

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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Re: International law obligations to release Lawyers and others Illegally Imprisoned

Dear Mr. Erdoğan and 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.

On 13 April 2020, Turkey passed an enactment to allow the temporary release of 45,000 prisoners and the permanent release of an additional 45,000. Over 50,000 prisoners convicted or charged with alleged 'terrorism' offences are excluded from release. Overly broad anti-terrorism charges, such as Articles 220 and 314 of the Penal Code of Turkey, have been widely used to arbitrarily arrest, detain and convict thousands of people who peacefully exercise internationally protected rights including the right to freedom of expression. These people who were denied fair trials, unlawfully convicted and arbitrarily detained now face the potential infection of the lethal COVID-19.

LRWC calls on the Government of Turkey (Turkey) for the permanent release of all those convicted or detained under Articles 220, 227 and 314 of the Penal Code of Turkey.

LRWC agrees with Amnesty International that the excluded prisoners convicted of overly broad anti-terrorism charges now face the likelihood of contracting possible lethal COVID-19. LRWC joins Amnesty International to call on Turkey to "do the right thing and immediately release those who are imprisoned solely for expressing their peaceful views."

The Spread of Coronavirus in Turkey

As of 16 April 2020, Turkey has reported 74,193 confirmed cases of the coronavirus, with 1,643 deaths. The numbers are increasing exponentially.

Prisons around the world have become breeding grounds for the coronavirus, and this virus does not discriminate based on ideology. If COVID-19 spreads inside a prison, the consequences will be devastating not only to the prisoners, but to the Turkish society at large. Prison guards will be exposed and will spread the virus outside the prison.

Prison occupancy rates in Turkey presently range from 130 to 153 per cent of intended capacity. Almost 300,000 people are imprisoned in Turkey out of a national population of 82 million - one of the highest incarceration ratios in the world. The figure has increased considerably over the past five years with the incarceration of tens of thousands of political prisoners, most of them under terrorism charges. These crowded conditions make the control of infection within prisons essentially difficult.

This reality has been recognized by the Turkish government, supported by the fact that Turkey has recently approved the release of tens of thousands of inmates, but excluding political prisoners. These human rights defenders who have been imprisoned on baseless charges of aiding a terrorist organization in fact pose no danger to Turkey outside of prison, and should be included in this release of inmates. There is no justifiable reason to exclude them from this proposed new law.

Turkey's Misuse of its Anti-terrorism Law

As of February 2020, more than 1,500 lawyers have been prosecuted and 605 lawyers arrested (remanded to pretrial detention) with 345 lawyers sentenced to a total of 2,158 years in prison on the grounds of membership of an armed terrorism organization or of spreading terrorist propaganda.¹ All of the persecuted lawyers have been charged with terror-linked offenses; the two main accusations imputed to them are membership of an armed terrorist organization, and forming and leading an armed terrorist organization.

The laws under which these lawyers are charged have been used as a tool to suppress criticism of state action and exposure of wrongdoing by the state. Lawyers seen as state critics through representation of clients, causes unpopular to the Government of Turkey or their own communications are prosecuted and automatically convicted. Lawyers are obliged to defend persons who have been accused of crimes, regardless of the seriousness or nature of those crimes. They should not be punished for simply doing their jobs, and should not be charged with the same offences as their clients.

Legal Analysis

Some of the convicted lawyers have been sentenced for “willingly and knowingly aiding terrorist organization”, contrary to Articles 314-3 and 227-2 of the Turkish Penal Code. Such charges are commonly made against lawyers defending persons accused of being members of a terrorist organization. In other words, merely by fulfilling what is recognized as a lawyer's duty to provide a defence for accused persons, these lawyers are charged with being members of the same organization as their clients. The criminalization of lawyers' professional obligations contravenes the United Nations' (UN) *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations 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.

As noted in some of our previous correspondence, some lawyers have been sentenced to prison terms of more than 13 years on these charges. In addition to the fact that the sentences are unlawful, they are draconian and grossly excessive. The sentences are clearly designed to discourage lawyers from representing clients accused of terrorism-related or political crimes. The sentences are contrary to the principles espoused in Turkey's constitution which guarantees the rights of all accused persons to legal representation.

1. The Role of Lawyers

LRWC urges Turkey to comply with Turkey's obligations under international human rights laws, including the *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

¹ Report Update February 2020: Mass prosecution of lawyers in Turkey (2016-2020), by the Arrested Lawyers Initiative

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.

In Turkey, it has become common for lawyers defending journalists, human rights activists and those accused of being members of a terrorist organization to be charged with terrorist-related crimes. It appears that these lawyers have been targeted, charged, convicted and sentenced for doing nothing more than fulfilling their duties as lawyers, which is to advocate on behalf of their clients.

According to Human Rights Watch:²

Prosecutions and convictions of lawyers, including some focused on human rights, stood out as exemplifying the abusive use of terrorism charges. In March an Istanbul court convicted Ankara lawyer Selcuk Kozagaçlı, chair of the shuttered Contemporary Lawyers Association, on charges of membership of an armed organization to a prison sentence of over 11 years, along with 11 other lawyers.

2. Turkey's Anti-Terrorism Laws Terrorism charges continued to be widely misused in the third year after the 2016 coup attempt. As of June 2019, almost one-fifth (48,924) of the total prison population (246,426) had been charged with or convicted of terrorism offences, according to the Ministry of Justice. Those prosecuted and convicted included journalists, civil servants, teachers, and politicians, as well as police officers and military personnel.

Many terrorism trials in Turkey lack compelling evidence of criminal activities or acts that would reasonably be deemed terrorism, and the practice of holding individuals charged with terrorism offenses in prolonged pretrial detention raise the concerns that its use has become a form of summary punishment.³

3. Legality and Vagueness

In addition to the fact that charging lawyers for doing their jobs (simply providing a legal defence for an accused person) is contravenes international human rights law, the terrorism provisions themselves are too vague to constitute crimes.

The terrorism charges violate the international criminal law principle of legality.⁴ No crime or punishment can exist without a legal ground.⁵ 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 a lack of law on the offense.⁶ The principle of legality is a general principle of international law,⁷ to which Turkey is bound.

² <https://www.hrw.org/world-report/2020/country-chapters/turkey#981f12>

³ <https://www.hrw.org/world-report/2019/country-chapters/turkey>

⁴ 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)

⁵ 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

⁶ Ja'far Habibzadeh, Dr. Mohammad, "*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system," 2 IJPS 33 2006

⁷ 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* defines 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 lawful exercise of internationally protected rights. The prosecution of lawyers defending for an accused person is illegitimate based on any international standard.

The UN Working Group on Arbitrary Detention (WGAD) in a 2017 opinion concerning Turkey 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.⁸ The WGAD 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]legitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws.’⁹

The Penal Code has been used by Turkey to arbitrarily arrest, detain and convict lawyers acting for clients or causes unpopular to Turkish authorities or otherwise seen as government critics. The vague formulation and broad interpretation of the law by Turkish prosecutors and courts put all lawyers and other human rights defenders at risk of arbitrary detention. The targeting of lawyers and others has become common since the attempted coup in July 2016.

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 he or she can be informed about his or her 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 laws¹⁰ (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.¹¹ 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.”¹² (See the *Kononov* case,¹³ the *Lubanga* case¹⁴ and the *Vasiljevic* case.¹⁵)

⁸HRC, 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.

⁹ 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.

¹⁰ Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

¹¹ Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

¹² 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

¹³ *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 ehrc, Vol. 11, 129.

¹⁴ *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

¹⁵ *Prosecutor v Vasiljevic*, 29 November 2002, iccy Trial Chamber (tc), no. it-98-32-T.

The principle of legality has its basis in customary international law¹⁶ and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)¹⁷
- 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 22¹⁸

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.

International Criticism of Turkey’s Abuse of Antiterrorism Legislation

Various international bodies have criticized the way in which Turkey has applied its anti-terrorism laws to target human rights defenders. The European Court of Human Rights (ECtHR) has ruled in the 2017 and 2018 cases of *Isikirik v Turkey* and *Imret v Turkey* that Article 220 § 6-7 of the Turkish Penal Code did not afford legal protection against arbitrary interference to the ECtHR, Article 11 right to freedom of assembly and association and that such interference constitutes a breach of Article 11 unless it is, *inter alia*, “prescribed by law” (*Isikirik* § 55, *Imret* § 41). This requires that the law in question be accessible to the accused and foreseeable as to its effects (*Isikirik* § 57; *Imret* § 42-43). In the ECtHR’s view, sections 6 and 7 allow membership in an illegal organization to be established on the basis of the defendant having acted “on behalf” of that organization or “aided an illegal organization knowingly and willingly” respectively, without the prosecution having to prove material elements of actual membership. Neither sections define the meaning of “on behalf of” or “aiding knowingly and willingly” (*Imret* § 49). The ECtHR has concluded that Article 220 § 6-7 are not “foreseeable”; the resulting interference was not prescribed by law, and accordingly, Article 11 of the Convention had been violated (*Isikirik* § 70, *Imret* § 59).

In the case of *Parmak & Bakir*, the ECtHR dealt with Article 314 § 2 of the Penal Code, Turkey’s main anti-terror provision. The Court examined the interpretation of this provision by Turkish courts in the context of the ECHR, Article 7: no punishment without law. After summarizing the amendments made to Turkey’s anti-terror provisions from 2003 to 2010, the ECtHR concluded that:

The essence of the offence of membership of a terrorist organization is to join an association whose goal and mode of operation is to resort to the criminal use of force, violence and mass intimidation in order to advance certain political or ideological causes. The fact that the law-makers chose to single out the use of violence as a necessary means with which to commit terrorism... lends support to the conclusion that actual violence, or the intent to use such violence, is central to the definition of the offence (*Parmak & Bakir* § 68).¹⁹

¹⁶ 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

¹⁷ 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.”¹⁷

¹⁸ 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)

¹⁹ <https://verfassungsblog.de/the-turkish-judiciarys-violations-of-human-rights-guarantees/>

The lawyers and other human rights defenders imprisoned for alleged violation of these laws have neither condoned nor used violence, and therefore should have been found not guilty on all charges.

Conclusion

LRWC urges the Government of Turkey to:

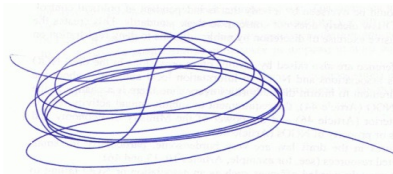
- a. immediately and permanently release from detention all lawyers, human rights defenders, journalists, academics, politicians and others detained, convicted or sentenced in respect of charges under Articles 314, 220 and 227-2 of the Penal Code of Turkey, unless and until an independent international tribunal determines that the detention of each is lawful;
- b. 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
- c. 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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