

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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August 8, 2019

Mr. Abdulhamit Gül
Minister of Justice
06659 Kizilay
Ankara, Turkey
Tel: +90 (0312) 417 77 70
Email: info@adelet.gov.tr

Re: International law obligations to release lawyer Nurullah Albayrak

Dear Mr. Gül,

We write on behalf of Lawyers' Rights Watch Canada (LRWC), a committee of lawyers and human rights defenders who promote international human rights, the independence and security of human rights defenders, the integrity of legal systems and the rule of law through advocacy, education and legal research. LRWC has Special Consultative Status with the Economic and Social Council of the United Nations.

LRWC has written in the past with respect to various Turkish lawyers and human rights defenders who have been detained, arrested, charged, and/or imprisoned in violation of Turkey's international human rights law obligations and Turkey's own Constitution. Communications to the Government of Turkey have been made by LRWC regarding the cases of: Eren Keskin, Selçuk Kozağaçlı, Şebnem Korur Fincancı, Ramazan Demir, Mustafa Aydın, Can Tombul, Taner Kilic and numerous other Turkish lawyers. LRWC has also made oral and written statements to the UN Human Rights Council and submissions to the UN Human Rights Council and Special Procedures regarding widespread persecution of lawyers, journalists and other human rights defenders through wrongful prosecutions and convictions, arbitrary detention and other grave rights violations.

We have just been advised that the Ankara Regional Appeal Court has upheld the sentence given to Mr. Gulen's lawyer, Nurullah Albayrak, who is the member of the Ankara Bar Association. The Regional Appeal Court upheld the two-year prison term given by the Ankara 9th Heavy Penal Court. His conviction and the sentence are contrary to international human rights law, contrary to Turkey's constitution, and are a travesty of justice. The alleged crimes that underlie his conviction are in fact not crimes under Turkish law, and would not be considered crimes in any country governed by the rule of law. We urge you to intervene.

Background of this Case

We are advised that the conviction was based on a petition, dated 9 July 2014, which Mr. Nurullah Albayrak had filed with the General Directorate of Security in July 2014. In that petition, Mr. Nurullah Albayrak reportedly urged the law enforcement officers not to comply with illegal orders which could eventually result in their criminal liability, and urged them to only comply with the law. Based upon Mr. Albayrak's petition, an indictment dated 17 September 2015 was issued against him with the charge of professional misconduct and he was convicted by Ankara 9th Heavy Penal Court on 29 September 2016 in absentia.

In a separate case, life imprisonment is being sought for Albayrak for leading an armed terrorist organization.

Legal Analysis

1. The Role of Lawyers

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.

The basis of the conviction of Mr. Nurullah Albayrak, as stated, is that he reportedly urged law enforcement officers to comply only with legal orders. Presumably, that same instruction would have been given to all law enforcement officers as part of their training, and should be part of the policies and procedures applicable to all government employees. It appears to be an innocuous and harmless reiteration of government policy. There is no conceivable justification for convicting a lawyer of professional misconduct for making a statement of that nature.

It appears that Mr. Albayrak has been targeted, charged, convicted and sentenced for doing nothing more than fulfilling his duties as a lawyer, which is to advocate on behalf of his clients and to seek to uphold the rule of law in Turkey. No doubt he has been persecuted because of his legal representation of an accused who is politically unpopular with the Turkish Government.

2. Legality and Vagueness

The pending charges against Mr. Albayrak, i.e., allegedly leading an armed terrorist organization, violate the international criminal law principle of legality.¹ No crime or punishment can exist without a legal ground.² 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.³ The principle of legality is a general principle of international law,⁴ to which Turkey is bound in accordance with the above-referenced covenants and conventions.

¹ 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)

² 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

³ Ja'far Habibzadeh, Dr. Mohammad, "*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system," 2 IJPS 33 2006

⁴ Sekuloski, Dr. Branko, "International Criminal Court," in European Scientific Journal vol.9, no. 28 (2013)

Neither the Penal Code in Turkey nor the *Law on Fight against Terrorism* 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 law is illegitimate by any international standard.

In a 2017 opinion concerning Turkey, the WGAD found that the investigation and prosecution of 10 individuals associated with the Turkish daily newspaper *Cumhuriyet*, under anti-terrorist law, Act No. 3713, for “aiding terrorist organizations, in accordance with the organizational aims of these organizations, without being a member”, violated the principle of legality due to the vagueness of the provision.⁵ The Working Group warned that

Vaguely and broadly worded laws have a chilling effect on the exercise of the right to freedom of expression with its potentials for abuse as they violate the principle of legality as codified in article 11 (2) of the Universal Declaration of Human Rights and [ICCPR] article 15 (1)....

[and that] anti-terrorism laws ‘by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention’ with the consequence that ‘[I]llegitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws’.⁶

The Turkish Penal Code has been used by Turkey to arbitrarily arrest, detain, and 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 prosecutors and courts puts all lawyers and other human rights defenders at risk of arbitrary detention. Targeting of lawyers and others has become common since the attempted coup on July 2016. In March 2019, 18 lawyers were sentenced to a total of 160 years in prison by Istanbul 37th Assize Court under Article 314 of the Penal Code. The Arrested Lawyers Initiative reports that between July 2016 and 5 June 2019, 1,546 lawyers have been prosecuted, 599 have been arrested, and in some cases subjected to torture and ill-treatment and 311 sentenced to a total of 1967 years in prison.

2. Certainty and Notice

The principle of legality includes the requirement of certainty (*nullum crimen sine lege*), that a person can only be held criminally responsible for an act that has already been determined in law 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 concept of *nullum crimen sine lege* overlaps with the principle of notice. A person cannot be convicted for acts against which there are no enforceable laws⁷ (and thus no capability of having notice of what is unlawful.) Where ambiguity exists in the definition of an offense, it must be interpreted in the interest of the defendant.⁸ 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.”⁹ See the *Kononov* case,¹⁰ the *Lubanga* case¹¹ and the *Vasiljevic* case.¹²

⁵ HRC, Working Group on Arbitrary Detention, Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), 26 July 2017, A/HRC/WGAD/2017/41, para. 101.

⁶ HRC, Working Group on Arbitrary Detention, Opinion No. 41/2017 concerning 10 individuals associated with the newspaper *Cumhuriyet* (Turkey), 26 July 2017, A/HRC/WGAD/2017/41, paras. 98-99. See also, HRC Working Group on Arbitrary Detention, Opinion No. 20/2017 concerning Musallam Mohamed Hamad al-Barrak (Kuwait), 19-28 April 2017, A/HRC/WGAD/2017/20, paras. 50-51.

⁷ Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

⁸ Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

⁹ 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

¹⁰ *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 ehrc, Vol. 11, 129.

¹¹ *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

¹² *Prosecutor v Vasiljevic*, 29 November 2002, icty Trial Chamber (tc), no. it-98-32-T.

The principle of legality has its basis in customary international law¹³ and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)¹⁴
- 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 22¹⁵
- Erdemovic case,¹⁶
- Delalic case¹⁷

Turkey is obliged to ensure freedom from prosecution for charges that fail to comply with international requirements of certainty and legality and contravene the requirement under the ICCPR of notice.

Conclusion

LRWC urges the Government of Turkey to:

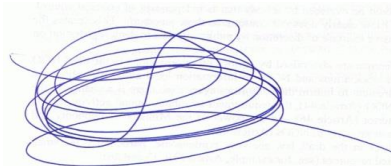
- a. immediately and unconditionally withdraw all charges against Mr. Albayrak;
- b. immediately vacate all convictions of Mr. Albayrak and the sentences imposed;
- c. put an end to all acts of harassment against Mr. Albayrak;
- d. ensure that all lawyers, journalists and other human rights defenders in Turkey can carry out their professional duties and activities without fear of reprisals, physical violence or other human rights violations; and
- e. 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:



Brian M. Samuels, QC,
Barrister and Solicitor (BC, Canada)



Gail Davidson, LRWC Executive Director

¹³ 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

¹⁴ 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."¹⁴

¹⁵ 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)

¹⁶ Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996)

¹⁷ Prosecuor v Delalic, Case No. IT-96-21-T, Judgment 1209-12 (Nov. 16, 1998)

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