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İHD's ASSESSMENT AND RECOMMENDATIONS ON THE AMENDMENTS TO THE LAW ON THE ENFORCEMENT OF SENTENCES

2 April 2020

İHD, hereby, presents its assessment and recommendations on the “Bill to Amend the Law on the Enforcement of Sentences and Security Measures and Some Other Laws” tabled on 31 March 2020 before the Grand National Assembly of Turkey (GNAT) Speaker’s Office by deputy group chairpersons and a group of deputies from the AKP and MHP.

It should firstly be noted that there are certain urgent measures that should be taken in prisons because of the COVID-19 pandemic. Necessary hygiene and healthcare services should be provided for prisoners, both convicted and non-convicted, due to this deadly pandemic until their release can be secured.¹

A. Recommendations Concerning Prisoners

Other than the release of prisoners, one notable measure to be taken is about non-convicted prisoners whose cases are still pending before courts with no finalized sentences delivered for them. The bill merely puts forth provisions about convicted prisoners disregarding non-convicted inmates.

Recommendation 1

To impede the adverse effects of the COVID-19 pandemic on prisoners, detention orders against them should be reviewed. Detention reviews should thus be conducted *ex officio* under Article 100 and subsequent articles in the Code of Criminal Procedure (CCP) and releases should be paved for depending on the fact that “detention is an exception,” particularly for prisoners victimized by unjust detention orders at unfair trials.

Those with medical conditions that pose serious health risks, specifically due to the current pandemic, should immediately be released without having to resort to any legal regulation by courts’ using their judicial discretion.

¹ See İHD et al., “The COVID-19 Pandemic and Urgent Measures in Prisons.” 20 March 2020. <<https://ihd.org.tr/en/joint-statement-covid-19-pandemic-and-urgent-measures-in-prisons/>>

To put it concretely, Article 108 § 3 of the CCP should be revised as follows:

(3) The judge or court shall review *ex officio* the status of the detained accused on each trial day or in cases of natural disaster or epidemic or between the trial days when necessary or within the time limits foreseen in the first subparagraph whether it is necessary that the detention period to continue.

B. Recommendations on the Bill to Amend the Enforcement Law

1. Time served in jail

The proposed bill sets forth that there would be no changes in the conditional release ratio of $\frac{3}{4}$ for terrorism offenses and organized offenses, yet, the $\frac{3}{4}$ conditional release ratio for repeat offenders and the related sexual offenses and drug trafficking offenses would be reduced to $\frac{2}{3}$.

The legislators should, first of all, clearly reveal what they imply by “terrorism offenses.” The Turkish Penal Code (TPC) does not have any type of offense entitled “terrorism offenses.” Article 3 of the Anti-Terror Code (ATC) No. 3713 lists individual terrorism offenses, while Article 4 of the ATC individually lists offenses committed for the purpose of terrorism. Moreover it is not clear whether the offenses listed under Articles 6 and 7 of the ATC are terrorism offenses or not.

Within the scope of the recent practice in courts, on the other hand, an obscurity on this issue based on no legal criterion whatsoever prevails. Under such circumstances İHD would like to persistently reiterate the need to repeal the ATC in its entirety and an assessment on this is a necessity.

Articles 5 and 17 of the ATC are related to the enforcement of sentences which makes way for a separate evaluation of these articles.

2. Obscurity of the Definition of Terrorism in the Anti-Terror Code No. 3713

Officials from the United Nations (UN), Council of Europe (CoE) and the European Union (EU) have often stated that the “definition of terror in Turkey is too broad, therefore, Turkey needs to narrow it down.” They have a point.

The fact that the definition of terrorism is maintained within such a broad frame merely serves to restrict and limit rights and freedoms. There are two trends about the ways in which terrorism can be defined: The first trend that keeps the complete establishment of democracy at arm’s length argues for an even further expansion of the definition having been unsatisfied with the current utterly broad definition. When this is not realized through normative regulations, the definition is further expanded and thusly implemented by creating de facto situations in practice. Today problems, which are created both by the broad definition of terrorism within the scope of investigations and proceedings and de facto expansion of the definition in practice that even goes beyond the former, are faced in Turkey.

The second trend points out to the necessity that the definition should be narrowed down in order to protect democracy and human rights. The fact that those who have been advocating that the

definition of terrorism was too broad and should be limited have been pointing to such a vital problem is better understood today.

When one looks at reports issued by human rights and journalists' organizations, violations brought about by the broad definition of terrorism can be seen in a crystal clear manner.²

3. The Definition of Terrorism in Turkish Legislation

Martin Scheinin, the former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, undertook a fact-finding mission to Turkey in 2006 and delivered his first report to the UN Human Rights Commission which was deliberated in the 62nd session of the commission. The rapporteur delivered his recommendations following his assessments on the definition of terrorism. These recommendations asked for a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities along with bringing the definitions of terrorism and terrorist offenses into harmony with international norms and human rights standards, notably with the principle of legality enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) that limits such offenses to deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages. Moreover, the rapporteur asked for the consideration of a separate definition of "terrorism" beyond acts comprising terrorist offenses and to take note of international covenants while drafting new anti-terror legislation.

The Special Rapporteur recommended more dialogue before and during deliberations at the GNAT pertaining to possible legal reforms. He underlined the necessity that the draft legislation on fundamental rights and freedoms should be deliberated in an open and transparent manner in a democracy and civil society needed to be included in such deliberations at all levels with full capacity. The Special Rapporteur believed that there was a need for precision and clarity in the definition of what constitutes terrorist acts in order to prevent the abuse of charges of membership and, aiding and abetting for reasons other than counter-terrorism and "thought crimes" sometimes referred to by authorities.³

The UN Special Rapporteur criticized the definition of terrorism as prescribed by Article 1 of the ATC since the definition was not based on specific criminal acts but on intent or target. According to the Rapporteur, this definition was broad and vague. In such cases people and organizations could be criminalized as terrorists although they did not engage in any violent acts.

This, indeed, is the case. Journalists, authors, academics, human rights defenders, trade unionists, artists, women, mayors, members of the parliament, politicians, students can easily be accused of being terrorists. Those who express their opinions can be charged although they have not engaged in any violent act.

Article 90 of the Constitution states that "in the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences

² "IHD 2018 Annual Report on Human Rights Violations in Turkey." 19 April 2019. <<https://ihd.org.tr/en/ihd-2018-report-on-human-rights-violations-in-turkey/>> <http://www.cgd.org.tr/index.php?Did=222> and <https://tgs.org.tr/cezaevindeki-gazeteciler/> for data collected by Progressive Journalists Association and the Journalists Union of Turkey, respectively.

³ To read the full report see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/119/83/PDF/G0611983.pdf>

in provisions on the same matter, the provisions of international agreements shall prevail” and “no appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.” The Turkish Constitution, moreover, does not set forth any definition of “terrorism.” Article 13 of the Constitution enshrines that the essence of fundamental rights and freedoms cannot be infringed. The ATC puts forth a rather broad definition of “terrorism” without any constitutional base and contrary to international conventions. It infringes upon the essence of the fundamental rights and freedoms of citizens through its definition and the pursuant articles prescribed therein.

IHD believes that the definition of terrorism in the ATC, just as was stated by the UN Rapporteur, contradicts the principle of legality of offenses and sentences and the principle of compliance of laws with accessibility, clarity, precision, foreseeability, and the rule of law. In Turkey people who did not commit any deadly or otherwise serious violence against individuals can be considered to have committed a terrorist offense, can be criminalized as terrorists, and can be subjected to a special trial and enforcement regime specific to this merely because they expressed their opinions that were not embraced by the political power or the official view on account of this definition.

ATC No. 3713, therefore, contradicts terrorism-related offenses and definitions adopted by the conventions which Turkey is a party to as per Article 90 of the Constitution.

There is no definition of “terrorism” in international law. Solely offenses which constitute “terrorist offenses” are indicated. Two conventions at the European level and various international conventions and protocols which specify terrorist offenses that these conventions refer to exist in the international field with regards to this issue.

Within this scope, the European Convention on the Suppression of Terrorism (1977), which went into force after having published in the *Official Gazette* of 26 March 1981 following the decision (No. 8/2487) of the cabinet on 24 February 1981, listed those offenses that should not be regarded as political offenses or as offenses connected with a political offense or as offenses inspired by political motives while indirectly referring to offenses that comprise terrorist offenses.

This convention was updated in 2003. The protocol amending the European Convention on the Suppression of Terrorism, published in the *Official Gazette* of 8 April 2005 following the decision of the cabinet (No. 2005/8613) on 15 March 2005, sets forth which offenses constitute terrorist offenses and covers international conventions and protocols regarding these.

Accordingly, the following have been qualified as terrorist offenses:

1. Offenses listed within the scope of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted on 14 December 1973 in New York;
2. Offenses listed within the scope of the International Convention against the Taking of Hostages adopted on 17 December 1979 in New York;
3. Offenses listed within the scope of the Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna;
4. Offenses listed within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done on 24 February 1988 in Montreal;

5. Offenses listed within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done on 10 March 1988 in Rome;
6. Offenses listed within the scope of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf done on 10 March 1988 in Rome;
7. Offenses listed within the scope of the International Convention for the Suppression of Terrorist Bombings adopted on 12 January 1998 in New York;
8. Offenses listed within the scope of the International Convention for the Suppression of the Financing of Terrorism adopted on 9 December 1999 in New York.

Another convention on the subject is the Council of Europe Convention on the Prevention of Terrorism (2005). This convention, which was adopted to enhance the effectiveness of existing international texts on the fight against terrorism, was published in the *Official Gazette* of 13 January 2012 following the decision of the cabinet on 28 November 2011 (No. 2011/2510). For the purposes of this Convention, “terrorist offense” signified any of the offenses within the scope of and as defined in one of the treaties and protocols listed in its appendix.

Accordingly, the offenses listed within the scope of the following conventions can be defined as terrorist offenses:

1. Convention for the Suppression of Unlawful Seizure of Aircraft signed in the Hague on 16 December 1970,
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done on 23 September 1971 in Montreal,
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents adopted on 14 December 1973 in New York,
4. International Convention against the Taking of Hostages adopted on 17 December 1979 in New York,
5. Convention on the Physical Protection of Nuclear Material adopted on 3 March 1980 in Vienna,
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) signed on 24 February 1988 in Montreal,
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done on 10 March 1988 in Rome,
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf done on 10 March 1988 in Rome,
9. International Convention for the Suppression of Terrorist Bombing done at New York on 15 December 1997,
10. International Convention for the Suppression of the Financing of Terrorism done at New York on 9 December 1999.

Moreover, in the concluding part of the report that the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism submitted to the Security Council, it was stated that the absence of a universal, comprehensive, and precise definition of “terrorism” posed a problem against active promotion of human rights while countering terrorism adding that a three-staged specification was needed to prevent –and to punish if failed– terrorism by the Security Council Resolution No. 1566 (2004). The resolution openly stated that “terrorist offenses” should be limited to cases where three cumulative characteristics of terrorist acts were present. These are, a) the means used, which can be described as deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages; b) the intent, which is to cause fear among the population or the destruction of public order or to compel the Government or an international organization to do or refraining from doing something regardless of their political, philosophical, ideological, racial, ethnic, religious, etc. motive; and c) the aim, which is to further an underlying political or ideological goal by acts covered within the scope of terrorism-related conventions and protocols and in definitions found in such texts. It is only when these three conditions are fulfilled that an act should be classified as terrorist; otherwise it loses its distinctive force in relation to ordinary crime. Similarly, it was also stated that when criminalizing conduct in support of terrorist offenses they should also be limited to the above-mentioned characteristics to provide definitions of offense. Furthermore, it was put forward that when states prohibited terrorist conduct the proscriptive provisions should comply with the requirements of accessibility, precision, applicability to counter-terrorism alone, non-discrimination, and non-retroactivity.⁴

Recommendations on the ATC Articles

Article 1 of the ATC, which defines terrorism in a vague and broad way without framing it with the component of violence, should be amended in line with the above-mentioned explanations.

Article 2 of the ATC, which designates criminalization of persons as guilty of terrorism who are members of an illegal organization although they did not commit a crime and those who committed a crime in the name of the organization although they were not members of the organization, shall be amended as it contains obscure and vague statements and provides an indirect definition of membership in an illegal organization.

Article 3 of the ATC proscribes terrorist offenses while offenses listed within the scope of Articles 302, 307 and 309 of the TPC classified under the part offenses against the security of the state and those under Articles 311, 312, 313, 314 and 315 of the TPC classified under offenses against the constitutional order have been defined as terrorism offenses. Among these, Article 314 proves to be quite problematic. This article regulates armed organizations and prescribes the sentence to be handed down to organization leaders and members. Subclause 3 of the article prescribes that those held to have indirect membership in an organization would be sentenced as actual organization members. In practice, however, we have been witnessing that the political opposition or individuals who expressed their opinions seen to be in parallel with those of the goals of such organizations are often sentenced under this article despite the fact that they had never been in an armed act or resorted to any kind of violence. It should therefore be noted that Article 314 of the TPC cannot be regarded to directly describe a terrorist offense, those sentenced under Article 314 can only be categorized to have committed a terrorist offense only if they are sentenced for another armed act,

⁴ https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1566%282004%29

and it cannot solely on its own constitute a terrorist offense. Thus it should also be indicated that particularly Sub-clauses 2 and 3 of Article 314 of the TPC must be evaluated like Article 220 of the TPC. It would be useful to look at Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"⁵ (Op. No. 872/2016 dated 13 March 2017).

The category of offenses committed for the purpose of terrorism under **Article 4 of the ATC** should be repealed in its entirety as they are defined too broadly and such categorization goes way beyond the above-mentioned definitions. Further the conditional release term should be implemented in the form of ½ for offenses defined under Article 4 within the scope of enforcement regulations just like other offenses.

Article 5 of the ATC prescribes an extension in sentence terms by half. It should be repealed as it prescribes a special double-sentencing because the imprisonment term in penal laws for this offense is already quite lengthy, its enforcement is heavy, and its term for conditional release is also lengthy. Further, prescription of an extension in a separate law regarding a sentence for an offense regulated under the TPC is rather problematic as per the principle of legality of offenses and sentences.

Articles 6 and 7 of the ATC, entitled "Announcement and Publication" and "Terrorist Organizations" respectively, should particularly be pointed out as they are the ones the most commonly resorted to by the Turkish judiciary and threaten freedom of expression. Articles 6 and 7 regulate the offense of terrorist propaganda while this goes against ECtHR case-law. The Constitutional Court's judgments in the cases of *Zübeyde Füsün Üstel and Others*, *Sırrı Süreyya Önder* and *Ayşe Çelik* actually reveal the need that these articles should definitely be repealed.

Venice Commission's "Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media"⁶ (Op. No. 872/2016) dated 13 March 2017 stated that public prosecutors often charged rights defenders and activists, most notably journalists, under Article 314 or 220 of the TPC and Article 7 of the ATC on the grounds of their press statements, protests and articles; this was unlawful with no substantiation in legality of offenses and led to serious deprivation of rights.

Article 2 of the Constitution of the Republic of Turkey states that Turkey is a social state governed by rule law, while Article 13 proscribes infringing upon the essence of fundamental rights and freedoms, Article 36 provides for the right to a fair trial, Article 38 sets forth the principle of legality of crime and punishment, Article 90 puts forth that international agreements duly put into effect have the force of law and cannot be argued to be unconstitutional, and Article 138 regulates that review of compliance with law should be carried out during trials.

Judicial statistics provided by the Ministry of Justice reveal the magnitude of the problem in Turkey. According to the data collected by the Ministry of Justice with regards to Articles 6 and 7 § 2 of the ATC:

- In 2013 lawsuits were launched against 178 persons as per Article 6 and against 10,547 persons as per Article 7 § 2,
- In 2014 lawsuits were launched against 125 persons as per Article 6 and against 15,815

⁵ For the full report see: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e)

⁶ For the full report see: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)007-e)

persons as per Article 7 § 2,

- In 2015 lawsuits were launched against 100 persons as per Article 6 and against 13,608 persons as per Article 7 § 2,
- In 2016 lawsuits were launched against 192 persons as per Article 6 and against 15,913 persons as per Article 7 § 2,
- In 2017 lawsuits were launched against 24,585 persons with no distinction between the said articles,
- In 2018 lawsuits were launched against 19,892 persons with no distinction between the said articles.

In the light of these data we recommend that the ATC should be repealed in its entirety as there is no need for another separate ATC because the TPC already incorporates provisions on organized crime and illegal organizations.

Recommendation 2

In the light of these data the following observations can be put forward without prejudice to the option to repeal the ATC in its entirety:

1. Article 1 of the ATC, which defines terrorism in a vague and broad way without framing it with the component of violence, should be amended.
2. Article 2 of the ATC, which designates criminalization of persons as guilty of terrorism who are members of an illegal organization although they did not commit a crime and those who committed a crime in the name of the organization as non-members, shall be amended as it contains obscure and vague statements and provides an indirect definition of membership in an illegal organization.
3. The category of offense committed for the purpose of terrorism incorporated in Article 4 of the ATC should be repealed in its entirety.
4. Article 5 of the ATC, which prescribes extension in sentence terms by half that are imposed based on the same code, should be repealed.
5. Article 6 of the ATC, which is characterized by its violation of the freedom of the press and the right to freedom of information, should be revoked. It is also crucial to repeal particularly Article 6 § 4 with the provision to impose fines on publication executives although they were not involved in committing an offense in accordance with the principle of individual criminal liability.
6. Article 7 § 2 of the ATC proscribing disseminating propaganda for a terrorist organization should be repealed.
7. The provision covered by Article 14 of the ATC, which puts forward that the identities of informants shall not be revealed, should be repealed as it protects informants even in the

case of reports the authenticity of which has not been verified and encourages informing on statements that do not constitute an offense. The identity of the complainant should be known by the suspect just as is the case with other offenses.

8. The provision covered by Article 15 of the ATC that states “assignment of an attorney to staff standing trial for offenses while combating terrorism or is a complainant thereof” shall be repealed as it provides safety of protection to public employees who forget about the fact that combating terrorism has a law as well and can commit such offenses as torture and ill-treatment.
9. The regulation on enforcement incorporated in Article 17 of the ATC should be revoked. The grounds for this matter is presented in the current report’s part on Law on the Enforcement of Sentences.

Recommendation 3

IHD would like to underline that the term “terrorism offenses” should definitely be avoided in the bill on the Enforcement Law following its assessment on the ATC. Instead, it would be more fitting to write down offenses in the TPC through the list approach.

IHD would further like to underline that those sentenced under Articles 6 and 7 of the ATC should benefit from the provisions concerning the ½ conditional release time within the enforcement bill because these offenses fall under freedom of expression offenses and are in no way terrorism offenses.

The first Judicial Package had opened up the path to appeals before the Court of Cassation for those sentenced under TPC’s insult, threat for the purpose of inciting fear and panic in the public, incitement to commission of crime, praising an offense and offender, inciting the public to hatred and enmity or insult, incitement to non-compliance with the laws, insulting the president, insulting the state’s signs of sovereignty; insulting the Turkish nation, Turkish republic, institutions and organs of the state, membership in an armed organization, turning people against the military; offenses under Articles 6 § 2, 6 § 4 and 7 § 2 of the ATC; and under Articles 28 § 1, 31 and 32 of the Law on Meetings and Demonstrations. The lawmakers had acknowledged the fact that these offenses were freedom of expression offenses in this way. Thus these offenses should also be listed among those for which ½ conditional release time has been prescribed in the enforcement bill. Consequently IHD proposes that Article 107 of Law No. 5275 be regulated accordingly.

Recommendation 4

Proposal to Postpone Investigations and Proceedings

IHD requests that the following recommendation, which would actually terminate pending investigations and proceedings within the field of freedom of expression, be implemented by the introduction of an addendum to the bill on amendments to the enforcement law.

A regulation is needed to terminate pending investigations and proceedings within the field of freedom of expression in the short run. IHD, therefore, offers a concrete proposal to postpone offenses committed through the media and their related sentences just as it had been done in 2 July 2012 within the scope of Law No. 6352 in order to iron out the current injustice in the freedom of

thought and expression field and to alleviate the pressure over social dissidence to some extent. Accordingly, although a partial improvement had been achieved through the postponement of offenses committed through the media and their related sentences in 2012, this regulation failed to get rid of the threats against freedom of expression. Freedom of expression should be protected unconditionally. To this end, an article should be added to the bill to eliminate the offenses alleged to have been committed through the press and the media and social media and sentences with all their consequences.

C. Inequality and Discrimination in Law No. 5275 on the Enforcement of Sentences and Security Measures

1. Article 107 of the Law on the Enforcement of Sentences and Security Measures sets forth provisions on conditional release. Article 107 § 4 disregards the principle of equality in the enforcement of sentences by stating “If a person is found guilty of establishing or leading a criminal organization to commit offenses or of offenses committed as part of the activities of such an organization, those sentenced to aggravated life in prison shall be entitled to conditional release if they have spent thirty-six years in prison, those sentenced to life in prison thirty years, and those sentenced to other limited prison sentences three fourths of their respective sentences,” while the normal enforcement term of $\frac{2}{3}$ is increased to $\frac{3}{4}$. Persons, whose sentences have already been increased by half under Article 5 of the ATC under illegal organization offenses, are now forced to serve their time under heavier circumstances; this practice should be ended. Provisional Article 6, added to the law through the decree law no. 671 of 17 June 2016, reduced the enforcement time in conditional release for ordinary offenders from $\frac{2}{3}$ to $\frac{1}{2}$. This new regulation did not cover offenses listed in the TPC pertaining to murder in the first degree; voluntary injury against any one of the antecedents or descendants, or spouse or sibling, or against a child or a person who cannot protect themselves due to physical or psychological disability and offenses with aggravated injurious consequence beyond the intended purpose; offenses that violate the secrecy of private life; production and trafficking of drugs; offenses defined in Section 4-7 of Part 4 of Book 2; and offenses under ATC No. 3713 dated 12 April 1991.

2. The provision in temporary Article 2 of the enforcement law which is at the same time regulated in Article 17 § 4 of the ATC states that “Terrorist offenders whose death sentences are converted to life in prison, terrorist offenders whose death sentences are converted to aggravated life imprisonment or terrorist offenders who are sentenced to aggravated life imprisonment, shall not be entitled to benefit from the provisions of conditional release. They shall serve aggravated life imprisonment throughout their lives.” This provision should be repealed to allow those whose death sentences are converted to imprisonment sentences to be eligible for conditional release.

The European Court of Human Rights held that it is a violation of human dignity to deny life prisoners any prospect of release under Article 3 of the European Convention on Human Rights in its judgments in the cases of *Vinter and Others v. United Kingdom* and *Abdullah Öcalan v. Turkey* while proposing that legal regulations should be put in order as life prisoners should not be deprived of the hope to be granted release.

Recommendation 5

iHD's concrete suggestion here stipulates for equality in conditional release terms in the enforcement of sentences. If this recommendation is not realized then we believe that this inequality ratio that Turkey has been acknowledging for years should not be disrupted.

Namely, the conditional release term for political prisoners was $\frac{2}{3}$ while it was $\frac{1}{2}$ for ordinary prisoners within the old TPC and enforcement law. When the new TPC and enforcement law entered into force, these ratios were converted to $\frac{3}{4}$ and $\frac{2}{3}$ respectively. Yet the new enforcement pack disrupts this balance while maintaining $\frac{3}{4}$ for terrorism offenses and reducing the conditional release terms for other offenses to $\frac{2}{3}$ with most of them to $\frac{1}{2}$ which will further deteriorate discrimination and go against the principle of proportionality. Should equality be ignored in enforcement, this balance that Turkey formed within itself should at the very least be maintained and offenses regarded to fall under freedom of expression (threat, incitement to commission of crime, praising an offense and offender, inciting the public to hatred and enmity or insult, incitement to non-compliance with the laws, insulting the president, insulting the state's signs of sovereignty; insulting the Turkish nation, Turkish republic, institutions and organs of the state, membership in an armed organization, turning people against the military; offenses under Articles 6 § 2, 6 § 4 and 7 § 2 of the ATC; and under Articles 28 § 1, 31 and 32 of the Law on Meetings and Demonstrations) should be **excluded** to reduce $\frac{3}{4}$ to $\frac{2}{3}$ in terms of terrorism offenses.

3. Conditions for conditional release set forth in Article 105 § A of the law have not been regulated in line with the principle of equality either. Convicted prisoners in good conducted who have served the last six months of their sentences in open prisons with a year or less remaining for their conditional release could be eligible for conditional release was regulated, while provisional Article 4 states that the condition to serve the last six months of one's sentence in an open prison would not be sought until 21 December 2020. Provisional Article 6, added to the law through the decree law no. 671 of 17 August 2016, increased the time to benefit from conditional release from one year to two years. This new regulation excluded offenses listed in the TPC pertaining to murder in the first degree; voluntary injury against any one of the antecedents or descendants, or spouse or sibling, or against a child or a person who cannot protect themselves due to physical or psychological disability and offenses with aggravated injurious consequence beyond the intended purpose; offenses that violate the secrecy of private life; production and trafficking of drugs; offenses defined in Section 4-7 of Part 4 of Book 2; and offenses under ATC No. 3713 dated 12 April 1991.

Recommendation 6

All prisoners should be rendered eligible for conditional release through introducing the necessary regulations in Articles 105 and 105 § A of the Law No. 5275 within the scope of the bill.

If this cannot be provided, a regulation should be introduced to make prisoners eligible for conditional release for offenses acknowledged to fall under freedom of expression within the first judicial package as was explained above (threat, incitement to commission of crime, praising an offense and offender, inciting the public to hatred and enmity or insult, incitement to non-compliance with the laws, insulting the president, insulting the state's signs of sovereignty; insulting the Turkish nation, Turkish republic, institutions and organs of the state, membership in an armed

organization, turning people against the military; offenses under Articles 6 § 2, 6 § 4 and 7 § 2 of the ATC; and under Articles 28 § 1, 31 and 32 of the Law on Meetings and Demonstrations).

4. Exclusion of terrorism and organization-related offenses in Article 17 § 6a of Law No. 5275 and postponement of enforcement is against Articles 5 and 14 of the ECHR and Articles 10 and 19 of the Constitution.

Recommendation 7

The discriminatory regulation in the postponement of enforcement of sentences should be repealed.

5. Exclusion of convicted and non-convicted prisoners for offenses within the scope of the ATC on similar grounds in the provisional Article 8 of Law No. 5275 should also be acknowledged to be unconstitutional.

When the provisions of Articles 10 and 19 of the Constitution are taken together, it is clear that the principle of equality before law should be observed within the enforcement of sentences as well. Besides the Constitutional Court's judgment of 31 March 1992 (Merits No. 1991/18, Judgment No. 1992/20) regarding the provisional Article 1 of Law No. 3713 when it went into force should be taken into account.

Recommendation 8

Discrimination in terms of benefitting from the provisional Article 8 should be eliminated.

6. Enforcement of Aggravated Life in Prison and the Condition of Sick Prisoners

According to the Ministry of Justice's data of 17 February 2014, there are 1,453 prisoners sentenced to aggravated life in prison in Turkey. Aggravated life in prison replaced death sentence in Turkey which was abolished in 2002.

Of these prisoners ones who were convicted under Book Two, Part 4, Section 4 of the TPC entitled "Offenses against the Security of the State," Section 5 entitled "Offenses against the Constitutional Order and the Functioning of this Order," and Section 6 entitled "Offenses against National Defense" of committing these offenses within the activities of an organization cannot benefit from conditional release due to the provisions in Article 107 § 16 of the Law on the Enforcement of Sentences and Security Measures along with those in provisional Article 2 and the enforcement of their sentences continue "until they die." Further Article 25 § 1-i of the Law on the Enforcement of Sentences and Security Measures the enforcement of the sentence of convicted aggravated life prisoners can in no way be suspended.

It goes without saying that aggravated life in prison is an inhuman punishment as it is implemented with convicts accommodated alone in a single cell and because of its severe enforcement conditions. The ECtHR held in its judgements in the cases of *Öcalan*, *Gurban and Kaytan* that this was in violation of Article 3 of the ECHR as it was considered to be fall under torture and ill-treatment due to the

“absence of the possibility of release” about this enforcement regime that qualifies as punishment within punishment which lasts until the prisoner is dead. As it has also been stated in the ECtHR judgments, the enforcement of a sentence can never last until the prisoner dies; persons go through legal review at certain intervals and can be released if they meet specific conditions. Convicts deemed to be the most “dangerous,” including political prisoners, cannot be sentenced to die in prisons without granting them the hope of release.

The gravest ban on aggravated life is enshrined in Article 25 preventing conditional release and sentencing these prisoners to die in prison even if they are too sick to survive in prison on their own and have a medical report to this end.

Article 16 § 2 of the same law, on the other hand, states under the title “Postponement of Enforcement due to Illness” that “if the enforcement of the prison sentence presents an absolute threat to the life of the convict, it shall be postponed until the prisoner recuperates,” while Article 16 § 6 puts forth that “the enforcement of the sentence of a convict who cannot continue their life under prison conditions due to severe illness or disability or who are evaluated to pose no severe or substantial threat against public security may be deferred until their recovery according to the procedure set forth in the third paragraph.”

Enforcement of sentences particularly for sick prisoners according to this regime leads to their death and each sick prisoners whose treatment is not undertaken within an appropriate time frame under appropriate conditions are driven to death each passing day.

While the enforcement of the sentences of sick prisoners should have been undertaken in official medical centers’ sections specifically allocated to them even if their illnesses are not critical, the failure to suspend the enforcement of sentences for prisoners with life-threatening conditions qualifies as a violation of the right to life.

Recommendation 9

Therefore, the provision in Article 25 § 1-i of the Law on the Enforcement of Sentences and Security Measures stating “enforcement can in no way be suspended” and provisional Article 2 of the same law should be repealed and the changes in conditional release conditions about aggravated life in prison explained above should be enacted. Further the last sub-clause of Article 17 of the ATC No. 3713 should also be repealed. A date of possible release fit for the ages and health conditions of such prisoners should be set and a new legal status summary should be composed in line with the related ECtHR judgments.

7. The provision that sets mandatory uniform clothing should be repealed.

Additional Article 1, which was added through the decree law no. 696 to Law No. 5275 and passed into law with Article 97 of Law No. 7079, prescribes uniforms for prisoners. It was also stated that a directive would be issued to implement this provision, though the said directive has yet to be issued. This amended provision is completely against prisoners’ rights. This provision should be acknowledged to fall under conduct incompatible with human dignity and should be sent to the Constitutional Court for repeal as per UN’s Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) that was adopted and revised on 17 December 2015 through UN Resolution

70/175 which Turkey has to comply with.

Recommendation 10

The provision that prescribes uniform clothing should necessarily be repealed.

8. Articles pertaining to disciplinary action in the enforcement law should be re-regulated in observance of UN's Mandela Rules.

Articles 23-26, 28 and 32 in the bill on the enforcement law introduces new definitions to disciplinary action in Law No. 5275 and aggravates related punishment.

Specifically Article 32 of the bill amends a fourth clause to Article 62 of Law No. 5275 to set forth that newspapers that do not receive advertisement by the state's Press Advertisement Agency will not be taken into prisons. This proposed provision, which is in blatant violation of Articles 22, 26 and 28 of the Constitution, should certainly be removed from the bill.

The current enforcement law does not guarantee rights and freedoms for prisoners, it merely sets forth the rules they must abide by and imposes obligations. Furthermore the rules imposed on prisoners are not only limited to laws. A "Prison Disciplinary Board," with no jurist members represented, or under certain conditions the prison director on their own can impose aggravated punishment in the form of not only communication and visitation bans but also solitary confinement on the grounds of prison security.

Particularly the adverse effects of long-term imprisonment sentences along with rules and disciplinary punishment restrictive of rights and freedoms that maximize isolation should be taken into account.

States should not discriminate people in the protection of rights and freedoms and, what is more important, they should take measures that will minimize the difference between life outside and life in prison under their obligations set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, UN's Minimum Rules for the Treatment of Prisoners, ECHR, European Prison Rules, and the recommendations by the Committee of Ministers of the Council of Europe.

Recommendation 11

The provisions pertaining to disciplinary action within the scope of Law No. 5275 should be reviewed in the light of UN's Mandela Rules. Articles 23-26, 28 and 32 should be withdrawn.

9- Isolation in prisons should be ended, punitive isolation should be removed from the legislation and the enforcement law, bylaw and regulations should be reviewed in line with UN's Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) that was adopted and revised on

17 December 2015 through UN Resolution 70/175.⁷ Particularly the following should be guaranteed:

1. Respect for the inherent dignity and value of prisoners,
2. Compliance with healthcare rules,
3. Role of healthcare providers,
4. Investigation into all signs or allegations of torture, ill-treatment or degrading treatment or punishment regarding prisoners,
5. Protection of all vulnerable groups deprived of their liberty considering the countries under challenging circumstances and meeting their special needs,
6. Access to the right to legal counsel,
7. Access to complaint mechanisms followed by independent monitoring,
8. Compliance with the UN's Mandela Rules by all countries,
9. Training of prison staff and other related personnel to implement UN's Mandela Rules.

Recommendation 12

All practices that violate the dignity of the human person in prisons, notably isolation, should be ended in line with the Mandela Rules and the domestic legislation should be adapted in compliance with international human rights law.

10. An additional article should be incorporated into the bill on amendments to the enforcement law so as to allow for retrials in observance of ECtHR and Constitutional Court's judgments for those who are still serving their sentences as their convictions delivered by military judges in State Security Courts had been finalized.

The ECtHR judgments in the cases of *Leşker Acar*, *Şehmus Yıldız*, *Abdullah Altun et al.* held that Article 6 § 1 of the ECHR was violated due to trials by military judges in State Security Courts and such judgments are now a part of the court's case law. The court also stated within the scope of such judgments that the applicants be retried and the consequences of the violation should be remedied.

The Constitutional Court's judgment in the case of *Abdullah Altun* (App. No. 2014/2894) on 17 July 2018 held that retrial was called for against rulings delivered by State Security Courts (as of the period with military judges) and thus the ECtHR's judgments against Turkey on this matter should be complied with.⁸

Rulings by State Security Courts, therefore, should be subjected to retrial with regards to thousands of convicted prisoners still incarcerated and the right to a fair trial should be granted along with a decision to halt the enforcement of their sentences.

Recommendation 13

An additional article should be incorporated to the CCP so as to allow for ex officio retrials by force of the judgments by the ECtHR and the Constitutional Court.

⁷ See the Nelson Mandela Rules: <https://undocs.org/A/RES/70/175>

⁸ <https://kararlarbilgibankasi.anayasa.gov.tr/Basvurular/tr/pdf/2014-2894.pdf>

11. Suppression of the perception of impunity within the scope of conditional release

Regulations to this end within the bill to amend the enforcement law should be revised so as to render all prisoners eligible for conditional release without discrimination.

12. Temporary extension of one-year conditional release term to 3 years

The exclusion of terrorism offenses from the scope of conditional release within the bill to amend the enforcement law should be backed out of. Temporary regulation should be made available for all offenses under the ATC, having taken the above-mentioned assessment into account, in this way more prisoners' rights to health and life can be guaranteed in the face of the current pandemic.

13. Provision to hold good conduct reviews at all stages of enforcement

Having conditional release on a more negative plane than that of the former regulation through the bill on amendments to the enforcement law is unacceptable. Leaving good conduct and enforcement time off to the mercy of observation and administration boards in a way to eradicate the conditional release period, which is already too long, for political prisoners will lead to great arbitrariness in practice. Basing good conduct reviews on all terms served by convicted prisoners cannot be accepted. It is clear that disciplinary punishment imposed particularly on long-term prisoners will prevent good conduct assessments. Disciplinary action prescribed within the current enforcement law is quite comprehensive and susceptible to arbitrary practices. Therefore, assessment of good conduct reviews so as to cover the whole imprisonment terms can in no way be accepted unless disciplinary action is reviewed in line with Mandela Rules and narrowed down. This provision is against the principle of proportionality too. Should it be passed into law, no prisoner can become eligible for conditional release time specifically in terms of the above mentioned offense types. And this state of affairs is indeed against human rights law along with all international conventions and declarations on prisoners' rights.

Recommendation 14

Article 36 of the proposed bill and Article 89 of Law No. 5275 should be amended. Article 36 of the bill should be withdrawn as per our above-mentioned critical points.

14. Provision on the conditional release time for standing imprisonment sentences under ATC

Article 66 of the proposed bill introduces an additional statement to Article 17 § 1 of the ATC No. 3713 to set forth that conditional release time for standing imprisonment sentences under the ATC would be $\frac{3}{4}$. As has been stated above in our comprehensive evaluation of offenses under the ATC and in our assessment of conditional release times, Article 66 of the bill should necessarily be withdrawn.

15. Discrimination in transfers to open prisons should be eliminated

Article 18 of the bill to amend Article 14 of Law No. 5275 prescribes that those sentenced to 3 years or less in prison may serve their times in open prisons with the exception of those who committed offenses under the ATC. When one looks at the current ATC, it is seen that people are handed down sentences of 3 years or less only under Articles 6 and 7 of the ATC that fall under freedom of expression and opinion and Article 2 of the ATC by way of Article 314 § 3 of the TPC, thus, Article 220 § 6-7 of the TPC. It would, therefore, be another instance of blatant discrimination to exclude offenses that fall under freedom of expression from the scope of Article 14 of Law No. 5275.

16. The criterion “threat to public security” that prevents the release of sick prisoners should be removed from Article 16 of the enforcement law.

An entirely subjective criterion arguing that critically sick prisoners and those who cannot live on their own in prisons as confirmed by medical reports by the Forensic Medicine Institute pose a threat to public security should never be in the law. In practice public prosecutors have been denying appeals to postpone enforcement of sentences for some prisoners on the grounds of this provision. Among these persons, some have died in prisons. This provision, therefore, needs to be removed from Article 16.

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