

# Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them

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Tuesday, May 08, 2018

Mr. Abdulhamit Gül  
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Dear Minister of Justice Gül,

## **Re: International law obligations to release Eren Keskin**

We are writing on behalf of Lawyers Rights Watch Canada (LRWC), a committee of Canadian lawyers who promote human rights and the rule of law internationally. LRWC also provides support to lawyers and other human rights defenders in danger because of their advocacy.

LRWC is gravely concerned regarding the continuing and unjust persecution of Turkish lawyer Eren Keskin. Ms. Keskin has been convicted on criminal charges that are illegitimate and unfounded and faces numerous other charges that are equally baseless, which could result in a cumulative and extremely lengthy prison term that effectively could see Ms. Keskin die in prison.

### **Background of Ms. Keskin**

Ms. Keskin, 59 years of age, is a lawyer and co-president of the Human Rights Association in Turkey (İHD). Having worked on contested human rights issues for almost thirty years, Keskin has contributed significantly to the protection of minority rights, countered violence against women, and campaigned to end torture and challenge militarism. Ms. Keskin is also the founder of Legal Aid For Women Who Were Raped Or Otherwise Sexually Abused by National Security Forces a legal office providing *pro bono* services for trans-persons and women who were raped or sexually abused in prison.

Ms. Keskin is an internationally recognized human rights defender. She is an honorary member of the Paris Bar Council, and the winner of multiple international awards for her peace and human rights work, including the 2018 Helsinki Civil Society Award.

In support of the right of freedom of expression and as a symbolic gesture of support for the imprisoned editorial staff, from 2013 to 2016 Ms. Keskin held the title of 'editor-in-chief' for *Özgür Gündem*, one of the few independent newspapers in Turkey critical of the government and known for its extensive reporting on the Kurdish-Turkish conflict.

### **The Charges, Convictions, and Ongoing Persecution of Ms. Keskin**

In retaliation for her human rights activities, Ms. Keskin has been subjected to multiple instances of persecution and harassment, including assassination attempts and criminal prosecutions based on overly broad and vague charges that preclude both advance notice and defense. An accused person facing such charges can only know the specific act(s) or expression(s) prohibited after a court has arbitrarily made that determination. A past example, in 1995, Ms Keskin was sentenced and imprisoned for using the word

*Kurdistan*. Today, again, Ms. Keskin is at immediate risk of exorbitant fines and lengthy imprisonment—possibly for the rest of her life—for peacefully and lawfully exercising her professional duties as a lawyer and as an editor and her rights to freedom of expression and to engage in public debate.

Due to her title as ‘editor-in-chief’, over 120 cases have been lodged against her in Turkish courts. Ms. Keskin was criminally charged for news and articles by other authors exercising their right to freedom of expression. According to the Turkish Press Law, editors-in-chief can be indicted for publications in cases when the responsible authors cannot be criminally charged. Six of these cases have already resulted in wrongful convictions with all appeal options exhausted. The convictions are for overly broad and vague charges of ‘insulting the President’ and ‘failure to publish article corrections in the newspaper’. Fines of nearly €14,500 (TL 72,000) have been imposed on Ms. Keskin. Failure to pay the outstanding monetary fines would result in approximately 8,5 years of imprisonment.

In a further 69 cases, Ms. Keskin has been pronounced guilty but the cases remain under review before the Court of Appeals or the Supreme Court. Unless the decisions of the courts of first instance are reversed, a cumulative sentence of 12.5 years and fines of approximately € 93,000 (TL 460,000) may be imposed on Ms. Keskin, in relation to following overly broad and vague charges:

- a. ‘spreading propaganda for an armed terrorist organisation’ (*Law on Fight against Terrorism, Article 7(2)*),
- b. ‘denigrating the Turkish nation, the Republic of Turkey, institutions and organs of the State’ (*Turkish Criminal Code, Article 301*),
- c. ‘insulting the President’ (*Turkish Criminal Code, Article 299*), ‘failure to publish article corrections in the newspaper’ (*Press Law, Article 18*),
- d. ‘revealing the identity of the accused’ (*Press Law, Article 21(c)*), and ‘insult’ (*Turkish Criminal Code, Article 125*).

Court sessions in trials related to her title as the ‘editor-in-chief’ of *Özgür Gündem* were scheduled for May 3 and 7, 2018. Additionally, Ms. Keskin is one of the nine defendants, including advisory board members, journalists and the editorial director of *Özgür Gündem*, in another ongoing prosecution, which includes so-called terrorism-related offences. The charges in this case could result in a sentence of up to 24 years in prison. The next court session in this case is scheduled for June 4, 2018.

In addition to the mounting indictments, Ms. Keskin’s ongoing work as a human rights lawyer is being challenged as well. The legal team of the Office of the President of Turkey has filed an application to the Istanbul Bar Association to impose disciplinary measures on Ms. Keskin, which may result in disbarment. A travel ban has also been imposed on Ms. Keskin

The Penal Code of Turkey does not define what constitutes an armed terrorist organization or the criteria for what constitutes membership and, absent any definition, it therefore can be, and has been, arbitrarily used to criminalize a wide range of legal activities including the exercise of internationally protected rights.

This provision of the Penal Code has been widely misused by the Government of Turkey to arbitrarily arrest and detain and wrongfully convict lawyers acting for clients or causes unpopular with the authorities or otherwise seen as government critics. The vague formulation and broad interpretation of the law by the Turkish government puts all lawyers and other human rights defenders at risk of arbitrary detention. Targeting of lawyers and others with politically motivated prosecutions, illegitimate charges and arbitrary detention has become widespread and systematic in Turkey since July 2016.

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<sup>1</sup> *Özgür Gündem* was shut down in August 2016 by a court order following the *coup d’etat* attempt in Turkey, while several criminal charges were brought against its journalists and editors. More than 100 persons voluntarily named themselves as editor-in-chiefs on a rotating basis.

The above noted charges against Eren Keskin violate the international criminal law principle of legality<sup>2</sup> that provides that no crime or punishment can exist without a legal ground.<sup>3</sup> The principle of legality ensures that a person must be discharged if there is no law that codifies the offense, there is a silence on the offence or there is a lack of law on the offence.<sup>4</sup> The principle of legality is a general principle of international law.<sup>5</sup>

### **Nullum crimen sine lege (overlaps with some aspects of the principle of notice )**

International law provides that a person can only be held criminally responsible for an act that has already been determined in law—prior to the impugned act(s)—to be a crime and for which already there exists a penalty. A person must be able to know in advance what is unlawful so that s/he can inform their actions. The rule of *nullum crimen sine lege* overlaps with the principle of notice. A person cannot be convicted for acts against which there are no enforceable laws<sup>6</sup> and thus no notice of what is unlawful either before the impugned act takes place or before trial. Where any ambiguity exists in the definition of an offense, it must be interpreted in the interest of the defendant.<sup>7</sup> The European Court of Human Rights (ECtHR) applies an “accessibility and foreseeability” test; in order for an offence to be knowable to an offender, the provisions must be both “foreseeable” and “accessible.”<sup>8</sup> See:

- Kononov case,<sup>9</sup>
- Lubanga case<sup>10</sup>
- Vasiljevic case<sup>11</sup>

This requirement of certainty and notice has its basis in customary international law<sup>12</sup> and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)<sup>13</sup>
- International Covenant on Civil and Political Rights (ICCPR) (1966), Article 15
- European Convention on Human Rights and Fundamental Freedoms (ECHR) (1950), Article 7
- Rome Statute of the International Criminal Court, Article 22<sup>14</sup>
  - Erdemovic case,<sup>15</sup>
  - Delalic case<sup>16</sup>

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<sup>2</sup> Crisan, Iulia, “The Principle of Legality “*Nullum crimen, nulla poena sine lege*” and Their Role” in Effectus Newsletter, Issue 5 (2010); Olasolo, Hector, “A Note on the Evolution of the Principle of Legality in International Criminal Law” in Criminal Law Forum 18:301-319 (2007)

<sup>3</sup> Lincoln, Jennifer, “*Nullum Crimen Sine Lege* in International Criminal Tribunal Jurisprudence: the problem of the residual category of crime,” 7 Eyes on the ICC 137 2010-2011

<sup>4</sup> Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

<sup>5</sup> Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

<sup>6</sup> Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

<sup>7</sup> Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

<sup>8</sup> Wilt, Harmen van der, “Nullum Crimen and the International Criminal Law: The Relevance of the Foreseeability Test” in Nordic Journal of International Law 84 (2015) 515-531

<sup>9</sup> *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 ehrc, Vol. 11, 129.

<sup>10</sup> *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

<sup>11</sup> *Prosecutor v Vasiljevic*, 29 November 2002, iccy Trial Chamber (tc), no. it-98-32-T.

<sup>12</sup> Wharton, Sara, “The Evolution of International Criminal Law: Prosecuting “New” Crimes Before the Special Court for Sierra Leone” in International Criminal Law Review 11 (2011) 217-239

<sup>13</sup> UDHR, Article 11: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”<sup>13</sup>

<sup>14</sup> Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013); Olasolo, Hector, “A Note on the Evolution of the Principle of Legality in International Criminal Law” in Criminal Law Forum 18:301-319 (2007)

<sup>15</sup> *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996)

<sup>16</sup> *Prosecutor v Delalic*, Case No. IT-96-21-T, Judgment 1209-12 (Nov. 16, 1998)

## **International Human Rights Law Obligations**

LRWC urges you to comply with Turkey's obligations under international human rights laws, including the United Nations' (UN) *Basic Principles on the Role of Lawyers*.

Article 16 of the *Basic Principles on the Role of Lawyers* states:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economics or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Article 18 states:

Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

Article 23 provides:

Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization.

As a party to the ICCPR<sup>17</sup>, the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the ECHR,<sup>18</sup> Turkey is legally obligated to ensure that individuals within its territory enjoy, without discrimination, rights to: be presumed innocent, freedom from arbitrary arrest or detention, pre-trial release and to trial within a reasonable time and the right to obtain a remedy in relation to any violation of these rights. As Turkey is a member of the Council of Europe, the relevant recommendations of the Committee of Ministers on pre-trial detention and release also apply.

Turkey is obliged to ensure for Eren Keskin and others freedom from prosecution for charges that fail to comply with international requirements of certainty and therefore contravene the requirement under the ICCPR of notice of charges, right to prepare a defense and freedom from ex post facto offences. Detention based on such charges is arbitrary and unlawful.

In addition, arrests and detentions by Turkish authorities must comply strictly with the requirements of the ICCPR and the ECHR. The ECtHR has held in relation to the lawfulness of arrest and detention, that "lawful" and "in accordance with a procedure prescribed by law" in Article 5(1) of the ECHR requires,

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

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<sup>17</sup> International Covenant on Civil and Political Rights, 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, online at: <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>18</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>.

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...<sup>19</sup>

Similarly, the UN Human Rights Committee (HR Committee) has clarified that “remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances”<sup>20</sup> and that “[p]re-trial detention should be an exception and as short as possible”<sup>21</sup> and must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.<sup>22</sup> The HR Committee, affirmed 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”... The mere assumption by a State party that the author 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.<sup>23</sup>

LRWC urges the Government of Turkey to:

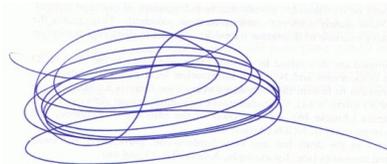
- a. immediately and unconditionally release Ms. Keskin;
- b. immediately and unconditionally withdraw all charges against Ms. Keskin;
- c. immediately stay all prosecutions of Me Kerskin including those referred to in this letter;
- d. vacate all convictions of Ms. Keskin and the sentences imposed;
- e. put an end to all acts of harassment against Ms. Keskin
- f. ensure that all lawyers, journalists and other human rights defenders in Turkey can carry out their professional duties and activities without fear of reprisals, physical violence or other human rights violations; and
- g. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments, including the ICCPR and the ECHR.

Thank you for your prompt attention to this important matter.

All of which is respectfully submitted:



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Gail Davidson, LRWC Executive Director

<sup>19</sup> *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

<sup>20</sup> This is from the LRWC paper of 13 July 2012, “Arrest and Detention of Lawyers in Turkey,” para. 19, which does not seem to have an accurate citation for this particular quote.

<sup>21</sup> CCPR General Comment No. 8, supra note 31, at para. 3.

<sup>22</sup> Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8

<sup>23</sup> Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3

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