.7 The Committee further recalls that the burden of proof in relation to factual questions cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information.[52] It considers that the State party has not provided sufficient evidence, such as the full transcripts of the judicial proceedings, which would indicate that the author: (a) was able to adequately express herself throughout the proceedings; (b) was able to cross-examine witnesses, and (c) was able to prepare her defense despite her detention conditions. The Committee recalls that under article 14 (3) (d), accused persons are entitled to be present during their trial and that proceedings in the absence of the accused are only permissible if this is in the interest of the proper administration of justice. [53] The Committee observes that the conduction of trial hearings through video conference systems would not necessarily constitute *per se* a breach of fair trial guarantees. The Committee notes however that the author addressed a request to the first instance court on 14 December 2018 in order to be present in trial. It considers, that in the absence of further relevant information or explanations by the State party, in particular, justifying the conduction of the author's trial remotely and rejecting her request to be present, other than

[50] See, *Mukong v. Cameroon*, Communication No. 458/91 and *Potter v. New Zealand*, Communication No. 632/95.

[51] See *Maharjan et al. v. Nepal,* Communication No. 1863/2009, (CCPR/C/105/D/1863/2009), par. 8.7.

[52] See communications No. 30/1978, *Lewenhoff and de Bleier v. Uruguay*, Views adopted on 29 March 1982, para. 13.3; and No. 84/1981, *Dermit v. Uruguay*, Views adopted on 21 October 1982, para. 9.6.

[53] *Kostin v. Russian Federation*, (CCPR/C/119/D/2496/2014), para. 7.2; *Dorofeev v. Russian Federation*, (CCPR/C/111/D/2041/2011) See also the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 36.

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practical considerations outlined in the Izmir Regional Court of Justice's ruling, the Committee finds a violation of articles 14(3)(b), (d) and (e).

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 9 (1), 10 and 14 (3) (b), (d) and (e) and 15 of the Covenant.

12. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to release the author and to provide her with adequate compensation for the violations suffered. The State party is also under an obligation to take all necessary steps to prevent the occurrence of similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official language of the State party.

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Annex I

Joint opinion by Committee Members Carlos Gómez Martínez and Vasilka Sancin (partially dissenting)

1. We do not agree with the Committee's finding of a violation of article 15 of the Covenant.

2. Article 314 of the Turkish Penal Code defines the crime of terrorism as membership, to varying degrees of involvement (establishment, leadership, collaboration), of an armed organisation, which purpose is the commission of any of the offences included in the fourth and fifth parts of the chapter in which the provision is inserted. These fourth and fifth sections include a wide range of offences against the security of the State and against the constitutional order and its functioning.

3. We disagree that the offence of terrorism or membership to a terrorist organisation is too broadly defined in the Turkish Penal Code, and that its application by the State party's authorities amounted to a violation of article 15. We are of the opinion that the degree of specificity of the text is enough to avoid the defencelessness of those accused of committing a criminal act under article 314, and, moreover, there is no substantial difference in the definition of this offence in Turkey compared to other legal definitions of terrorism, such as the one included in the "Council Framework Decision of 13 June 2002 of the Council of the European Union on combating terrorism" (2002/475/JHA), or the one provided in the "Directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism".

4. Furthermore, there is no record that in the domestic proceedings the author invoked, before the State party's courts, a violation of Article 15 of the Covenant on the grounds of insufficient specification of the offence with which she was charged, which raises an issue of admissibility of such claim due to the obligation to exhaust domestic remedies first.

5. The Committee concludes that insufficient evidence (use of the Bylock application and ownership of an account with Bank Asya) demonstrates a defective characterisation of the offence, but this reasoning involves a confusion of levels: the description of the offence, which takes place at the legislative level, and the assessment of the evidence, which takes place at the judicial level. This is evident in paragraph 10.6, which, after stating that the offence encompassed in article 314 of the Turkish Penal Code is defined in very broad terms, includes reasoning relating to the insufficiency of the evidence in this case consisting of the author's use of an encrypted account and the ownership of a bank account. The arguments used by the Committee allude to a possible erroneous assessment of the incriminating evidence by the domestic authorities, perhaps contrary to the right to the presumption of innocence - a violation of Article 14(2) of the Covenant not invoked by the applicant - but not really to the principle of legality or criminality under Article 15 of the Covenant.

6. We also regret, that the Committee in para. 9.11, did not consider the author's claim, that the first instance court judge had made negative and partial comments towards her, in combination with the courts' application of Article 314 of the Turkish Penal Code, which could sufficiently substantiate the author's claims under article 14(1), namely, that the tribunal was not acting independently and impartially.

7 . It is quite another matter that State party's authorities, relying on Article 314 of the Turkish Criminal Code, acted in violation of the right not to be arbitrarily deprived of liberty (Article 9 of the Covenant) and in breach of essential procedural guarantees which are also human rights (Article 14, b, d, e of the Covenant), violations found by the Committee, with which we do fully agree.

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Annex II

Opinión individual de Hernán Quezada (parcialmente disidente).

1. Respecto de esa Comunicación, comparto la decisión del Comité en el sentido de que los hechos examinados ponen de manifiesto una violación de los derechos de la autora en virtud de los artículos 9 (1), 10 y 14 (3) (b), (d) y (e) del Pacto. Sin embargo, no estoy de acuerdo con la decisión de la mayoría acerca de la violación del artículo 15 del Pacto.

2. La autora fue condenada por su pertenencia a una "organización terrorista armada", según la definición del artículo 314 párrafo 2, en relación con el párrafo 1, del Código Penal de Turquía, que sanciona a quienes lleguen a ser miembros de una organización armada cuyo propósito sea cometer delitos previstos en el mismo cuerpo legal contra la seguridad del Estado y el orden constitucional y su funcionamiento. Al respecto, el Comité considera que esta "amplia" definición no clarifica los criterios usados para determinar cuáles son los actos constitutivos de ese delito, y que el solo uso por la autora de la aplicación Bylock y la titularidad de la cuenta del Banco Asya no son indicativos, en sí mismos, de evidencia de pertenecer a una organización armada ilegal, salvo que ello sea apoyado por otras pruebas (párr. 10.6).

3. A mi juicio, tal razonamiento confunde el principio de legalidad, contemplado en el artículo 15, con la valoración de la prueba en el proceso penal. Aunque la mencionada definición del delito pudiera ser objeto de debate, la conclusión de la mayoría se fundó principalmente en la cuestión probatoria, lo que es un aspecto ajeno al principio contemplado en el artículo 15 del Pacto. Por lo demás, según la jurisprudencia del Comité, la valoración de la prueba es un asunto entregado a los tribunales de los Estados Partes, a menos que se demuestre que esa evaluación fue claramente arbitraria o equivalió a error manifiesto o denegación de justicia, lo que no fue materia de discusión.

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