Submission to inform the High Commissioner's report to the Human Rights Council, pursuant to resolution A/HRC/51/24

Call for input "Use of Administrative Measures in Counter Terrorism"

International Association for Human Rights Advocacy in Geneva (IAHRAG)

April 2024

1. Introduction

1. IAHRAG is a Swiss-based NGO created in 2017. The purpose of the organization is to assist, support, guide, and sustain victims of human rights violations. One of its main sources of concern, as well as its activities, are the violations of human rights in Türkiye. As such, IAHRAG supports a large range of persons victims of the weaponization of counter-terrorism legal frameworks.

2. General context: large scale abuses of legislative measures in countering terrorism

2. The Turkish government's policy to counter terrorism is mainly characterized by legislative measures, including prosecutions. Such measures, particularly Article 314 of the Penal Code, have been consistently denounced for their incompatibility with human rights frameworks, particularly for their lack of predictability enhancing infringement upon the freedom of opinion, expression, association, and the right to personal liberty and freedom from arbitrary arrest and detention (see JOL TUR 13/2020).

3. July 15, 2016, was the turning point in the weaponization of counter-terrorism legal frameworks. The Turkish government indeed immediately accused the Hizmet Movement (also known as the Gülen Movement) of plotting the Coup attempt and declared overnight it was a terrorist group. This resulted into 1.576.566 terrorist investigations launched between 2016 and 2020 against people accused of links with the Movement (official data of the Ministry of Justice). Türkiye is the country with the highest percentage of prisoners sentenced for terrorist activities: on the 31st of January 2021, 13,3% of the carceral population were composed of prisoners sentenced on the ground of anti-terror legislation, precisely 30.555 prisoners (the Council of Europe, SPACE I – 2021, p. 51, here). The second country in terms of prisoners sentenced for terrorist activities in the same period was Russia, with 1.026 detainees, and the number of prisoners sentenced for terrorist activities in the same period over the remaining 45 Council of Europe members was 618 detainees (Türkiye and Russia excluded).

4. Both the Human Rights Committee and the European Court of Human Rights adopted landmark decisions condemning Türkiye for its practice of weaponizing counter-terrorism legal frameworks to target Hizmet Movement sympathizers (*Alakus v. Türkiye*, 3736/2020 and *Yüksel Yalçinkaya v. Türkiye*, 15669/20).

5. In addition to legislative measures, the Turkish government has adopted a number of administrative measures to "combat terrorism." This report aims to present to the High Commissioner some of the most problematic Turkish practices as administrative measures in this context.

3. Main concern brought to the knowledge of the High Commissioner for the purpose of this call for input: administrative measures in counter terrorism in the context of state of emergency

6. The intersectionality between regulation of states of emergency and administrative measures in counterterrorism is particularly relevant for the purpose of the High Commissioner report. **IAHRAG respectfully encourages the High Commissioner to integrate developments on administrative measures countering terrorism during states of emergency as it is a particularly favorable combination that enhances violations of human rights**. The Turkish case is a perfect illustration of how the overlapping of state of emergency derogatory measures

and counter terrorism' administrative measures may pave the way to the suspension of the rule of law.

a. Administrative measures attached to Decree laws during the State of emergency, in the context of so called "counterterrorism"

7. It is quite notorious that in the aftermath of July 15, 2016, the Turkish government declared a state of emergency lasting two years. Türkiye consistently justified this two years' state of emergency claiming that it was the only way to eradicate "the terrorist network" i.e. the Hizmet Movement.

8. During the state of emergency, the Government adopted 37 decree laws, on the basis of which:

- 130.000 public employees were dismissed (among them 4.362 judges and prosecutors);
- Passports of dismissed employees, as well as those of their spouses and children, were cancelled;
- Arms permits, ship's crew documents or piloting licenses held by dismissed employees were cancelled;
- Dismissed employees were evacuated from their public owned lodgment within 15 days;
- Dismissed employees were permanently banned to hold public servant positions;
- Thousands of Private institutions and organizations, educational institutions, press, newspapers, journals, TV channels, universities, foundations and associations, etc. were permanently shut down;
- Movable and immovable properties of these organizations were confiscated;
- Turkish citizens living outside of Türkiye could be deprived of their nationality without any judicial oversight, enhancing risks of statelessness for children.

9. Dismissed employees, as well as spouses and children, were also stripped of social benefits of all sorts (including health and education).

10. All these measures, related to counter terrorism since all these employees or institutions being allegedly terrorist members or in relation with terrorists, amount to the qualification of administrative measures.

b. Concerns over administrative measures taken during the State of emergency

11. While IAHRAG recognizes the necessity for States to adopt measures to prevent and repress terrorism, including through administrative measures, it remains that such measures should respect the protection of human rights and develop safeguards to ensure full compliance of human rights. IAHRAG brings to the attention of the High Commissioner the particularly malicious approach led by the Turkish government, manipulating administrative measures, in order to deprive thousands of people of their human rights.

i. Large scale administrative measures, concerning a massive number of persons, taking the form of decree laws without adequate supervision and exempted of judicial review

12. In the aftermath of July 15, 2016, the Turkish government dismissed thousands of public servants, closed thousands of private organizations and institutions through decree laws. This happened without the Parliament approval since the Turkish Parliament was on summer recess until October 1st, 2016.[1]

13. The specificity of the Turkish decree laws is that they came with annexes listing names of person to be dismissed, persons whose assets should be confiscated and institutions to be shut down. Such a situation led to a confusion between administrative and legal measures, general and individualized measures. This is particularly problematic: indeed, if administrative measures could be the object of administrative judicial review, decree laws are exempted from judicial review. Article 148 para. 1 of the Turkish constitution states that:

> "*Presidential decrees issued during a state of emergency or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance*".

14. Dismissed people, whose basic rights and freedoms protected by the ICCPR, including right to nationality, freedom of movement, equality and non-discrimination, had no judicial remedy to challenge these administrative measures.[2]

15. **In summary, the Turkish government took the opportunity of the state of emergency and the fight against "terrorism" to adopt administrative measures against individuals, disguised into laws, without supervision of the Parliament, *de jure* excluding any judicial review.**

ii. Vagueness of the basis for the administrative measures: lack of individualized administrative inquiry and use of secret intelligence material

16. Another specificity of the Turkish administrative measures, adopted during the State of emergency in the context of fight against "terrorism", is that they could not provide, due to their legal nature, any individualized and reasoned decision as to the dismissals, confiscation, passport's cancellation, media outlet's closure, let alone proper individualized inquiries (thousands of names were annexed to decree laws in the direct aftermath of the Coup attempt).

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[1] The Venice Commission observed that for over two months Parliament did not exercise its controlling powers over the specific decree laws. Even after Parliament resumed its work in October 2016, it did not fully comply with the 30-day time- limit for reviewing the emergency decree laws, see here.

[2] On 23 January 2017, the government issued Decree n° 685 establishing the Inquiry Commission for State of Emergency Measures to review the cases of dismissals. However, serious doubts were raised, and many voices supported that the Commission's purpose (led by former Justice Ministry deputy undersecretary Selahaddin Menteş, who had been openly supportive of President Erdoğan) was to simply delay or prevent European Court of Human Rights or Treaty bodies' decisions. The European Commission noted that "*The lack of institutional independence, lengthy review procedures, the absence of sufficiently individualized criteria, and the absence of a proper means of defence cast serious doubt over the Inquiry Commission on the State of Emergency Measures' ability to provide an effective remedy against dismissals*", see here.

17. Such administrative measures amount to the qualification of arbitrary decision. It is all the truest as no objective criteria were released to establish the connection of persons and institutions targeted by the administrative measures with the Hizmet Movement.

18. The Venice Commission has noted the lack of objective criteria:

> "*dismissals are ordered on the basis of an evaluation of a combination of various criteria, such as, for example, making monetary contributions to the Asya bank and other companies of the "parallel state", being a manager or member of a trade union or association linked to Mr Gülen, using the messenger application ByLock and other similar encrypted messaging programmes. In addition, the dismissals may be based on police or secret service reports about relevant individuals, analysis of social media contacts, donations, web-sites visited, and even on the fact of residence in student dormitories belonging to the "parallel state" structures or sending children to the schools associated with Mr Gülen. Information received from colleagues from work or neighbours and even continuous subscription to Gülenist periodicals are also mentioned amongst those many criteria which are used to put names on the "dismissals lists"*".[3]

19. **IAHRAG particularly brings to the attention of the High Commissioner the use of secret intelligence reports to target persons through administrative measures.** Turkish authorities rely heavily on intelligence service reports, the MIT, attesting that a specific person has a link with a terrorist organization and therefore poses a threat to public order and national security. The MIT notably had illegal access to ByLock datas, a phone chat application based in Lithuania, providing reports of persons accused of links with the Hizmet Movement. MIT's reports do not expose any reasoning and are in any case not made available to the targeted persons. **Administrative measures based on secret intelligence reports are particularly problematic as they are confidential and not communicated to the targeted person.**

iii. Administrative measures to counter terrorism in the frame of state of emergency made permanent: lack of necessity and proportionality

20. During states of emergency, any measures taken by Governments must respect the principles of necessity and proportionality and must allow appropriate judicial review (General comment No 29 on article 4 of the ICCPR, CCPR/C/21/Rev.1/Add.11).

21. Necessary and proportional measures taken during states of emergency, including administrative ones, should by nature be limited in time, temporary ((General comment No 29 on article 4 of the ICCPR, CCPR/C/21/Rev.1/Add.11).

22. Based on these Decree laws, over 2.000 private institutions were liquidated, among them 35 health institutions, 934 schools, 109 student dormitories, 104 foundations, 1125 associations, 15 universities and 29 trade unions have been permanently liquidated. Decree laws providing for the mass dismissals of public servants, liquidation of legal entities, and confiscation of their assets are permanent measures.

[3] Here.

23. Türkiye could have adopted temporary measures, such as suspension, for instance regarding dismissed employees, temporary administrators to supervise institutions/organizations' activities, and freezing of assets instead of confiscation, waiting for subsequent judicial review.

24. In reality, such permanent character of the measures was deliberately orchestrated (the Decree laws provided that "*stay of execution cannot be ordered in the cases brought as a result of the decisions taken and acts performed within the scope of* [the relevant decree laws]").

iv. Punishment and repressive tool disguised under decree laws and administrative measures, bypassing the judicial power

25. The Turkish administrative measures adopted against Hizmet Movement sympathizers were, in reality, a convenient way to discriminate against and massively punish and sanction them without recourse to criminal prosecutions. The measures adopted are indeed not only restrictive but also repressive and should in reality have been imposed by a criminal judge in the frame of criminal procedural law.

26. **The decree laws, and the administrative measures contained, amount in reality to a *de facto* transfer of judicial power, only institution that can punish and sanction, to the executive power.**

4. Additional concern brought to the knowledge of the High Commissioner for the purpose of this call for input: inclusion of persons on "terrorists' lists"

27. In addition to administrative measures executed by the Turkish government in the context of state of emergency, IAHRAG brings to the knowledge of the High Commissioner the practice of "Gray list" of persons wanted for alleged links with terrorist organizations. The list that is periodically updated, contains information on2.209 people from 19 different terrorist or alleged terrorist organizations. In order to give elements of comparison, the current FBI list of wanted terrorists contains 43 names.[4] The current Europol list (EU wanted list criminals) contains 55 names.[5]

28. The Gray list indistinctly gather PKK, ISIS, Daesh terrorists and human rights defenders and journalists for having connections with the Hizmet Movement or for their pro-Kurdish positions. The so-called "crime" of these persons is nothing but the exercise of their freedom of associations, expressions and thoughts, as protected under the International Covenant on Civil and Political Rights. In this way, the "gray list" is actually a cover to persecute all those who have expressed opinions different from the official Turkish narratives in the guise of terrorism' accusations.

29. It is particularly problematic that there are no judiciary supervision for the establishment of the lists nor remedies to challenge inclusion on the list.

30. A large number of persons whose names have been included in the list are residing outside of Türkiye and have been facing issues notably with bank institutions (closure of bank account and freezing of assets).

[4] See here.
[5] See here.

31. Such administrative measures complete the transnational repression tools already deployed by Türkiye (notably, Interpol red notices).

5. Recommendations

32. IAHRAG hereby respectfully requests the High Commissioner to consider:

- Recalling that administrative measures taken in the context of state of emergency shall strictly abide by the principles of necessity, proportionality and judicial review;

- Expressing concerns over the practice of administrative measures implemented in the form of laws, without or with limited supervision of the legislative power;

- Recalling that administrative measures should always be the object of a judicial review, that is fair, independent and impartial;

- Expressing outmost concerns regarding administrative measures implemented on the basis of confidential secret intelligence material not made available to the targeted person;

- Recalling that administrative measures should never be used as restrictive and repressive tools and never be construed as a way to circumvent criminal prosecutions and charges;

- Expressing concerns over the diffusion of "terrorist lists" established without judiciary supervision nor fair, impartial and independent remedies to challenge the inclusion in such lists;

- Expressly mentioning Türkiye and its problematic administrative measures in the upcoming report.