

Arrest and Detention of Lawyers in Turkey – Right to Pre-Trial Release

Introduction

1. Lawyers in Turkey are being subjected to arbitrary arrest and detention and judicial harassment for merely defending their clients' rights in politically sensitive cases.
2. As a signatory to the *International Covenant on Civil and Political Rights (ICCPR)* and the *European Convention on Human Rights (ECHR)*, Turkey is legally obligated to ensure that individuals within its territory enjoy, without discrimination, the right to be presumed innocent, the right not to be arbitrarily arrested or detained, the right to pre-trial release and to be brought to trial within a reasonable time and the right to obtain a remedy in relation to any violation of these rights.

Background

3. Cases of judicial harassment against lawyers for merely defending their clients' rights in politically sensitive cases have become frequent in Turkey, because they are either identified with their clients or the cause they defend.¹ "Sensitive" issues include "in particular expressing alternative identities (ethnic and religious minorities' rights, particularly the Kurdish issue, and sexual minorities), and criticising the State and its institutions (the functioning of the institutions, including the independence of the judiciary and the impunity of the State and the army for human rights violations)."²
4. Defence lawyers of imprisoned Kurdistan Workers Party (PKK) leader, Mr. Abdullah Öcalan, have been particularly at risk. Since 2005, more than one hundred criminal cases have been opened against at least 68 of Mr. Öcalan's lawyers for "complicity with a terrorist organisation", based on the violation of Article 314 of the Turkish Penal Code (TPC) and Articles 6 and 7 of the *Anti-Terrorism Law (ATL)*.³
5. The most recent and serious incident is the campaign of arrest, launched on November 22, 2011, that targeted 39 lawyers and one legal worker in the scope of an operation aiming to dismantle an alleged terrorist network known as the Kurdish Communities Union (KCK) - an organisation said to be the "urban branch" of the PKK. 36 lawyers remain in custody and are facing trial 16-18 July 2012 in Istanbul.

¹ The Observatory for the Protection of Human Rights Defenders, *Turkey: Human Rights Defenders, Guilty Until Proven Innocent: International Fact-Finding Mission Report* (May 2012,) at p.36.

² *Ibid.*, at p.5.

³ *Ibid.*, at 36.

6. In a Mission to Turkey in 2007, the Working Group on Arbitrary Detention found numerous persons accused of terrorism held in remand detention for “unacceptably long periods, in some cases more than 10 years, without having been judged.”⁴

7. In 2011, following his visit to Turkey, the Commissioner for Human Rights of the Council of Europe expressed concern about the “the excessive resort to remands in custody and their length, notably in light of the case-law of the ECtHR”.⁵ “The European Court of Human Rights...delivered more than 2200 judgments against Turkey in the period 1995-2010. Almost 700 of these judgments concerned violations of the right to a fair trial, and more than 500 related to the right to personal liberty and security.”⁶ As of September 2011, there were 144 judgments of the European Court of Human Rights under supervision of execution by the Committee of Ministers, primarily concerning the excessive resort to and length of detention on remand.⁷

8. While the Commissioner noted that important reforms have been made to Turkish legislation in recent years in order to bring it into line with European Court of Human Rights standards, many procedural shortcomings are identified in the case-law of the European Court of Human Rights and in the letter and spirit of the Turkish Constitution. The Commissioner noted the following issues: defective reasoning in decisions concerning detention in custody; failure to resort to existing alternatives to detention – bail is almost never accepted by courts; long time limits for detention – while the new Turkish Code of Criminal Procedure (TCCP) introduced upper limits for detention, these are “still very long, especially for crimes against state security”; and lack of an effective domestic remedy and compensation for unlawful detention.⁸

Presumption of innocence

9. Turkey is obligated to respect the presumption of innocence, as set out in the *Universal Declaration of Human Rights (UDHR)*, the *ICCPR* and the *ECHR*:

UDHR, Article 11(1):

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

⁴ Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/4/40/Add.5 7 February 2007, at p.2.

⁵ Council of Europe, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visit to Turkey from 10 to 14 October 2011*, at p.2.

⁶ *Ibid.*, at p.5.

⁷ *Ibid.*, at p.9.

⁸ *Ibid.*, at pp.10-12.

ICCPR, Article 14(2):

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

ECHR, Article 6(2):

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

10. Under the United Nations ***Standard Minimum Rules for the Treatment of Prisoners, Rule 84(2)***, “Unconvicted prisoners are presumed to be innocent and shall be treated as such.”

11. The Human Rights Committee, in its ***General Comment No.13(7)***, noted

7. ... a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

Non-discrimination

12. Turkey must ensure that the international human rights of persons within its territory are enjoyed without distinction of any kind:

Universal Declaration of Human Rights, Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

ICCPR, Article 2(1); Article 26:

1. Each State Party to the present Covenant undertakes to respect and to

ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ECHR, Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

13. The ***United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 5(1)***, states:

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

14. The ***Standard Minimum Rules for the Treatment of Prisoners, Rule 6***, states:

6. (1) The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) On the other hand, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

15. The Human Rights Committee, in its ***General Comment No. 3(1)***, noted that

1. ...the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights...

Right to Liberty and Security of the Person

16. The right to liberty and security of the person underlies the right to be free from arbitrary arrest and detention, as reflected in the following instruments:

UDHR:

Article 3. Everyone has the right to life, liberty and security of person.

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

ICCPR, Article 9 (1) and (2):

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

ECHR, Article 5:

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

17. The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, states:

...

Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

...

Principle 12

1. There shall be duly recorded:

- (a) The reasons for the arrest;
- (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;
- (c) The identity of the law enforcement officials concerned;
- (d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

...

Principle 36(2)

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

...

18. The *Human Rights Committee*, in its **General Comment No. 8(1)**, states that *ICCPR*, Article 9(1)

...is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.

19. The Human Rights Committee has held that the notion of security of the person has a wider field of application to include an obligation to protect non-detained individuals from threats made by persons in authority.⁹ The major human rights treaties require that a deprivation of liberty must in all cases be carried out in accordance with the law and must not be arbitrary. The grounds for arrest and detention must be clearly established by domestic legislation and made in accordance with that law.¹⁰ With respect to “arbitrary arrest”, the Human Rights Committee has explained that

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.⁵ Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹¹

20. The Human Rights Committee has ruled that pre-trial detention may become a violation of the right to liberty and the presumption of innocence where the duration is excessive or is set according to the length of potential sentence or it is applied automatically.¹² Cases in which individuals have been arrested without warrant or summons and kept in detention without a court order have been found to violate the right to freedom from arbitrary arrest and detention in Article 9(1).¹³ Detention should not be of a punitive character.¹⁴

21. The European Court of Human Rights has held that “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) of the *ECHR*

stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the

⁹ *Barbarin Mojica v. Dominican Republic* (449/1991), at para. 5.4; *Bwalya v. Zambia* (314/1988), at para. 6.4.

¹⁰ *Clifford McLawrence v. Jamaica* (702/1996), at para. 5.5; *Dimitry L. Gridin v. Russian Federation* (770/1997), at para. 8.1.

¹¹ *Albert Womah Mukong v. Cameroon* (458/1991), at para. 9.8, reaffirmed, *inter alia*, in *Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria* (1085/2002), at para. 8.3, and *Rafael Marques de Morais v. Angola* (1128/2002), at para. 6.1.

¹² Human Rights Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), at para. 14.

¹³ *Luyeye Magana ex-Philibert v. Zaire* (90/1981), at para. 8.

¹⁴ *De Morais v. Angola*, *supra*, note 17, at para. 6.1.

purpose of Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...¹⁵

22. The European Court of Human Rights has stated that the “reasonableness” of the suspicion on which an arrest must be based forms an essential safeguard against arbitrary arrest and detention:

having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.¹⁶

23. In *Case of Öcalan v. Turkey*, the European Court of Human Rights affirmed its earlier rulings regarding detention of suspected of terrorist offences, in which it recognized that while “the investigation of terrorist offences undoubtedly presents the authorities with special problems...[T]his does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved”.¹⁷

Right to be informed of reasons for arrest and of any charges

24. Turkey is obligated to promptly inform persons arrested and detained of the reasons for their arrest and detention:

ICCPR, Article 9(2):

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

ICCPR, Article 14(3):

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

¹⁵ *Steel and Others v. the United Kingdom* (App. No. 67/1997/851/1058), judgment of 23 September 1998, Reports 1998-VII, p. 2735, at para. 54.

¹⁶ *Fox, Campbell and Hartley v. The United Kingdom* (App no. 12244/86, 12245/86, 12383/86), Series A, No. 182, p.19, at para. 32.

¹⁷ *case of Öcalan v. Turkey*, (App No 46221/99), 12 May 2005, at para. 104.

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay...

ECHR, Article 5(2):

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

25. The Human Rights Committee, in ***General Comment No. 13(8)***, states that Article 14(3) includes

8. ...the right of everyone to be informed in a language which he understands of the charge against him... Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention...the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority... this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such...

26. In ***General Comment No. 3(2)***, the Human Rights Committee states:

2. In this connection, it is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. It is desirable also to give publicity to the State party's cooperation with the Committee.

27. The Human Rights Committee has held that "one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority."¹⁸

28. According to the European Court of Human Rights, Article 5(2) of the *ECHR*

¹⁸ *Campbell v. Jamaica* (248/1987), at para. 6.3.

contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5...by virtue of paragraph 2...any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 (art. 5-4)... Whilst this information must be conveyed "promptly"...it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.¹⁹

Right to be Promptly Brought Before a Judge or Other Judicial Officer and to trial within a reasonable time or release

29. Turkey is obligated to promptly bring persons arrested or detained before a judge or other judicial officer and to trial within a reasonable time or to release:

ICCPR, Article 9(3):

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

ECHR, Article 5(3):

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial...

30. The ***United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment***, state:

...

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

¹⁹ Fox, *Campbell and Hartley v. The United Kingdom*, *supra*, note 16, at para. 40.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

...

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

...

31. The Human Rights Committee's *General Comment No. 8*, states that

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power...delays must not exceed a few days...

3. ...Pre-trial detention should be an exception and as short as possible...

32. The Human Rights Committee has ruled that, while the meaning of the term "promptly" in article 9(3) must be determined on a case-by-case basis, delays should not exceed a few days.²⁰ Judicial power under Article 9(3) must be exercised by an authority which is independent, objective and impartial.²¹

33. The Human Rights Committee has ruled that detention should not continue beyond the period for which the State party can provide appropriate justification.²² It falls first to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end,

they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect

²⁰ *Stephens v. Jamaica* (373/1989), at para. 9.6.

²¹ *Vladimir Kulomin v. Hungary* (521/1992), at para. 11.3.

²² *Salim Abbassi v. Algeria* (1172/2003), at para. 8.4.

for individual liberty and set these out in their decisions on the applications for release...

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also ascertain whether the competent national authorities displayed “special diligence” in the conduct of the proceedings...²³

34. The above reasoning is reflected in the European Court of Human Rights’ decision in *Case of Kevin O’Dowd v. The United Kingdom*.²⁴

35. The European Court of Human Rights has ruled that the “officer” must be independent of the executive and the parties, must hear the individual brought before him in person and must have the power to make a binding order for the detainee’s release²⁵:

Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimize the risk of arbitrariness.²⁶

36. The European Court of Human Rights has held that, under *ECHR*, Article 5(3) “it is the provisional detention of accused persons which must not...be prolonged beyond a reasonable time” and that the end of the period of detention is the day “on which the charge is determined, even if only by a court of first instance.”²⁷

37. In *Case of Cahit Demirel v. Turkey*, the European Court of Human Rights held that the multiple, consecutive detention periods served by the applicant should be regarded as a whole when assessing the reasonableness of the length of detention under Article 5(3) of the Convention.²⁸ The Court criticized the stereotypical reasoning of the State Security Court, which considered the applicant’s detention at the end of every hearing, extending it in each case using “identical stereotyped terms, such as “having regard to the nature of the offence, the state of the evidence and the content of the case file””. While the Court acknowledged that the “state of the evidence” may be relevant for the

²³ *Assenov and Others v. Bulgaria* (App. No. 90/1997/874/1086), Report 1998-VIII, p. 3300, at para. 154.

²⁴ *Case of Kevin O’Dowd v. The United Kingdom*, (Application no. 7390/07) 21 September 2010, Final 21/02/2011, at paras.

²⁵ *Assenov and Others v. Bulgaria*, *supra*, note 23, at para. 146.

²⁶ *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A, No. 145, pp. 31-32, at para. 58.

²⁷ *Wemhoff v. Germany*, (App No. 2122/64), 25 April 1968, at para. 5.

²⁸ *Case of Cahit Demirel v. Turkey*, (App No. 18623/03), 7 July 2009, Final, 07/10/2009, at para. 23.

“existence and persistence of serious indications of guilt” and that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding, “neither the state of evidence nor the gravity of the charges can by themselves serve to justify a length of preventive detention of over six years and four months”.²⁹ The Court further noted that

the Diyarbakır State Security Court failed to indicate to what extent the applicant’s release would have posed a risk after the passage of time, in particular in the later stages of the proceedings. Furthermore, the first-instance court never gave consideration to the application of a preventive measure, such as a prohibition on leaving the country or release on bail, other than the continued detention of the applicant...³⁰

38. In *Case of Erişen and Others v. Turkey*, the European Court of Human Rights held that “domestic courts dealing with requests of release during pre-trial detention must provide the “guarantees of a judicial procedure”, so that the proceedings must be adversarial and must always ensure equality of arms between the parties – the prosecutor and the detainee³¹.

Right to Release Pending Trial

39. A presumption in favour of pre-trial release is contained in the following instruments:

ICCPR, Article 9(3):

3. ... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...

ECHR, Article 5(3):

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be...entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

40. The ***United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 39***, states:

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in

²⁹ *Ibid.*, at para. 23.

³⁰ *Ibid.*, at para. 26.

³¹ *Erişen and Others v. Turkey*, (App No 7067/06), 3 April 2012, at para. 52.

the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

41. The ***United Nations Standard Minimum Rules for Non-custodial Measures (“The Tokyo Rules”)***, state:

...

2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. The number and types of noncustodial measures available should be determined in such a way so that consistent sentencing remains possible.

...

3.1 The introduction, definition and application of non-custodial measures shall be prescribed by law.

3.4 Non-custodial measures imposing an obligation on the offender, applied before or instead of formal proceedings or trial, shall require the offender's consent.

3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

...

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

...

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

...

42. The ***United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)***, Rule 58, states:

Taking into account the provisions of rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible.

43. The Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, expressing serious concern about delays in the criminal justice process and the high proportion of pre-trial detainees among the prison population, among other things, recommended that Member states use pre-trial detention only if circumstances make it strictly necessary and as a last resort in criminal proceedings.³²

44. The Human Rights Committee has reaffirmed its jurisprudence that pre-trial detention should remain the exception and that bail should be granted, “except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party”.³³ The mere assumption by the State party that a detainee would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant.

45. The European Court of Human Rights has ruled that the danger of an accused person’s absconding “cannot be gauged solely on the basis of the severity of the sentence risked”, but “must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial”.³⁴ Nor can “the existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor...alone justify a long period of pre-trial detention”.³⁵

³² Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August – 7 September, 1990, A/Conf.144/28/Rev.1, p.158.

³³ *Aleksander Smantser v. Belarus* (1178/2003), at para. 10.3.

³⁴ *Tomasi v France* (App No 12850/87) (1993) Series A, No 241-A, at para. 98.

³⁵ *Van Der Tang v. Spain* (App No 19382/92) (1995) Series A, No. 321, p. 18, at para. 63.

46. The European Court of Human Rights has found that certain crimes prejudicing public order may justify pre-trial detention.³⁶ However, the Office of the UN High Commissioner for Human Rights has challenged the notion of “public order” as a justification for pre-trial detention in a democratic society governed by the rule of law.³⁷

Right to Speedy Review of Lawfulness of Detention

47. Turkey is obligated to ensure that persons arrested or detained are entitled to take proceedings to challenge the lawfulness of their detention:

UDHR, Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

ICCPR, Article 2(3)

3. Each State Party to the present Covenant undertakes:
- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICCPR, Article 9(4):

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

³⁶ *Tomasi v. France*, *supra*, note 34, at para. 91.

³⁷ Office of the UN High Commissioner for Human Rights in association with the International Bar Association (2003), *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), p.194.

ECHR, Article 5(4):

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

48. The ***United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*** state:

...

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

...

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

49. The Human Rights Committee has found a violation of Article 9(4) when a person was held incommunicado and effectively barred from challenging his arrest and detention.³⁸ An appeal against a detention order to the Minister of the Interior does not satisfy the requirement in Article 9(4) to have the detention reviewed by a court, “so as to ensure a higher degree of objectivity and independence in such control”.³⁹

³⁸ *Guillermo Ignacio Dermot Barbato et al. v. Uruguay* (84/1981), at para. 10.

³⁹ *Mario Inés Torres v. Finland* (291/1988), at para. 7.2.

50. The “lawfulness” of a detention under Article 5(4) of the *ECHR* must be determined in the light not only of domestic law, but also the text of the Convention.⁴⁰ A person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention.⁴¹

51. In *Case Of Firat Can v. Turkey*, the European Court of Human Rights ruled that “complaints concerning the lack of effective remedies by which to challenge the lawfulness of the pre-trial detention should be examined under Article 5 § 4 of the Convention, which provides a *lex specialis* in relation to the more general requirements of Article 13”.⁴² In *Case of Çatal v. Turkey*, the Court held that, “In the context of the review of a detained person’s continued detention pursuant to Article 5 § 4 of the Convention, the proceedings must be adversarial and must ensure “equality of arms” between the parties, namely the prosecutor vis-à-vis the detained person.”⁴³

Right to Compensation for Unlawful Deprivation of Liberty

52. Turkey has an obligation to ensure that individuals deprived of their liberty through unlawful arrest or detention are compensated:

ICCPR, Article 9(5):

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

ECHR, Article 5(5):

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

53. The *United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Rule 35, states:

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

⁴⁰ *Brogan v. UK*, *supra*, note 26, at para. 65.

⁴¹ *Assenov and Others v. Bulgaria*, *supra*, note 23, at para. 162.

⁴² *Firat Can v. Turkey* (App No 6644/08), 24 May 2011, Final 24/08/2011, at para. 52.

⁴³ *Çatal v. Turkey*, (App No 26808/08), 17 April 2012, at para. 32.

54. In *Case of Sahap Doğan v. Turkey*, the European Court confirmed its earlier findings that changes to the TCCP that provide for the re-examination by a judge of the need for continued detention on remand, both periodically (every thirty days) and spontaneously at the request of the suspect or the accused person, and the possibility of compensation for unlawful detention, did not provide an adequate remedy for challenging the lawfulness of detention and, as a demand for compensation may not be made until the end of legal proceedings, this remedy is also not available where, as in this case, the domestic proceedings are still pending.⁴⁴

This summary is presented jointly by Lawyers Rights Watch Canada, the Observatory for the Protection of Human Rights Defenders, a joint programme of the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT) and Lawyers for Lawyers.

Created in 1997 by FIDH and OMCT, the Observatory for the Protection of Human Rights Defenders, is one of the leading global programme for the protection of human rights defenders.

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⁴⁴ *Sahap Doğan v. Turkey*, (App No 29361/07), 27 May 2010, at paras. 32-33.