

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

www.lrwc.org – lrwc@portal.ca – Tel: +1 604 738 0338 – Fax: +1 604 736 1175
3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

Tuesday, October 22, 2019

Mr. Abdulhamit Gül
Minister of Justice
06659 Kizilay
Ankara, Turkey
Tel: +90 (0312) 417 77 70
Fax: +90 (0312) 419 33 70
Email: info@adelet.gov.tr

Re: International law obligations to release Contemporary Lawyers' Association (ÇHD) lawyers

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: Nurullah Albayrak, 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 prosecutions, convictions, arbitrary detentions and other grave human rights abuses in violation of international law.

LRWC has just been advised that on 16 October 2019 the İstanbul Regional Court of Justice 2nd Penal Chamber (Court of Appeals) has rejected the appeals and confirmed the sentences imposed in March 2019 by the Istanbul 37th Heavy Penal Court on lawyers who are members of the Contemporary Lawyers' Association (ÇHD). The convictions and sentences are contrary to international human rights law, contrary to Turkey's constitution, and contrary to basic principles of fairness and justice. The alleged crimes that underlie these convictions would not be considered crimes in any country governed by the rule of law. We urge you to intervene to ensure the release of those sentenced and the vacation and nullification of the convictions and sentences imposed.

An international delegation of lawyers who observed the March 2019 court proceedings that imposed the convictions and sentences, concluded that the, “trial is completely null and void” and called for, “the immediate acquittal of all defendants, to be attained through all possible judicial and legal means.”¹

Background of this Case

This case involves the sentencing of 20 ÇHD lawyers. The six lawyers, sentenced to less than five years in prison do not have the right to any further appeal. ÇHD lawyers sentenced to more than five years in prison, have a right to appeal to Turkey’s Supreme Court of Appeal.

Sentences confirmed by the Court of Appeals are below. Two of the lawyers have not been sentenced as they were not present and have been designated as ‘fugitives’.

1. Selçuk Kozağaçlı - 11 years and 3 months in prison for membership in a terrorist organization;
2. Engin Gökoğlu - 10 years and 6 months in prison for membership in a terrorist organization;
3. Aycan Çiçek - 9 years in prison for membership in a terrorist organization;
4. Ahmet Mandacı - 2 years, 13 months and 15 days in prison for "willingly and knowingly aiding a terrorist organization," under the Turkish Penal Code, Articles 314-3 and 227-2;
5. Zehra Özdemir - 2 years, 13 months and 15 days in prison for "willingly and knowingly aiding a terrorist organization," under the Turkish Penal Code, Articles 314-3 and 227-2;
6. Ayşegül Çağatay - 3 years and 9 months in prison for "willingly and knowingly aiding a terrorist organization," upon the Articles 314-3 and 227-2 of the Turkish Penal Code;
7. Yağmur Ereren - three years, 9 months in prison for "willingly and knowingly aiding a terrorist organization," upon the Articles 314-3 and 227-2 of the Turkish Penal Code;
8. Didem Baydar Ünsal - 3 years, 9 months in prison for "willingly and knowingly aiding a terrorist organization," upon the Articles 314-3 and 227-2 of the Turkish Penal Code;
9. Yaprak Türkmen - three years, 9 months in prison for "willingly and knowingly aiding a terrorist organization," upon the Articles 314-3 and 227-2 of the Turkish Penal Code;
10. Özgür Yılmaz - 13 years and 6 months for membership in a terrorist organization/;
11. Şükriye Erden - 12 years in prison for membership in a terrorist organization;
12. Oya Aslan – designated a fugitive and case still open;
13. Günay Dağ – designated a fugitive and case still open;
14. Süleyman Gökten - 10 years and 6 months in prison for membership in a terrorist organization;
15. Naciye Demir - 9 years in prison for membership in a terrorist organization;
16. Ezgi Çakır - 8 years possibly changed to house arrest for membership in a terrorist organization;
17. Aytac Ünsal – 10 years and 6 months for membership in a terrorist organization;
18. Behiç Aşçı – 12 years in prison for membership in a terrorist organization;;
19. Barkın Timtik – 18 years and 9 months for founding and managing a terrorist organization.
20. Ebru Timtik – 13 years and 6 months for membership in a terrorist organization;

In some cases, for example in the case of Selçuk Kozağaçlı, the sentenced lawyer was never given the opportunity to look at his case file, which is a violation of basic principles of fundamental justice.

Six of the lawyers were sentenced for “willingly and knowingly aiding terrorist organization”, contrary to Articles 314-3 and 227-2 of the Turkish Penal Code; eleven for “membership in a terrorist organization and one for founding and managing a terrorist organization.. Such charges are commonly made against lawyers providing legal representation to persons accused of being members of a terrorist organization or threatening national security. In other words, merely by fulfilling the critical duty to provide a legal defence to accused persons, these lawyers are charged with similar or matching offences. As explained below, that contravenes the United Nations’ (UN) *Basic Principles on the Role of Lawyers*, adopted by

¹ *A travesty of justice - 18 Turkish lawyers sentenced to long prison terms, 159 Years, 1 Month, 30 Days in Total*, European Association of Lawyers for Democracy and Human Rights, 20 March 2019, at <https://eldh.eu/wp-content/uploads/2019/03/Statement-conviction-of-18-CHD-lawyers-1.pdf>

the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, with respect to which Turkey is obligated to comply.

Ten of these lawyers have been sentenced to prison terms of between 9 and 13.5 years. In addition to the fact that the sentences lack a legal justification, they are draconian and grossly excessive. The sentences are clearly designed to discourage lawyers from representing clients who are accused of terrorism-related or political crimes by imprisoning those providing such legal representation. That is contrary to the principles espoused in Turkey's constitution, which guarantees the rights of all accused persons to legal representation.

Legal Analysis

1. The Role of Lawyers

LRWC urges adherence 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, economic 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.

It has become common practice in Turkey for lawyers defending journalists, human rights activists, and those accused of being members of the PKK, to be charged with terrorist-related crimes. The criminalization of lawyers' professional obligations is contrary to international laws and standards including the Basic Principles. In addition, the Penal Code terrorism provisions are too vague and broad to constitute legitimate criminal offences that can provide a legal justification for prosecution, conviction or sentencing.

2. Legality and Vagueness

All the terrorism-related charges referred to above violate the international criminal law principle of legality and therefore cannot provide a legal justification for conviction or deprivation of liberty.² No crime or punishment can exist without a legal ground.³ 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 offense or there is

² 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)

³ 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

a lack of law on the offence.⁴ The principle of legality is a general principle of international law,⁵ to which Turkey is bound in accordance with the above-referenced covenants and conventions.

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.⁶ 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 ‘[l]egitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws’.⁷

The Organization for Security and Cooperation in Europe (OSCE) Guidelines on the Protection of Human Rights Defenders, states:

25. Legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work, should be amended or repealed. Full due process protections, in line with international fair trial standards, must be ensured.

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. The *Arrested Lawyers Initiative* reports that as of 1 September 2019, more than 1500 lawyers have been prosecuted and 599 lawyers arrested. So far, 321 lawyers have been sentenced to 2022 years in prison on the grounds of membership of an armed terrorism organization or of spreading terrorist propaganda.

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

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

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

⁶HRC, 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.

⁷ 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.

notice. A person cannot be convicted for acts against which there are no enforceable laws⁸ (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.⁹ 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.”¹⁰ See the *Kononov* case,¹¹ the *Lubanga* case¹² and the *Vasiljevic* case.¹³

The principle of legality has its basis in customary international law¹⁴ and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)¹⁵
- 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 22¹⁶
- Erdemovic case,¹⁷
- Delalic case¹⁸

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.

Lack of Independent Judiciary

Turkey’s Constitution, specifically § 9, guarantee judicial independence:

“Judicial power shall be exercised by independent courts on behalf of the Turkish Nation”.

This is also a basic principle of international law, as guaranteed by the ICCPR, ECHR and codified in the UDHR, Article 10:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Beginning in 2010, Turkey amended its rules relating to the appointment of judges and prosecutors, and instituted mass reassignments and dismissals of judges with individuals who were more sympathetic to the government. By October 2014, the Turkish government secured control of the judiciary. By July 16, 2016, 2745 judges and prosecutors were suspended.

⁸ Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

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

¹⁰ 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

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

¹² *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

¹³ *Prosecutor v Vasiljevic*, 29 November 2002, ICTY Trial Chamber (TC), no. it-98-32-T.

¹⁴ 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

¹⁵ 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.”¹⁵

¹⁶ 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)

¹⁷ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996)

¹⁸ *Prosecutor v Delalic*, Case No. IT-96-21-T, Judgment 1209-12 (Nov. 16, 1998)

A 2017 comprehensive report by the Platform for Peace and Justice (a human rights organization based in Brussels) outlines and documents the erosion and eventual abolition of the rule of law in Turkey, as a result of the dismissal, reassignment, intimidation, and replacement of judges.

It is not surprising that the 19 ÇHD lawyers were sentenced, given that the judges in their cases were handpicked by the Turkish government, which is intent on intimidating lawyers into not accepting clients charged with terrorism offenses or human rights defenders. Conviction and sentencing by a tribunal that is not independent should not be allowed to stand, and on that basis alone the sentences should be vacated.

Conclusion

LRWC urges the Government of Turkey to comply with its international law obligations and to take all measures necessary to ensure:

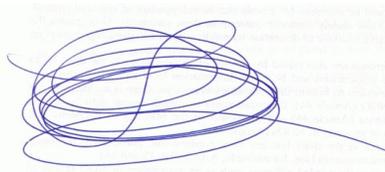
- a. Vacation and nullification of the convictions and sentences imposed on each of the lawyers named in this letter and affirmed by the Court of Appeals;
- b. The immediate and unconditional release of all the lawyers named in this letter;
- c. That all lawyers, journalists and other human rights defenders in Turkey can carry out their professional duties and activities without fear of reprisals, physical violence or other human rights violations including prosecutions and trials that do not comply with international law obligations; and
- d. Respect for human rights and fundamental freedoms of all lawyers and human rights defenders in Turkey 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

Copied to:

His Excellency Mr. Ali Naci Koru
Ambassador Extraordinary and Plenipotentiary
Permanent Representative
Chemin du Petit-Saconnex 28B
1211 Geneva 19
Tel: +41 22 918 50 80
Email: turkey.unog@mfa.gov.tr

Selçuk Ünal
Ambassador of Turkey to Canada
197 Wurtemberg Street
Ottawa, Ontario K1N 8L9
Canada
Tel: +1 (613) 244 24 70
Email: embassy.ottawa@mfa.gov.tr

Chris Cooter
Ambassador of Canada to Turkey, Georgia, Azerbaijan and Turkmenistan
Consulate General of Canada
209 Buyukdere Caddesi
Tekfen Tower
Levent 4, Istanbul
34394 Turkey
Tel: 90-212-385-9700
Email: ISTBL-CS@international.gc.ca

Special Rapporteur on the situation of human rights defenders
Mr. Michel Forst
defenders@ohchr.org

Special Rapporteur on the independence of the judges and lawyers
Mr. Diego Garcia-Sayan
SRindependenceJL@ohchr.org

Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Mr. David Kaye
freedex@ohchr.org

Working Group on Arbitrary Detention

Mr. José Guevara
Ms. Leigh Toomey
Ms. Elina Steinerte
Mr. Sètondji Adjovi
Mr. Seong-Phil Hong
wgad@ohchr.org