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Human Rights Committee

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

Communication submitted by:	Mukadder Alakuş (represented by her husband, Fatih Alakuş, and by counsel, Kurtulus Bastimar)
Alleged victim:	The author
State party:	Türkiye
Date of communication:	23 December 2019 (initial submission)[1]
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 8 April 2020 (not issued in document form)
Date of adoption of Views:	26 July 2022
Subject matter:	Conditions of detention; access to health care in prison; arbitrary detention
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Right to life; torture and ill-treatment; arbitrary arrest and detention; conditions of detention; right to a fair trial

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

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

*** A joint opinion by Committee members Carlos Gómez Martínez and Vasilka Sancin (partially dissenting) and an individual opinion by Hernán Quezada Cabrera (partially dissenting) are annexed to the present Views.

[1] Supplemented on 6 April 2020.

Articles of the Covenant: 6, 7, 9, 10, 14, 15, 18, 19, 21, 22, 25, 26 and 27

Articles of the Optional Protocol: 2, 3 and 5 (2) (b)

1. The author of the communication is Mukadder Alakuş, a national of Türkiye born in 1971, who is currently held in Eskişehir Type L Prison. She claims that the State party has violated her rights under articles 6, 7, 9, 10, 14, 15, 18, 19, 21, 22, 25, 26 and 27 of the Covenant. The Optional Protocol entered into force for Türkiye on 24 February 2007. The author is represented by counsel.

Facts as submitted by the author

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

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

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

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

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

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

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

2.8 On 20 October 2019, a doctor formally diagnosed her with gallstones and recommended surgery. The author, however, decided not to undergo surgery as she was concerned about the lack of hygiene and access to medicine within the detention facility after the operation.

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

Complaint

3.1 The author claims a violation of her rights under articles 6, 7, 9, 10, 14, 15, 18, 19, 21, 22, 25, 26 and 27 of the Covenant. She claims that her conditions of detention put her life at risk and amount to inhuman and degrading treatment, in violation of articles 6, 7 and 10 of the Covenant. The prison is overcrowded and there is not enough food or access to hot water for all the inmates. Drinking water for detainees is distilled from the ceiling. The unhygienic conditions of detention and her lack of access to adequate medical treatment and food have exacerbated her medical conditions and increased her risk of death. She argues that conducting medical examinations within her unhygienic and unequipped prison cell in the presence of prison staff amounts to inhuman and degrading treatment. The author also maintains that the State party denies political prisoners access to medical care as an intentional act of cruelty to extract information.[3]

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

3.3 Regarding her claims under article 14, the author submits that she was brought before a judge without having been notified of the charges against her and without having adequately prepared her defence with her lawyer. She was, however, forced to sign statements drafted by the police stating that she had been notified of the charges and had adequately prepared her defence. She alleges violations of the principle of equality of arms, as she was not permitted to call and examine witnesses and to access the entire case file. In addition, she could not adequately express herself because of her displaced dentures and the fact that the court proceedings were carried out through a video conference system. Furthermore, the author maintains that the judge's negative remarks concerning the Gülen movement during the trial and suggesting to her counsel that she should confess in court show the judge's prejudice regarding her innocence. Lastly, the author claims that the courts did not provide reasoning to justify the rejection of her attempts to challenge the lawfulness of her detention.

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

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

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

[3] The author refers to the cases of Halime Gülsu and Nesrin Gençosman, both accused of links with the Gülen movement, who died in prison, reportedly due to deprivation of medication.

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

State party's observations on admissibility and the merits

4.1 In a note verbale dated 7 December 2020, the State party submitted its observations on admissibility and the merits. It submits that the author was taken into custody by order of the Turgutlu Magistrate's Office on suspicion of membership of an armed terrorist organization. The following day, her defence statement was taken in the presence of an appointed lawyer, and she was subsequently arrested on the basis of a strong suspicion of a crime having been committed. The author was charged with the offence of "being a member of an armed terrorist organization", based on conversations recorded within the ByLock encrypted application, exclusively used by members of the Fetullah terrorist organization, deposits made to a bank affiliated with the organization and her participation in activities organized by the organization.[5] She was sentenced to seven years and six months of imprisonment, in accordance with article 314 (2) of the Penal Code. The State party notes that the author's application before the Constitutional Court, lodged on 4 June 2020, is currently pending.[6]

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

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

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

4.5 The State party considers that the communication constitutes an abuse of the right of submission for using offensive and politically motivated language and submitting misleading claims. The author claims that she could not adequately prepare her defence and was forced to sign documents, while omitting that she was represented throughout the judicial proceedings and that all her statements were taken in the presence of her lawyer. The State

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

[6] The application to the Constitutional Court raises claims under articles 10 (equality before the law), 17 (right to life), 19 (right to personal liberty and security), 36 (right to a fair trial) and 38 (no punishment without law) of the Constitution.

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

[8] European Court of Human Rights, *Uzun v. Turkey* (application No. 10755/13, Decision, 30 April 2013); *Mercan v. Turkey* (application No. 56511/16, Decision, 8 November 2016); *Zihni v. Turkey* (application No. 59061/16, Decision, 29 November 2016); and *Çatal v. Turkey* (application No. 2873/17, Decision, 7 March 2017).

[9] European Court of Human Rights, *Turgut and others v. Turkey* (application No. 4860/09, Decision, 26 March 2013).

party also rejects the author's claims concerning the denial of medical care, and submits that she was provided with medication and treated by specialist doctors.

4.6 As regards the author's claims under articles 6, 7 and 10 of the Covenant, the State party submits that the author was examined upon her arrival at the prison. She was recommended to undergo surgery to remove her gallstones, which she refused on 28 December 2019. She was examined, treated and provided with medication by the prison infirmary nine times. She was treated by Eskişehir State Hospital three times and by the prison dentist four times. Regarding the author's claim concerning the provision of inadequate food, the State party submits that, on 30 March 2020, the prison doctor recommended that she receive an appropriate diet in view of her gallstones. Moreover, the State party notes that nothing in her health records indicates that her conditions resulted from food deprivation. As regards her conditions of detention, the State party submits that prison cells comply with international standards and are open to regular inspection. The author has not lodged any formal complaint before any authority regarding allegations of torture and ill-treatment or the lack or quality of food. The State party also notes that she failed to seek interim measures before the Constitutional Court alleging a denial of health care and subsequent risk to her life.

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

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

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

4.10 As regards the author's claims under articles 18, 19, 21, 22 and 25, the State party refutes the allegation that the author was limited in her freedom of thought, conscience and religion, as the facts, evidence and charges brought against her only concerned her membership of an armed organization. It also notes that the author contests that she downloaded and used the ByLock application, but not the evaluation made of such evidence.

[10] European Court of Human Rights, *Golubev v. Russia* (application No. 26260/02, Decision, 9 November 2006); and *Asciutto v. Italy* (application No. 35795/02, Judgment, 27 November 2007).

[11] This includes offences under articles 309–315 of the Penal Code.

[12] Constitution, art. 138.

[13] Penal Code, art. 314.

[14] By decision of the National Security Council, the Fetullah terrorist organization was listed as a terrorist organization. The Court of Cassation ruled, on 24 Aril 2017, that the Fetullah terrorist organization was an armed terrorist organization.

It submits that the Court of Cassation and the Constitutional Court have established that downloading and using the ByLock application is crucial evidence of membership of the Fetullah terrorist organization, as the application was not available for download at that time and was exclusively installed by members of the organization using an external server. The State party further argues that the author's claims under article 22 of the Covenant are unsubstantiated. The Gülen movement is not a legally established association. As an armed terrorist organization, the Fetullah terrorist organization cannot be recognized as an association for the purposes of article 22. Lastly, the State party considers that the author's claims under article 25 are irrelevant and unsubstantiated, and that there is no indication of discriminatory treatment towards the author within the meaning of article 27 of the Covenant.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 31 December 2020, the author submitted comments on the State party's observations on admissibility and the merits. She asserts that, although her application to the Constitutional Court was lodged after submitting her communication, this was nevertheless prior to the Committee's examination of the admissibility of the communication.[15]

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

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

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

5.5 The author refutes that submitting a application for compensation to the Compensation Board would constitute an effective remedy. That procedure concerns applications lodged with the European Court of Human Rights, which is not her case. As the remedy sought by the author is her release, she argues that a claim for compensation would not be effective or offer any reasonable prospects of success in this sense. The author notes that the Committee[19] and the European Court of Human Rights[20] have rejected the State party's argument of inadmissibility for failure to file a compensation claim under article 141 of the Code of Criminal Procedure on similar grounds, considering that this remedy would not end the author's pretrial detention. Although the European Court of Human Rights found that an application to the Compensation Board could provide redress in a case concerning the

[15] European Court of Human Rights, *Kavala v. Türkiye* (application No. 28749/18, Judgment, 11 July 2022).

[16] Annual report of the Constitutional Court, 2017.

[17] *Akmatov v. Kyrgyzstan* (CCPR/C/115/D/2052/2011).

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

[19] Ibid.

[20] European Court of Human Rights, *Alpay v. Turkey* (application No. 16538/17, Judgment, 20 March 2018); *Altan v. Turkey* (application No. 13237/17, Judgment, 20 March 2018); and *Demirtaş v. Turkey* (application No. 14305/17, Judgment, 22 December 2020).

right to property, that ruling cannot be applied to applications seeking the termination of deprivation of liberty.

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

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

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

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

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

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

5.12 The author refutes the State party's observations with regard to her claims under article 6 of the Covenant. The health report annexed to the State party's observations fails to provide detailed information on the author's chronic rheumatism. The author claims that, despite the dietary indications included in the report, the prison administration never acted thereupon and she was never provided with an appropriate diet. The author also claims that

[21] See A/HRC/WGAD/2020/47 and A/HRC/WGAD/2019/53.

[22] See E/CN.4/2005/6.

[23] A/HRC/WGAD/2020/30, para. 87.

[24] A/HRC/WGAD/2020/2, paras. 72–73.

[25] The author refers to *Özçelik et al. v. Turkey*.

[26] The author submits that she stays in a prison cell designed for 7 persons with 14 other inmates.

[27] European Court of Human Rights, *J.M.B. and others v. France* (application No. 9671/15, Judgment, 30 January 2020); *Torregiani and others v. Italy* (application No. 43517/09 and others, Judgment, 8 January 2013); and *Sulejmanovic v. Italy* (application No. 22635/03, Judgment, 16 July 2009).

she never underwent a comprehensive medical examination, including by a rheumatologist, so that the necessary medical care could be provided by the authorities.

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

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

State party's additional observations

6.1 On 7 May 2021, the State party submitted additional observations on the admissibility and merits of the complaint reiterating its inadmissibility for non-exhaustion of domestic remedies, in light of the author's pending application before the Constitutional Court. As regards the effectiveness of this particular remedy, the State party submits that the Constitutional Court's judgments are legally enforceable, binding on all organs of the State and, therefore, cannot be disregarded by the relevant authorities. The State party highlights that in the *Uzun* case, the European Court of Human Rights concluded that the procedure before the Constitutional Court afforded an appropriate mechanism for the protection of human rights and should be exhausted.[28] The State party considers the judgments of the European Court of Human Rights cited by the author as irrelevant to the author's particular situation and misleading, as in her case, her individual application is still pending.

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

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

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

6.5 The State party contends that the author's reference to opinions of the Working Group on Arbitrary Detention to support her claims under article 9 of the Covenant is misleading and irrelevant. It further reiterates that the author never challenged the indictment against her. With regard to the use of the video conference system for court proceedings, the State party argues that this was not in violation of article 14 of the Covenant. It also refutes the author's claim that she had requested to attend court proceedings.

6.6 Regarding the author's claims under articles 15, 18, 19, 21, 22, 25 and 27 of the Covenant, the State party submits that the author was not charged with using the ByLock application or holding a Bank Asya account, but for membership of an armed terrorist organization, under article 314 of the Penal Code. The State party reiterates that using the ByLock application and having an account at Bank Asya were considered as crucial evidence

[28] European Court of Human Rights, *Uzun v. Turkey*.

[29] The State party refers to *Zündel v. Canada* (CCPR/C/89/D/1341/2005).

by domestic courts in proving her offence, alongside six witness statements, which identified the author as a member of the Fetullah terrorist organization.

Additional submissions

From the author

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

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

7.3 The author refutes the State party's allegations that her claims regarding the denial of medical care are unsubstantiated. She indicates that, on 9 March 2021, she submitted a request to the Communication Centre of the Presidency to receive adequate medical treatment and to be treated in a well-equipped hospital. On 18 January 2021, she filed a petition with the Constitutional Court regarding the denial of medical treatment and how that negatively affected her ability to express herself in court and conduct her defence. In the petition, she also claims that she was forced to withdraw her petitions to the prison administration requesting medical treatment for her rheumatoid arthritis and that she was strip-searched several times, in violation of article 7 of the Covenant. Regarding this latter complaint, the author brought this to the attention of the Eskişehir Chief Public Prosecutor's Office on 2 March 2021, which, on 17 May 2021, declined to initiate an investigation.

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

From the State party

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

8.2 The State party maintains that the author's application to the Constitutional Court cannot be considered unreasonably delayed and that her reference to the *Özçelik* case is

[30] European Court of Human Rights, *Alpay v. Turkey*; *Mehmet Altan v. Turkey*; and *Koçintar v. Turkey* (application No. 77429/12, Decision, 1 July 2014).

[31] See *Quereshi v. Denmark* (CERD/C/66/D/33/2003).

[32] European Court of Human Rights, *Altan v. Turkey*; and *Koçintar v. Turkey*.

misleading in the sense that the Committee did not consider the remedy unduly prolonged, but rather noted the State party's failure to argue otherwise.

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

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

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

8.6 The State party reiterates that the author's petition dated 14 January 2018 did not request her attendance at court, but rather to face the witnesses, which was made possible through the video conference system. The State party argues that it was in the author's interests for the hearings to be held online. The State party notes that she requested the video recordings of the court hearings a year and a half after the last hearing had taken place. Under the relevant domestic regulation, video recordings are transcribed and handed to the parties upon their request, as in the author's case. It submits that the author's failure to promptly request the video recordings and forward any complaints to the authorities demonstrates her lack of good faith, which supports its claim that the communication constitutes an abuse of the right of submission.

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

Issues and proceedings before the Committee

Consideration of admissibility

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

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

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

[33] Law No. 5275.

disposal. In the circumstances of the present communication, the Committee does not find that the author abused her right of submission under article 3 of the Optional Protocol.

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

9.5 The Committee notes the author's argument that filing an individual application before the Constitutional Court is not an effective remedy as: (a) it does not offer reasonable prospects of success for her release, owing to the non-enforcement of the Court's judgments by lower courts; and (b) the process would be unreasonably prolonged considering the author's first attempt to exhaust remedies before domestic courts on 4 September 2018 and the Constitutional Court's backlog. The Committee notes, in this regard, the author's argument that the Constitutional Court would take a year and a half to process her application. The Committee notes the State party's argument that, according to the Constitution, the Constitutional Court's judgments are binding on all organs of the State and that lower courts have begun retrials or ordered the release of applicants following its judgments. It further notes the State party's argument that the author's application, lodged on 4 June 2020, cannot be considered as unduly prolonged and that the delay in the separate criminal proceedings should not be considered in evaluating whether the remedy is unreasonably prolonged. The Committee observes that, at the time of the consideration of the communication, two years had lapsed since the author had lodged her application with the Constitutional Court. In the circumstances, and following its jurisprudence, the Committee does not find that a delay of two years in considering a constitutional action is unduly prolonged.[35] On the other hand, following its jurisprudence,[36] the Committee also notes that the European Court of Human Rights has expressed concern regarding the effectiveness of this remedy in cases involving pretrial detention, due to the non-implementation, by lower courts, of the Constitutional Court's findings in two cases in which the Court had found violations.[37] The Committee notes that it would be for the Government to prove that the remedy of an individual complaint to the Constitutional Court was effective, both in theory and in practice, in cases concerning the right to liberty and security.[38] The Committee finds that, in the circumstances of the author's case, the State party has not shown that an individual complaint to challenge the author's detention before the Constitutional Court would have been effective, in practice.

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

9.7 The Committee takes note of the author's claims alleging that she was coerced into signing drafted statements to confess her guilt and that she was not promptly informed of the reasons for her arrest or the charges brought against her. The Committee observes, however,

[34] European Court of Human Rights, *Uzun v. Turkey*; *Mercan v. Turkey*; *Zihni v. Turkey*; and *Çatal v. Turkey*.

[35] *M.G.C. v. Australia* (CCPR/C/113/D/1875/2009); and *Zündel v. Canada*.

[36] *Özçelik et al. v. Turkey*.

[37] European Court of Human Rights, *Altan v. Turkey*, para. 142; and *Alpay v. Turkey*, para. 121.

[38] Ibid.

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

that those claims do not appear to have been raised at any point in the domestic proceedings. That part of the communication, raising issues under articles 9 (2) and 14 (3) (a) and (g) of the Covenant, is accordingly declared inadmissible for failure to exhaust all domestic remedies in accordance with article 5 (2) (b) of the Optional Protocol.

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

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

9.10 The Committee recalls that, in any event, the State party remains responsible for the life and well-being of its detainees.[40] In the light of the proof provided by the State party of the dental and medical treatments and medicines provided and prescribed to the author, as well as the author's failure to produce documentary evidence in support of her allegations, the Committee cannot conclude that the author was denied access to medical care or subjected to cruel, inhuman or degrading treatment while in detention, which would constitute a violation of her rights under articles 6 and 7 of the Covenant. In the absence of any further pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate, for the purposes of admissibility, these allegations. Accordingly, it declares this part of the communication inadmissible under article 2 of the Optional Protocol.

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

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

Consideration of the merits

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

10.2 The Committee notes the author's claim under article 9 (1) of the Covenant regarding the unlawful and arbitrary nature of her arrest and detention. It takes note of the author's claims that her arrest and detention were based solely on her alleged use of the ByLock application, on holding an account at Bank Asya and on her participation in a peaceful rally, without solid evidence to suggest a strong suspicion that she had committed a criminal offence; and her arrest warrant did not include facts or evidence that would justify her pretrial detention during such a long period. It notes the State party's argument that the author was not charged with using the ByLock application or holding an account at Bank Asya, although

[40] See *Fabrikant v. Canada* (CCPR/C/79/D/970/2001); and *Lantsova v. Russian Federation* (CCPR/C/74/D/763/1997).

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

the State party acknowledges this evidence was considered crucial by domestic courts (para. 6.6 above), but rather because of her participation in the activities of the Fetullah terrorist organization confirmed by six witness statements. It also notes the State party's submission that the author's detention was based on article 100 (3) of the Code of Criminal Procedure, given the strong suspicion of her having committed the offence of membership of a terrorist organization and the risk of her absconding.

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

10.4 In respect of article 15 (1) of the Covenant, the Committee notes the author's claim that she was convicted for acts that were not defined as crimes nor prohibited under domestic law, such as downloading the ByLock application, sharing information through that application, having an account at Bank Asya and attending a peaceful rally. The Committee notes the State party's argument that the author was charged and condemned for her membership of an armed terrorist organization, which is a crime specified under law.[43] It also notes that the Court of Cassation has found that the involvement of any individual with the ByLock application proves, beyond any doubt, a link between the individual and the terrorist organization since the ByLock messaging application is a communication network exclusively designed and developed to fulfil the communication needs of the organization.[44]

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

10.6 The Committee recalls that the principle of legality in the field of criminal law, as one of the fundamental principles of the rule of law, requires both criminal liability and punishment to be limited to clear and precise provisions in the law at the time the act or omission took place.[46] In doing so, the Committee limits itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the Penal Code or under international law.[47] The Committee observes that article 314 (1) of the Penal Code defines the crime of membership of an armed organization as "any person who establishes or commands an armed organization with the purpose of committing the offences listed in parts four and five of this chapter".[48] In light of this broad definition, and in the absence of information from the State party regarding the existence of domestic legal provisions that clarify the criteria used to establish the acts constitutive of the crime defined under article 314 (1) of the Penal Code, the Committee cannot conclude that the author's alleged use of the ByLock application and ownership of an account at Bank Asya amounted to sufficiently clear and predictable criminal offences at the time that the acts took place. The Committee considers that, as a matter of principle, merely using or downloading a means of encrypted communication or owning a bank account cannot indicate, in

[42] Committee's general comment No. 35 (2014), para. 12.

[43] Penal Code, art. 314.

[44] As specifically mentioned by the Court of Cassation in case E. 2017/16-956, K. 2017/370.

[45] See, for example, *Garzón v. Spain* (CCPR/C/132/D/2844/2016), para. 5.15; and *Gimenez v. Paraguay* (CCPR/C/123/D/2372/2014), para. 7.13.

[46] Committee's general comment No. 29 (2001), para. 7.

[47] *Baumgarten v. Germany* (CCPR/C/78/D/960/2000), para. 9.3; and *Garzón v. Spain*, para. 5.14.

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

themselves, evidence of membership of an illegal armed organization, unless supported by other evidence, such as conversation records.[49] In the absence of documentary evidence provided by the State party, the Committee finds, in these circumstances, that the rights of the author under article 15 (1) have been violated.

10.7 The Committee notes the author's allegations that she was not provided with food, water or medication while in police custody and was detained in an overcrowded cell in Eskişehir Type L Prison and Eskişehir Type H Prison, in which she shared a cell designed to hold 7 persons with 14 other inmates. It also notes the author's claims that she slept on a mattress on the floor, and lacked a medically adequate diet, hot water and accessible toilets given her particular health conditions. The Committee notes the State party's argument that Eskişehir Type L Prison is not overcrowded and complies with international standards, as the author stays in a ward with seven bedrooms each measuring 8.83 square metres. It notes the State party's referral to the visit report of the Human Rights and Equality Institution of Turkey to the detention facility, which demonstrates the unfounded nature of the author's claims.

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

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

[49] Mutatis mutandis, European Court of Human Rights, *Akgün v. Turkey* (application No. 19699/18, Judgment, 20 July 2021), para. 173.

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

[51] *Maharjan et al. v. Nepal* (CCPR/C/105/D/1863/2009), para. 8.7.

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

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

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

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

[52] *Lewenhoff and de Bleier v. Uruguay*, communication No. 30/1978, para. 13.3; and *Dermit v. Uruguay*, communication No. 84/1981, para. 9.6.

[53] *Kostin v. Russian Federation* (CCPR/C/119/D/2496/2014), para. 7.2; and *Dorofeev v. Russian Federation* (CCPR/C/111/D/2041/2011). See also the Committee's general comment No. 32 (2007), para. 36.

Annex I

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

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

2. Article 314 of the Penal Code of Türkiye relates to participation in an armed organization to varying degrees (establishment, leadership and membership), the purpose of which is the commission of any of the offences included in the fourth and fifth parts of the chapter in which the provision is inserted. Those fourth and fifth parts include a wide range of offences against the security of the State and against the constitutional order and its functioning.

3. We disagree that the offence of terrorism or membership of an armed organization is too broadly defined in the Penal Code, and that its application by the State party's authorities amounted to a violation of article 15. We are of the opinion that the text is sufficiently precise to ensure that those accused of committing a criminal act thereunder are able to defend themselves and, moreover, there is no substantial difference in the definition of such an offence in Türkiye compared with other legal definitions of terrorism, such as the one included in the Council Framework Decision of 13 June 2002 of the Council of the European Union on combating terrorism or the one provided in Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism.

4. Furthermore, there is no record that, in the domestic proceedings, the author invoked a violation of article 15 of the Covenant on the grounds that the offence with which she was charged was insufficiently precise, which raises an issue of admissibility for such a claim due to the obligation to exhaust domestic remedies first.

5. The Committee concludes that insufficient evidence (use of the ByLock application and ownership of an account at Bank Asya) demonstrates a defective characterization of the offence, but such reasoning involves a confusion of levels: the description of the offence, which takes place at the legislative level, and the assessment of the evidence, which takes place at the judicial level. This is evident in paragraph 10.6 of the Committee's Views, in which it, after stating that the offence encompassed in article 314 of the Penal Code is defined in very broad terms, concludes that the author's use of an encrypted application and her ownership of a bank account is insufficient evidence of membership of an illegal armed organization. The arguments used by the Committee allude to a possible erroneous assessment of the incriminating evidence by the domestic authorities, perhaps contrary to the right to the presumption of innocence – a violation of article 14 (2) of the Covenant, which was not invoked by the applicant – but not really contrary to the principle of legality or criminality under article 15 of the Covenant.

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

7. It is quite another matter that the State party's authorities, relying on article 314 of the Penal Code, acted in violation of the right not to be arbitrarily deprived of liberty (article 9 of the Covenant) and in breach of essential procedural guarantees that are also human rights (article 14 (3) (b), (d) and (e) of the Covenant), violations found by the Committee, with which we fully agree.

Annex II

[Original: Spanish]

Individual opinion of Committee member Hernán Quezada Cabrera (partially dissenting)

1. I share the Committee's view that the facts before it disclose a violation of the author's rights under articles 9 (1), 10 and 14 (3) (b), (d) and (e) of the Covenant. However, I do not agree with the majority's finding of a violation of article 15 of the Covenant.

2. The author was convicted of being a member of an "armed terrorist organization", as defined in article 314 (2), read in conjunction with article 314 (1), of the Penal Code of Türkiye, which penalizes any person who joins an armed organization with the purpose of committing the offences listed in the Penal Code that are offences against the security of the State and against the constitutional order and its functioning. In this connection, the Committee considers that this "broad" definition does not clarify the criteria used to establish the acts constitutive of this crime and that the author's mere use of the ByLock application and ownership of an account at Bank Asya cannot indicate, in themselves, evidence of membership of an illegal armed organization, unless supported by other evidence (see para. 10.6).

3. In my view, such reasoning conflates the principle of legality, as set forth in article 15 of the Covenant, with the evaluation of evidence in criminal proceedings. Debatable as the aforementioned definition of the offence might be, the majority's conclusion was based primarily on the evidentiary issue, which is unconnected with the principle set forth in article 15 of the Covenant. Moreover, according to the Committee's jurisprudence, it is generally for the courts of States parties to evaluate evidence, unless it can be shown that such evaluation was clearly arbitrary or amounted to a manifest error or denial of justice, which was not argued in this case.