



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under the Optional Protocol, concerning communication No. 2980/2017\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	İsmet Özçelik, Turgay Karaman and I.A. (represented by counsel, Walter Van Steenbrugge)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Turkey
<i>Date of communication:</i>	12 May 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 19 May 2018 (not issued in document form)
<i>Date of adoption of views:</i>	26 March 2019
<i>Subject matter:</i>	Arbitrary arrest and detention; access to justice
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims
<i>Substantive issues:</i>	Right to life; torture and ill-treatment; arbitrary arrest and detention; conditions of detention; right to a fair trial; derogation under article 4 of the Covenant
<i>Articles of the Covenant:</i>	4, 6, 7, 9, 10 and 14
<i>Articles of the Optional Protocol:</i>	1, 2 and 5 (2) (b)

\* Adopted by the Committee at its 125th session (4-29 March 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\*An individual opinion by Committee member Gentian Zyberi (partly concurring, partly dissenting) is annexed to the present Views.



1.1 The authors of the communication are İsmet Özçelik, Turgay Karaman and I.A., nationals of Turkey born in 1959, 1974 and 1978, respectively. The authors were removed from Malaysia to Turkey on 12 May 2017. They claim a violation of their rights under articles 6, 7, 9, 10 and 14 of the Covenant. The Optional Protocol entered into force for the State party on 24 February 2007. The authors are represented by counsel, Mr Walter Van Steenbrugge. The State party gave notice to the Secretary-General of a derogation under article 4 of the Covenant on 2 August 2016. On 9 August 2018, the State party notified the Secretary-General that the State of Emergency had ended as of 19 July 2018 and that the derogation had been terminated accordingly.

1.2 In the initial complaint of 12 May 2017, family members of the authors claimed that the authors were being held in incommunicado detention at an unknown location in Turkey and were at risk of being subjected to torture.<sup>1</sup> They requested the Committee to issue interim measures consisting of a request to the State party to ensure that they were not arbitrarily detained or tortured pending the examination of their complaint by the Committee. On 19 May 2017, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to take all necessary measures to confirm the authors' whereabouts and to put them immediately under the protection of the law; to officially inform the Committee, and the authors' family and representatives of their whereabouts; to take all measures necessary to enable the authors to be in contact with their relatives; to promptly bring the authors before a judge and give them access to a lawyer of their choice.

1.3 On 31 October 2017, the Committee, acting through its Special Rapporteur on new communications and interim measures, rejected the State party's request to lift interim measures. The Committee requested that the State party take all measures necessary to promptly bring the authors before a judge and give them access to a lawyer of their choice, to provide the authors with prompt access to appropriate and adequate medical care, and to ensure that the authors were authorized to communicate with and be visited by their families, counsel or any other person of their choice. Pursuant to rule 97 (3) of the Committee's rules of procedure, the Committee also denied the State party's request for the admissibility of the communication to be examined separately from the merits.

1.4 On 25 September 2017, I.A. withdrew his complaint before the Committee. On 27 February 2018, the State party requested the complaint as it pertains to him to be discontinued.

#### **The facts as submitted by the authors**

2.1 The authors are considered to be connected to the Gülen movement by Turkish authorities. In 2017, they were residing in Malaysia. They submit that they were unlawfully deprived of their liberty under Malaysian anti-terrorism legislation during the first week of May 2017, by individuals acting under the control or instructions of Turkish authorities.

2.2 At the time of their submission of the communication before the Committee, Turgay Karaman and İsmet Özçelik had both lived in Malaysia for 13 years. Turgay Karaman was the principal of Time International School, a school inspired by the teachings of Fethullah Gülen. On 2 May 2017, he was kidnapped in Malaysia because of his affiliation with the Gülen movement. CCTV footage revealed that he was forced into a car by five unidentified persons in an underground parking garage. His family quickly discovered that he could not be reached and they alerted the local police and the UN office in Kuala Lumpur. İsmet Özçelik, an academic, was at this time awaiting resettlement by UNHCR after having previously been the victim of an attempted abduction from his son's home in Kuala Lumpur, when unidentified armed persons, who appeared to be linked to Malaysian security services, attempted to kidnap him and send him to Turkey. The local police intervened and stopped the rendition. He was detained for a period of 50 days before Malaysian authorities decided to release him pending trial. On 4 May 2017, he was once again deprived of his liberty by Malaysian police.

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<sup>1</sup> Additional information was also provided by family members of the authors on 18 May 2017.

2.3 Gradually, it became clear to the authors' family members that the authors were detained at the police headquarters in Kuala Lumpur. The authors did not have access to a lawyer or their casefile. Their Malaysian lawyer immediately filed a request to obtain such access. On 9 May 2017, brief contact between the lawyer and the authors was allowed. The request for access to the authors' casefiles was however denied.

2.4 On 12 May 2017, the authors were removed to Turkey despite the fact that an extradition hearing had not been held and no judicial decision to that effect had been taken. Upon return to Turkey, the authors were held in incommunicado detention at an unknown location.

### **The complaint**

3.1 At the time of the initial submission, the authors claimed that, as detainees, they were at an imminent risk of being tortured and ill-treated, in violation of their rights under articles 6, 7, 9 and 10 of the Covenant. They noted that they were considered to be connected to the Gülen movement, which has been designated as a terrorist organization in the State party, and that cases of torture and abuse had frequently been documented with regard to individuals alleged to be associated with the movement.<sup>2</sup>

3.2 The authors further claimed that their rights under article 14 of the Covenant had been violated as they were held in incommunicado detention in Turkey at an unknown location and were deprived of their right to a fair trial. The only information the authors' relatives had received on their whereabouts was that they had been interrogated by the anti-terror unit of the Ankara Police Department on 14 May 2017. Their relatives did not have any information as to where the authors were detained or whether they had been brought before a judge or had access to a lawyer and their casefile.

3.3 On the 25 September 2017, in their comments on the State party's observations on the admissibility of the complaint, the authors provided further information on the complaint. They argue that they have been arbitrarily and unlawfully deprived of their liberty in violation of their rights under article 9 of the Covenant. They claim that they were removed from Malaysia without an extradition request having been made; that Turkish authorities have not informed them of the charges against them; that it took the Turkish authorities 19 and 21 days respectively to bring them before a judge; that they have not had the possibility to re-appear in person or by a lawyer before a court to have their detention reviewed; and that they do not have access to their casefiles.

3.4 The authors claim that they have been subjected to ill-treatment in violation of their rights under article 7 of the Covenant. İsmet Özçelik informed his counsel that he had been subjected to ill-treatment, that violence had been used against him and that his family had been threatened. Due to this ill-treatment, his health problems – in particular his heart condition – have drastically worsened. Turgay Karaman has also been subjected to ill-treatment and torture. The authors claim that they have also been threatened with solitary confinement.

3.5 In their submission of 25 September 2017, the authors provide further information as to their claims under article 10 of the Covenant. They claim that their families were not informed of their prison transfers and that they are detained in a prison far from their families' hometown. Contact with their families is rendered so difficult and burdensome that they rarely have the opportunity to communicate with them, despite having made official applications for telephone conversations with family members. They also claim that they were not allowed to receive clothes from their families for a period of three months and that they were refused adequate medical care. They are kept in over-crowded cells, which are intended for a maximum of 20 persons but in which 26 persons are held. They have been deprived of basic access to food, hygienic conditions and recreation.

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<sup>2</sup> The authors refer to the report 'A Blank Check, Turkey's Post-Coup Suspension of Safeguards Against Torture', Human Rights Watch, October 2016, and 'Turkey: Independent monitors must be allowed to access detainees amid torture allegations', Amnesty International, July 2016.

3.6 As to their claim under article 14 of the Covenant, the authors claim that they have not been informed of the charges against them and that they have not had access to prompt legal assistance. The first time they were allowed to consult with their counsel was 13 days (İsmet Özçelik) and 17 days (Turgay Karaman) after their arrest. Additionally, they have not been allowed access to their case files and have only been brought before a judge once.

#### **State party's observations on admissibility**

4.1 On 19 July 2017, the State party submitted its observations on the admissibility of the communication. The State party submits that the communication is inadmissible on grounds of non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol. It further submits that the authors' claims under articles 9, 10 and 14 are inadmissible as the State party has made a derogation under article 4 of the Covenant, which has been duly notified to the Secretary-General.

4.2 The State party notes that as per findings by its domestic authorities, the Gülen movement or "the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY)" is an armed terrorist organization established by Fetullah Gülen with the aim of overthrowing the government. It notes that the National Security Council of Turkey has established, in a number of decisions, that FETÖ/PDY is a terrorist organization that constitutes a threat to national security and which was responsible for the 15 July 2016 coup attempt in the State party. It notes that a nationwide state of emergency was declared as of 21 July 2016. The State party notes that in a notification of derogation under article 4 of the Covenant, dated 21 July 2016, it informed that, as a consequence of the state of emergency, measures taken could involve derogations from obligations under articles 2 (3), 9-10, 12-14, 17, 19, 21-22 and 25-27 of the Covenant, as permissible under article 4 of the Covenant.<sup>3</sup> The State party submits that the authors' claims under articles 9, 10 and 14 fall within the scope of the notification of derogation. The State party submits that these claims should therefore be found to be inadmissible. It argues that in accordance with article 4, the decree laws issued and measures taken after the declaration of the state of emergency were taken only to the extent that they were strictly required by the exigencies of the situation and proportionate to the crisis faced by the authorities. It further notes that the measures were only to be in force during the state of emergency, and thus temporary in nature.

4.3 The State party notes that numerous arrests and custody proceedings were initiated following the coup attempt. It provides information on the decree laws enacted following the declaration of the state of emergency. The maximum duration of police custody under the decree laws was raised to 30 days by Decree Law No. 667 in order to ensure that effective investigations were conducted. Later on, considering the changing circumstances, the measure of extended police custody periods was reviewed. With Decree Law No. 684, the maximum duration of police custody was reduced to seven days. It can be extended for an additional seven days by decision of a public prosecutor. The order of custody can be appealed before a criminal court by the person in custody, his or her defense counsel or legal representative, spouse or first to second-degree relatives. Legal assistance is provided during police custody and health reports are issued upon entry and release.

4.4 As concerns the specific circumstances of the authors' case, the State party notes that an investigation is still pending before the Ankara Chief Public Prosecutor's Office against the authors on grounds of being members of an armed terrorist organization. A decision of

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<sup>3</sup> On 2 August 2016, the Secretary-General was notified of the following: "... The coup attempt and its aftermath together with other terrorist acts have posed severe dangers to public security and order, amounting to a threat to the life of the nation in the meaning of Article 4 of the International Covenant on Civil and Political Rights. The Republic of Turkey is taking the required measures as prescribed by law, in line with the national legislation and its international obligations. In this context, on 20 July 2016, the Government of Turkey declared a State of Emergency for a duration of 90 days, in accordance with the Turkish Constitution (Article 120) and the Law No. 2935 on State of Emergency (Article 3/1b). The decision was published in the Official Gazette and approved by the Turkish Grand National Assembly on 21 July 2016. In this process, measures taken may involve derogation from obligations under the International Covenant on Civil and Political Rights regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4 of the said Covenant. "

restriction was taken as concerns the investigation file. An arrest warrant was issued against İsmet Özçelik on 29 August 2016 by the Sarayönü Criminal Magistrate's Office. An arrest warrant was issued against Turgay Karaman on 21 March 2017, by decision of the Ankara 2<sup>nd</sup> Criminal Magistrate's Office. The arrest warrants were issued under article 314 (2) of the Criminal Code as the authors were suspected of being members of an armed terrorist organization. The authors were taken into custody upon their arrival in Turkey on 12 May 2017. On 18 May 2017, the custody period was extended for an additional seven days upon the instruction of the Public Prosecutor. During the custody period, the authors were notified of their rights. The authors' relatives were informed of their arrest on 12 May 2017. On 17 May 2017, upon his request, İsmet Özçelik was provided with counsel appointed from the Bar Association. He met with his lawyer on the same date and his statement was taken by law enforcement officials in the presence of his counsel. On 19 May 2017, Turgay Karaman likewise met with his counsel, at which time his statement was taken by law enforcement officials in the presence of his counsel.

4.5 The authors were held in custody between 12 and 23 May 2017. They were medically examined before and after the detention and medical reports were issued. On 23 May 2017, the authors were brought before the Ankara 5<sup>th</sup> Criminal Magistrates' Office in the presence of their counsel and were detained by order of the Court. They were taken to Sincan T-Type Closed Prison where they were held until 3 June 2017, when they were transferred to Denizli T-Type Closed Prison, for security and capacity reasons. They are currently held in Denizli prison.

4.6 During their detention period in Sincan prison, Turgay Karaman and İsmet Özçelik had access to emergency health services 24 hours a day. They could watch television in the ward, there was a toilet, a bathroom and kitchen facilities. They had unlimited access to open air and sunlight. Mondays were the visiting day at the prison. However, their relatives did not visit the authors. Despite having the right to do so, the authors did not make any phone calls, or send or receive letters. İsmet Özçelik met with his lawyer on 28 May 2017 for 57 minutes and on 30 May 2017 for 66 minutes. Turgay Karaman met with his lawyer on 26 May 2017 for 30 minutes. In Denizli prison, the authors are held in a ward for 20 persons. There are no restrictions concerning telephone conversations or visitations. İsmet Özçelik was visited by his parents on 6 June 2017. Turgay Karaman had a telephone conversation with a relative on 12 June 2017.

4.7 The State party submits that the authors' claims are inadmissible for failure to exhaust domestic remedies as the authors did not appeal the detention decision of the Ankara 5<sup>th</sup> Criminal Magistrates' Office. The State party further argues that claims relating to alleged arbitrary custody and detention and to the non-communication of the reasons for arrest can be reviewed under domestic law by first instance courts under article 141 of the Code of Criminal Procedure (CCP). The State party further notes that individuals can submit complaints before the Constitutional Court on alleged violations that fall within the scope of the European Convention on Human Rights and its Protocols, after the exhaustion of all administrative and judicial remedies. It notes that in cases submitted to the European Court of Human Rights following the coup attempt of 15 July 2016, the Court has found that complaints before the Constitutional Court is an effective remedy that an applicant has to exhaust prior to submitting a complaint.<sup>4</sup>

#### **Authors' comments on the State party's observations on admissibility**

5.1 On 25 September 2017, the authors submitted their comments on the State party's observations on the admissibility of the communication.

5.2 The authors claim that none of the domestic remedies invoked by the State party constitutes an adequate or sufficient remedy.

5.3 The authors note that they have appealed the detention decision of the Ankara 5<sup>th</sup> Criminal Magistrates' Office. On 30 May 2017, Turgay Karaman's counsel appealed the decision while the lawyer assigned to İsmet Özçelik by the Bar Association appealed the

<sup>4</sup> The State party refers to *Mercan v. Turkey*, (application No. 56511/2016), 8 November 2016; and *Zihni v. Turkey*, (application No. 59061/2016), 29 November 2016.

detention decision on 26 May 2017. On 22 June 2017, the Ankara 6<sup>th</sup> Criminal Magistrates' Office rejected both appeals.

5.4 The authors note that filing a complaint before the domestic courts under article 141 CCP in order to obtain financial compensation is not a remedy they are seeking. Their primary objective is not to obtain financial compensation but to ensure that the continuous violation of their rights ends and that they are released from detention.

5.5 The authors argue that filing an individual application before the Constitutional Court is not an effective remedy as the Court is not competent to deal with measures imposed under the Decree Laws. The Constitutional Court rendered a decision on 13 October 2016 in which it rejected an appeal introduced in September 2016 by the Republican Peoples' Party (CHP), the main opposition party, to review the constitutionality of Decree Law No. 667. The Court found it was not competent to conduct such a review. They further argue that pursuing a claim before the Constitutional Court would be unreasonably prolonged. According to the most recent figures available, over 100,000 cases are currently pending before the Court, while the Court has in the past dealt with a maximum of 20,000 cases a year.<sup>5</sup> They note that, as per recent estimates, it will take the Court at least 10 years to review every case currently pending before it.<sup>6</sup>

5.6 The authors argue that, even if there would have been domestic remedies to exhaust, they are impeded from exhausting them as they cannot rely on actual legal representation and assistance. Finding counsel has been extremely burdensome. Most were too afraid to represent anyone allegedly connected to the Gülen movement. It is only after having been turned away numerous times that the authors' family members managed to find counsel for the authors in Turkey. They note that İsmet Özçelik's counsel visited him only once, in May 2017. Shortly thereafter, however, counsel was arrested because he was providing legal assistance to an alleged Gülenist. The authors' friend who arranged for contact with this lawyer was also arrested. Upon release, the counsel withdrew from representing the author. He was assigned another counsel by the Turkish Bar Association. This counsel did not take any action to defend his interests and instead kept trying to persuade him to confess to crimes he had not committed. The authors note that they have no legal background or knowledge of the Turkish criminal justice system and they are therefore not in position to initiate domestic proceedings in the absence of legal assistance.

5.7 The authors additionally argue that domestic remedies in Turkey should be presumed to be non-effective due to the gross and systematic violations of human rights in the country. They note that almost one third (4,424) of the judges and prosecutors have been dismissed on allegations of conspiring with the Gülen movement, while 2,386 judges and prosecutors have been detained.<sup>7</sup> In its report of November 2016, the European Commission stressed that: "these large-scale dismissals as well as large-scale recruitments of new judges and prosecutors raise a serious challenge to the performance and independence of the judiciary".<sup>8</sup>

5.8 The authors submit that their claims under articles 9, 10 and 14 of the Covenant are admissible despite the State party's derogation under article 4 as the measures taken by the State party authorities pursuant to the derogation do not comply with the principles of proportionality, consistency and non-discrimination.<sup>9</sup> The authors note that the principle of proportionality requires that measures adopted pursuant to a derogation do not go beyond what is strictly necessary in order to cope with a public emergency which threatens the life

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<sup>5</sup> The authors refer to a New York Times article, 'Inside Turkey's Purge', 13 April 2017.

<sup>6</sup> The authors refer to a Hurriyet Daily News article, 'Constitutional Court's decision on jailed journalists', 1 April 2017. [As per statistics available on the webpage of the Constitutional Court, the court received 20.578 individual applications in 2014, 20.376 in 2015, 80.756 in 2016 and 40.530 in 2017. The court decided 10.926 cases in 2014, 15.416 in 2015, 16.102 in 2016 and 89.653 in 2017.]

<sup>7</sup> European Commission, 'Staff Working Document: Turkey 2016 Report', 9 November 2016.

<sup>8</sup> Ibid p. 19.

<sup>9</sup> The authors refer to Human Rights Council, Working group on arbitrary detention, Opinion No. 1/2017 concerning Rebi Metin Görgeç (Turkey) A/HRC/WGAD/2017/1, 8 June 2017.

of the nation.<sup>10</sup> They argue that the decree laws have been adopted with the specific purpose of eliminating all individuals or organizations even slightly linked to or inspired by the ideas of the Gülen movement and that the derogation is therefore contrary to the objective and purpose of derogations under article 4.

#### **State party's observations on the merits**

6.1 On 27 February 2018, the State party submitted its observations on the merits of the complaint. It reiterates its arguments concerning the non-exhaustion of domestic remedies and submits that the authors have failed to substantiate their claims for the purpose of admissibility.

6.2 The State party reiterates that the authors' claims under article 9 of the Covenant fall within the scope of its derogation made under article 4 of the Covenant and that the derogation should therefore be taken into account in examining the complaint. It notes that the investigation against the authors is still pending. It further notes that in its decision on detention the Ankara 5<sup>th</sup> Criminal Magistrate's Office noted that İsmet Özçelik was using the ByLock application, an encrypted communication system utilized by members of FETÖ/PDY, and that he had deposited money in Bank Asya in 2014 with a view to support FETÖ/PDY. The State party submits that the detention of the authors cannot be considered to be arbitrary or groundless taking into account the state of emergency, the declaration of derogation, the scope of the investigation against the authors, and the serious and complex nature of the alleged crimes.

6.3 As to the authors' claims under article 14 of the Covenant, the State party notes that access to the case file may be restricted under article 153 of the Code of Criminal Procedure, which stipulates that: "At the request of the public prosecutor, the defence lawyer's right to examine the content of the case file and to make copies may be restricted by decision of the judge, if his examining the contents of the file or taking copies is likely to jeopardize the aim of the ongoing investigation." It however notes that the restriction does not extend to statements by the suspect, expert reports and records of judicial proceedings at which the suspect is entitled to be present. It argues that the authors were informed of the accusations against them through the questions asked during the police interrogation and through the hearings before the public prosecutor's office and the court. It further notes that once an indictment is issued, the restriction on the file is lifted and the defence counsel can examine the contents of the file and make copies. The State party submits that the authors have not been deprived of the right to a fair trial. It further notes that the authors have not raised their claims under article 14 before the domestic authorities.

6.4 As concerns the authors' claims under article 7 of the Covenant, the State party notes that article 9 of the 'By-law on Apprehension, Custody and Taking of Statements' stipulates as a mandatory requirement that medical reports are issued for persons arrested or detained in order to prevent ill-treatment. Likewise, a medical report is also issued before the transfer of a suspect, as well as upon the extension of the custody period or upon release from custody. The authors were medically examined before their detention and medical reports were issued. In addition, they were examined at both Sincan and Denizli prisons. There was no indication that they had been subjected to torture or ill-treatment. The State party further notes that the authors have not raised their claims under article 7 before the domestic authorities.

6.5 As concerns the authors' claims under article 10 of the Covenant the State party notes that the authors were detained on remand in Sincan prison from 23 May to 3 June 2017. During this time they could communicate with their relatives and they were medically examined. Turgay Karaman made no claims of having any health problems. İsmet Özçelik was diagnosed with "KAH (coronary artery), DM (diabetes mellitus) and HT (hypertension)" on 30 May 2017. He was prescribed medication accordingly. The authors were able to purchase basic clothing from the prison canteen from funds deposited on their prison accounts. Clothes that were brought by their relatives were duly accepted and delivered to

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<sup>10</sup> The authors refer to the European Court of Human Rights, *Aksoy v. Turkey*, (application No. 21987/93), 18 December 1996; *Demir and Others v. Turkey* (application Nos. 21380-83/93), 23 September 1998; *Nuray Şen v. Turkey* (application No. 41478/98), 17 June 2003 and *Bilen v. Turkey* (application No. 34482/97), 21 February 2006.

the authors. The authors had access, for a fee, to the prison laundry service. Despite having the right to do so, they did not make any phone calls or send or receive any letters. On 3 June 2017, the authors were transferred to Denizli prison. Turgay Karaman was examined in the prison by his family physician on 3 June 2017. He was subsequently examined by a doctor at Denizli state hospital and was prescribe medication. On 21 September 2017, he was examined at a dental health centre. İsmet Özçelik was examined by his family physician on 3 June, 5 July, 10 August, 2 October and 30 November 2017. He was prescribed medication. On 12 July 2017, he was examined by a cardiologist at Denizli state hospital. Turgay Karaman had phone conversations with his father 13 times between June and December 2017. İsmet Özçelik had a phone conversation with his sister on 27 November 2017. There are no restrictions on the authors' ability to receive and send letters and both authors have sent and received letters. The authors are also able to communicate with their counsel and have visitors. The authors have been provided with drinking water and nutritious and healthy food suitable for their age, health conditions and religious and cultural requirements in both prisons. The State party submits that the authors' detention conditions are therefore in conformity with article 10 of the Covenant. The State party further notes that the authors have not raised their claims under article 10 before the domestic authorities.

### **Authors' comments on the State party's observations on the merits**

7.1 On 16 July 2018, the authors submitted their comments on the State party's observations on the merits of the complaint.

7.2 The authors note that the State party has not submitted any documentation such as relevant arrest warrants, extradition requests or detention decisions in support of its submission that the authors have not been subjected to treatment contrary to their rights under the Covenant.

7.3 The authors reiterate their submission that they have been arbitrarily and unlawfully deprived of their liberty in violation of their rights under article 9 of the Covenant. They note that, as per information provided by their Malaysian lawyer, the Malaysian Special Branch covertly rendered them into the custody of Turkish intelligence officers in the evening of 11 May 2017, after which they were removed to Ankara without any notification to their family or legal counsel. They have not been informed of the concrete charges held against them and are still unaware of the exact reasons why they are detained. It was only through the observations of the State party that they were made aware of some of the alleged evidence against them. They note that the only evidence listed as concerns the charges against İsmet Özçelik, is the alleged use of the application Bylock, an online communication platform used by over a million people worldwide and that he has deposited money in Bank Asya, which was, for years, the largest participation bank in Turkey. They note that the State party has not provided any information of any evidence against Turgay Karaman that would justify his detention. The authors submit that the evidence referred to by the State party clearly fails to meet the reasonable suspicion standard.

7.4 The authors reiterate their submission that they have not been brought promptly before a judge. They note that the European Court of Human Rights has consistently held that article 5 of the European Convention on Human Rights is violated when a person is deprived longer than four days from his or her freedom without access to a judge.<sup>11</sup> They additionally note that, since their first appearance before a judge, they have not had the possibility to re-appear in person before a court, nor via counsel, to have their detention reviewed. They do not know how the investigation progresses as they have no access to the casefile.

7.5 As concerns their claims under article 7 of the Covenant, the authors note the State party's argument that medical reports were issued upon their transfer to Denizli and Sincan prisons, which did not reveal any indications of torture or ill treatment. The authors note that the State party has not submitted the medical reports in question with its observations and

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<sup>11</sup> The authors refer to the European Court of Human Rights *McKay v. the United Kingdom*, (application No. 543/03), 13 October 2006, para. 33.



that they do not have access to the reports. They further argue that even if these reports were to exist, they do not prove that torture or ill-treatment has not taken place.<sup>12</sup>

7.6 As concerns their claims under article 10 of the Covenant, the authors claim that they were transferred to Denizli prison without their lawyers or family members being informed. They further note that Denizli prison is in a location six hours away from their relatives in Ankara. They also reiterate their claims that they were not allowed to receive clothes from their families for three months and that contact with their families is so difficult and burdensome that they rarely have the opportunity to communicate with them. They claim that they have applied for permission to make telephone calls to their wives and children who live abroad but have not been allowed to do so. They have only been allowed limited and monitored phone calls with their parents in Turkey. When Turgay Karaman tried to insist on his right to make phone calls, he was threatened with solitary confinement by the prison warden. The only way they can communicate with their families abroad is through letters; however some of the letters received are not delivered to the authors by the prison authorities, and the ones that are delivered take up to one month to be handed to the authors. They further claim that they have been refused necessary medical treatment, which seriously impacts their health and well-being. The authors also allege that they have to stay in overcrowded prison cells where six to ten people have to sleep on the floor and that they lack access to basic food, hygiene and recreation.

7.7 As concerns their claims under article 14 of the Covenant, the authors argue that the questions posed to them during interrogation are insufficient for the purpose of informing them about the charges against them. They also note that their conversation with counsel were monitored and recorded.<sup>13</sup> The authors further reiterate their claim that they do not have access to their case file or effective legal counsel. They have no prospect to be tried without undue delay as no progress has been made in the investigation against them.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 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.

8.3 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 authors failed to appeal the detention decisions of the Ankara 5<sup>th</sup> Criminal Magistrates' Office. The Committee notes, however, the authors' submission that they appealed these

<sup>12</sup> The authors refer to Human Rights Watch, 'In Custody Police Torture and Abductions in Turkey', 12 October 2017 and Human Rights Watch, 'A Blank Check', October 2016 in which it was noted that: "Detainees who alleged torture were brought before doctors for routine medical reports, but either the doctors showed no interest in physical evidence of torture or the presence of police officers inhibited them from conducting proper medical examinations and made it hard for detainees to describe their injuries or speak about treatment in custody." They further refer to a report by OHCHR, 'Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January – December 2017', March 2018, para. 83 in which it is noted that: "OHCHR received credible reports that medical checks conducted by the designated doctors on detainees held in police custody were often done in the presence of police officers, violating the confidentiality of patients and impeding adequate documentation of possible torture or ill-treatment."

<sup>13</sup> The authors refer to OHCHR, 'Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January – December 2017', March 2018, para. 83 in which it is noted that: "Decree 667 significantly erodes detainees' right to confidential legal advice. It provides that oral consultations between the detainees and their lawyers may be recorded for security reasons, and that the documents they exchange may be seized; the timing of such consultations may be regulated, and the lawyer may be replaced, at the request of the prosecution."

decisions to the Ankara 6<sup>th</sup> Criminal Magistrates' Office, which rejected their appeals on 22 June 2017. The Committee notes that the State party does not refute the authors' assertion in this regard and that it has not identified any further avenues of appeal against the authors' detention order. The Committee finds that the authors have therefore exhausted this remedy.

8.4 The Committee notes the State party's submission that the authors failed to exhaust domestic remedies by not submitting an individual application before the Constitutional Court. It further notes the State party's submission that the European Court of Human Rights has held, in cases concerning pre-trial detention after the declaration of the state of emergency, that an individual applications before the Constitutional Court constitutes an effective remedy.<sup>14</sup>

8.5 The Committee notes the authors' argument that filing an individual application before the Constitutional Court is not an effective remedy as: a) the Court is not competent to deal with measures imposed under the Decree Laws; b) the process would be unreasonably prolonged; and c) they are unable to rely on effective legal representation and assistance in order to appeal to the Constitutional Court. The Committee notes that the State party has not provided any information on the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention imposed under the decree laws. It further notes that the State party has not refuted the authors' claim that the proceedings before the Constitutional Court would be unduly prolonged. It additionally notes that the State party has not provided any specific information refuting the authors' claim that their lack of access to effective legal representation prevents them from submitting a complaint before the Constitutional Court. It also notes that the European Court of Human Rights has expressed concern as to the effectiveness of the remedy of an individual complaint to the Constitutional Court in cases concerning pre-trial detention, due to the non-implementation, by lower courts, of the Constitutional Court's findings in two cases in which the Constitutional Court had found violations of the applicants' rights.<sup>15</sup> The Committee further notes that the European Court of Human Rights noted 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.<sup>16</sup> In the absence of any further information on file that would support the effectiveness of the remedy of a complaint before the Constitutional Court, the Committee finds that, in the circumstances of the authors' case, the State party has not shown that an individual complaint before the Constitutional Court would have been effective to challenge the authors' detention under the decree laws.

8.6 The Committee further notes the State party's submission that the authors have failed to exhaust domestic remedies by not filing a compensation claim under article 141 of the CCP. It notes, however, that a remedy provided under this provision would not end the authors' pre-trial detention and could therefore not be an effective remedy under article 5 (2) (b) of the Optional Protocol.

8.7 The Committee notes the State party's submission that, as concerns the authors' claims under articles 6, 7, 10 and 14, the authors have failed to exhaust domestic remedies by not raising these claims before a domestic authority. The Committee notes the authors' claims that they have been subjected to ill-treatment, that Mr. İsmet Özçelik informed his counsel of this and that the counsel appointed by the Turkish Bar Association did not take any action to defend his interests and tried to persuade him to confess to crimes he had not committed. It also notes the authors' claim that they have no legal background or knowledge of the Turkish criminal justice system. The Committee recalls that authors of communications must exercise due diligence in the pursuit of available remedies<sup>17</sup> but it notes

<sup>14</sup> *Mercan v. Turkey*, (application No. 56511/2016), 8 November 2016; and *Zihni v. Turkey*, (application No. 59061/2016), 29 November 2016.

<sup>15</sup> 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.

<sup>16</sup> *Ibid*

<sup>17</sup> 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.

that in the present case the authors have not provided any specific information or substantiation of having raised these claims before relevant domestic authorities, or having instructed their counsels to do so on their behalf. The Committee accordingly, finds the authors' claims under articles 6, 7, 10 and 14 inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.

8.8 The Committee further notes the State party's submission that the authors' claims under article 9 should be found to be inadmissible as the State party has made a derogation under article 4 of the Covenant. The Committee recalls that before a State moves to invoke article 4 of the Covenant, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.<sup>18</sup> The Committee notes that the State party proclaimed a state of emergency on 20 July 2016 and its position that the coup attempt and its aftermath have posed severe dangers to public security and order, amounting to a threat to the life of the nation. It notes that the authors' have not contested that the situation amounted to a public emergency within the meaning of article 4 of the Covenant. It further notes that the European Court of Human Rights and the Constitutional Court of Turkey have found that the attempted coup disclosed the existence of a public emergency threatening the life of the nation within the meaning of article 15 of the European Convention on Human Rights and the Constitution.<sup>19</sup> The Committee considers that the derogation was thus made in a situation that amounted to a public emergency within the meaning of article 4 of the Covenant. However, the State party fails to explain how the authors were linked to or posed, in any way, dangers that were envisaged under the declaration of the state of emergency in the territory of the State party, or how their pre-trial detention under the emergency decree laws was strictly required by the exigencies of the security situation. The Committee further notes the authors' submission that the measures adopted by the State party in their case did not comply with the principles of proportionality, consistency and non-discrimination. The Committee considers that the assessment as to whether the measures taken in the authors' case were strictly required by the exigencies of the situation needs to be examined in the context of the merits of the communication.

8.9 The Committee further notes the authors' claims that their rights under article 9 of the Covenant were violated, as they were removed from Malaysia to Turkey by individuals acting under the control or instructions of the Turkish authorities without any judicial procedure for extradition having been initiated by Turkey. The Committee notes that, according to the limited information on file, it appears as the authors were detained by Malaysian authorities prior to their removal to Turkey. The Committee notes that the information on file does not allow it to conclude that the authors were removed to Turkey under the effective control of Turkish authorities. It therefore finds this part of the communication inadmissible under article 1 of the Optional Protocol.

8.10 The Committee notes that I.A. has withdrawn his complaint before the Committee. It therefore decides to discontinue the communication as it pertains to him.

8.11 In the absence of any other challenges to the admissibility of the communication, the Committee declares the communication admissible insofar as it concerns the rest of the authors' claims under article 9 of the Covenant, and proceeds with their consideration on the merits.

#### *Consideration of merits*

9.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5(1) of the Optional Protocol.

9.2 As concerns the State party's derogation under article 4 of the Covenant the Committee recalls that a fundamental requirement for any measures derogating from the

<sup>18</sup> General Comment No. 29 (2001), para. 2.

<sup>19</sup> European Court of Human Rights, *Mehmet Hasan Altan v. Turkey* (application No. 13237/17), 20 March 2018, paras. 88-93 and *Şahin Alpay v. Turkey* (application No. 16538/17), 20 March 2018, paras 72-78.

Covenant is that such measures are limited to the extent strictly required by the exigencies of the situation in accordance with the principle of proportionality. The Committee further recalls that the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation that this does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.<sup>20</sup> The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances. The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary.<sup>21</sup>

9.3 The Committee notes the authors' claim under article 9 of the Covenant. It notes that the authors have not claimed that their detention in Turkey was unlawful under the decree laws. The question before the Committee is therefore to consider whether their detention is arbitrary. 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 and that remand in custody on criminal charges must be reasonable and necessary in all circumstances.<sup>22</sup>

9.4 The Committee notes the authors' claim that they have not been informed of the charges against them and are unaware of the exact reasons why they are detained; that they do not have access to their casefiles; and that no evidence has been presented by the State party grounding a reasonable suspicion that they have committed a criminal offence necessitating pre-trial detention. It notes the State party's argument that the detention of the authors cannot be considered to be arbitrary or groundless taking into account the state of emergency, the declaration of derogation, the scope of the investigation against the authors, and the serious and complex nature of the alleged crimes. It further notes the State party's argument that the authors were informed of the accusations against them through the questions asked during the police interrogation and through the hearings before the public prosecutor's office and the court. The Committee recalls that persons arrested for the purpose of investigating crimes that they may have committed or for the purpose of holding them for criminal trial must be promptly informed of the crimes of which they are suspected or accused.<sup>23</sup> The Committee notes that the State party has not submitted any documentation such as the detention order, arrest warrant or transcripts of judicial proceedings in order to substantiate its claim that the authors have been promptly informed of the reason for their arrest or the charges against them. It further notes that the State party has not provided any information on the questions posed to the authors during the investigation or records of such interviews. The Committee further note that the State party has not provided any information on the evidence held against Turgay Karaman that would justify his detention and that the only evidence held against İsmet Özçelik is the use of the Bylock application and the deposition of funds in the Bank Asya. In these circumstances, the Committee considers that the State party has not established that the authors were promptly informed of the charges against them and the reason for their arrest, nor substantiated that their detention meet the criteria of reasonableness and necessity. It recalls that a derogation under article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary.<sup>24</sup> The Committee therefore finds that the authors' detention amounted to a violation of their rights under article 9 (1-2) of the Covenant.

9.5 The Committee further notes the authors' claim that it took the Turkish authorities 19 and 21 days respectively to bring them before a judge and that they have not had the possibility to re-appear in person or by counsel before a court to have their detention reviewed. It notes the State party's submission that the authors were taken into custody upon their arrival in Turkey on 12 May 2017, that the custody period was extended for an additional seven days on 18 May 2017 upon the instruction of the Public Prosecutor and that the authors were detained on 23 May 2017. The Committee notes that, based on the information on file,

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<sup>20</sup> General Comment No. 29 (2001), para. 4.

<sup>21</sup> General Comment 35 (2014), para. 66.

<sup>22</sup> General Comment 35 (2014), para. 12.

<sup>23</sup> General Comment 35 (2014), para. 29.

<sup>24</sup> General Comment 35 (2014), para. 66.

it appears that the authors were detained by Malaysian authorities prior to their removal to Turkey, according to the author's claims, at the request of Turkish authorities (see para.8.9). However, in the absence of any concrete information in the file that would suggest that the authors were under the effective control of Turkish authorities before their removal to Turkey, the Committee considers that the detention period attributed to Turkish authorities started on 12 May 2017. The authors were brought before a judge on 23 May 2017, namely 11 days after having been taken into custody by Turkish authorities.

9.6 The Committee recalls that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control. It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with. Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under article (9) 3 of the Covenant.<sup>25</sup> While the exact meaning of "promptly" may vary depending on objective circumstances, delays should not exceed a few days from the time of arrest. Any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.<sup>26</sup> The Committee notes that any derogation from this time frame in times of public emergency must be justified as strictly required by the exigencies of the situation. After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.<sup>27</sup>

9.7 The Committee notes that in the authors' case it took 11 days before they were brought before a judge and that consequently they were not brought promptly before a judge or judicial officer. The Committee further notes the authors' claims that since the detention hearing on 23 May 2017 they have not had the possibility to re-appear in person, or via counsel in order for the detention decision to be re-examined, a period amounting to almost two years. It notes that the State party has not refuted the authors' claims in this regard and that the State party has also not provided any information on whether the detention decisions against the authors have been periodically re-examined. The Committee considers that such a delay and lack of re-examination of the necessity and reasonableness of the authors' continued detention, especially taking into account its findings as concerns the authors' claims under article 9 (1-2), cannot be considered as strictly required by the exigencies of the situation. The Committee accordingly finds a violation of the authors' rights under article 9 (3) of the Covenant.

10. 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 authors' rights under article 9 (1-3) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors 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 authors and provide them 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.

12. 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 or 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.

<sup>25</sup> General Comment 35 (2014), para. 32.

<sup>26</sup> General Comment 35 (2014), para. 33.

<sup>27</sup> General Comment 35 (2014), para. 38.

## Annex

### **Individual Opinion of Mr. Gentian Zyberi (partly concurring, partly dissenting)**

#### **Background**

1. On 15 July 2016, Turkey suffered a coup d'Etat, a criminal attack against the Turkish constitutional order, aimed at overthrowing the Turkish government and President Erdoğan. Turkey gave notice to the Secretary-General of a derogation under article 4 of the Covenant on 2 August 2016, whereby measures taken may involve derogation from obligations under the ICCPR regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27 (para. 1.1 and footnote 3 of the Committee's views). The state of emergency in Turkey was lifted as of 19 July 2018 (para. 1.1).

#### **Concurring opinion**

2. I am fully agreed with the Committee that the facts of the case reveal a violation of Article 9(1-3) of the Covenant (para. 10). Turkey has not established that the authors were promptly informed of the charges against them and the reason for their arrest, nor substantiated that their detention meet the criteria of reasonableness and necessity. This has led the Committee to find that the authors' detention amounted to a violation of their rights under article 9 (1-2) of the Covenant (para. 9.4). Furthermore, as the Committee has found, a delay and lack of re-examination of the necessity and reasonableness of the authors' continued detention, especially taking into account its findings as concerns the authors' claims under article 9(1-2), cannot be considered as strictly required by the exigencies of the situation. This has led the Committee to find a violation of the authors' rights under article 9(3) of the Covenant (para. 9.7).

#### **Dissenting opinion**

3. I am unable to join the Committee's decision to declare inadmissible under Article 1 of the Optional Protocol the authors' claim of violation of Article 9 for their unlawful rendition from Malaysia to Turkey.<sup>1</sup> The authors have claimed that they have been subject to attempted kidnapping (para. 2.2), and that no extradition hearing had been held or judicial decision taken in that regard (para. 2.4). According to the authors' Malaysian lawyer, the Malaysian Special Branch covertly rendered them into the custody of Turkish intelligence officers in the evening of 11 May 2017, after which they were removed to Ankara without any notification to their family or legal counsel (para. 7.3). Turkey has not provided any documents pertaining to the removal of the authors from Malaysia, neither to the authors nor to the Committee. Under these circumstances, the Committee should have accepted the authors' claim and found Turkey responsible for violating Article 9 based on its complicity and active role in the authors' unlawful removal from Malaysia.

4. I also depart from the Committee's finding of inadmissibility of the authors' claims under Articles 7, 10 and 14 pursuant to article 5(2)(b) of the Optional Protocol. First, from a general perspective the overall legal environment in Turkey after the coup has been negatively affected, including that part of the legal profession administering criminal justice for individuals alleged to have been a part of or affiliated with FETÖ/PDY.<sup>2</sup> Secondly, and specifically related to the case at hand, the authors have tried to use the legal venues reasonably available to them, to no avail.

<sup>1</sup> Malaysia is not a party to the Covenant and the Optional Protocol.

<sup>2</sup> See, inter alia, Opinion on Emergency Decree Laws NOS. 667-676 Adopted Following the Failed Coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9-10 December 2016), especially pp. 32-38.



5. The authors have claimed that they are impeded from exhausting domestic remedies, as they cannot rely on actual legal representation and assistance given that finding defense counsel has been extremely burdensome (para. 5.6). Moreover, the authors have noted that they have no legal background or knowledge of the Turkish criminal justice system and they are therefore not in position to initiate domestic proceedings in the absence of legal assistance (para. 5.6). While I agree with the Committee that authors of communications must exercise due diligence in the pursuit of available remedies, such pursuit can only take place in an environment which is conducive to such efforts. The Turkish legal system after the coup, where almost one third (4,424) of the judges and prosecutors have been dismissed on allegations of conspiring with the Gülen movement and where 2,386 judges and prosecutors have been detained (para. 5.7), does not provide an environment conducive to upholding the standards of due process.

6. The authors have appealed their detention without success (para. 5.3). Mr Özçelik informed his legal counsel that he was subject to ill-treatment and that his family had been threatened (para. 3.4). Both authors are in detention after almost two years, without specific charges or a trial date. These facts should have guided the Committee to put more weight to the second sentence of Article 5(2)(b) of the Optional Protocol, which justifies non-exhaustion of domestic remedies when unreasonably prolonged.

7. What perhaps epitomizes the problems with the administration of criminal justice in this case concerns the violation of the right to a fair trial under Article 14(3)(g) of the Covenant. The counsel assigned to Mr Özçelik by the Turkish Bar Association did not take any action to defend his client's interests and instead kept trying to persuade him to confess to crimes he had not committed (para. 5.6). Article 14(3)(g) of the Covenant protects an individual from being compelled to testify against himself or to confess guilt. Instead of protecting the rights of the accused, legal counsel purportedly undermined them.

8. Finally, it is problematic that the Committee placed the burden of proof on the authors, even when no documentary or other evidence was offered by the State to counter their claims.

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