

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations*

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Mr. Abdulhamit Gül  
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Dear Mr. Erdoğan and Mr. Gül,

**Re: International law obligations to release Mr. Taner Kılıç, Ms. Özlem Dalkiran, Ms. Idil Eser and Mr. Günal Kurşun**

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 (UN).

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: Vahit Bıçak, Özgür Urfa, Selçuk Kozağaçlı, Şebnem Korur Fincancı, Ramazan Demir, Eren Keskin, Mustafa Aydın, Can Tombul, Taner Kılıç, and numerous other Turkish lawyers. LRWC has also made oral and written statements to the UN Human Rights Council (UNHRC) and submissions to the UNHRC's 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.

This letter is with respect to the most recent sentencing of Mr. Taner Kılıç, Ms. Özlem Dalkiran, Ms. Idil Eser, and Mr. Günal Kurşun, which took place on 3 July 2020.

## **Background**

Mr. Taner Kılıç is a founding member and Honorary Chair of Amnesty International Turkey. Mr. Kılıç was initially taken into custody on 6 June 2017, and held in prison for 432 days (approximately 1 year and 2 months) before being released. We wrote to you regarding the situation of Mr. Kılıç in October 2017. He is an internationally recognized human rights defender.

Ms. Özlem Dalkiran is an active member of the Citizens' Assembly (formerly known as Helsinki Citizens' Assembly), an organization promoting peace, democracy, and civil society throughout Europe. She is a long-standing and prominent human rights campaigner. She is a founding member, former head of media, and former chair of Amnesty International Turkey.

Ms. Idil Eser is a former Executive Director of Amnesty International Turkey. We understand that Ms. Idil Eser is currently a guest researcher at the Norwegian Centre for Human Rights. She was incarcerated for 113 days.

Mr. Günel Kurşun is a well-known scholar in the field of International Criminal Law and Genocide studies. He taught at the Criminal Law Department of the Çukurova University in Adana and was President of the İnsan Hakları Gündemi Derneği-Human Rights Agenda Association (IHGD-HRAA). He was dismissed from his positions pursuant to Statutory Decree no. 675, issued on 29 October 2017.

Ms. Özlem Dalkiran, Ms. Idil Eser, and Mr. Günel Kurşun were arrested on 5 July 2017 and detained at that time following a digital security and information management workshop organized by the Human Rights Joint Platform in Buyukada.

On 18 July 2017, Mr. Günel Kurşun was transferred to Silivri prison. On July 31, 2017, Ms. Özlem Dalkiran and Ms. Idil Eser were transferred to that same prison.

Three of these individuals are high-profile members of Amnesty International, an internationally recognized and respected human rights organization. Amnesty International is independent of any political ideology, economic interest, or religion.

## **Charges and Convictions**

Mr. Taner Kılıç, Ms. Özlem Dalkiran, Ms. Idil Eser, and Mr. Günel Kurşun were charged with "assisting an armed terrorist organization" under articles 314.2, 314.3, 220.6, 53.1 and 58.9 of the Turkish Penal Code as well as Articles 3 and 5 of the Anti-Terror Law No. 3713.

On 3 July 2020, Mr. Kılıç was convicted of "membership in a terrorist organization" and sentenced to 6 years and 3 months in prison. Ms. Özlem Dalkiran, Ms. Idil Eser, and Mr. Günel Kurşun were convicted of "assisting a terrorist organization" and sentenced to 2 years and 1 month in prison.

## Turkey's Abuse 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). To date, 345 lawyers have been sentenced to a total of 2,158 years in prison (an average prison sentence of 6.25 years) on the grounds of membership of an armed terrorism organization or of spreading terrorist propaganda.<sup>1</sup> All of the persecuted lawyers have reportedly 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 and others have been charged have been used as a tool to discourage lawyers from representing politically unpopular defendants, to discourage other human rights defenders from campaigning for the enforcement of internationally recognized human rights standards, and to undermine the rule of law in Turkey. As explained below, lawyers have a professional obligation to defend persons who have been accused of crimes, regardless of the seriousness or nature of those crimes. Lawyers are being punished for simply doing their jobs, and are being charged with the same offences as their clients.

### Legal Analysis

As stated, some of the individuals convicted under these laws have been sentenced for “willingly and knowingly aiding terrorist organization,” contrary to Articles 314-3 and 227-2 of the Turkish Penal Code.<sup>2</sup> Such charges are commonly made against lawyers and other human rights defenders who are defending persons accused of being members of a terrorist organization. Merely by fulfilling what is recognized internationally 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.

Some lawyers have been sentenced to prison terms of more than 13 years on such charges. Not only are the sentences wholly unwarranted, they are grossly excessive. The charges and the disproportionate sentences appear to be designed to discourage lawyers from representing clients who are accused of terrorism-related or political crimes, thus depriving them of legal representation contrary to Turkey's obligations under the *International Covenant on Civil and Political Rights* (ICCPR),<sup>3</sup> ratified by Turkey in 2003 and the *European Convention on Human Rights* (ECHR),<sup>4</sup> ratified by Turkey in 1954.

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<sup>1</sup> Report Update February 2020: Mass prosecution of lawyers in Turkey (2016-2020), by the Arrested Lawyers Initiative, available at: <https://arrestedlawyers.org/2020/04/01/report-update-mass-prosecution-of-lawyers-in-turkey-2016-2020/>.

<sup>2</sup> Penal Code of Turkey, 2016, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)011-e).

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>4</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>.

The criminalization of lawyers' professional obligations is also contrary to the 1990 UN *Basic Principles on the Role of Lawyers* (Basic Principles).<sup>5</sup> The Basic Principles elaborate rights set out in the ICCPR, Article 14.3 (d), which guarantees the right of every person to defend him or herself "through legal assistance of his own choosing." The ECHR Article 6 § 3 (c) also ensures in the right of all persons to defend themselves through legal assistance of their own choosing. The right to legal representation is an essential component of the right to a fair trial, which Turkey's Constitution itself guarantees.<sup>6</sup> The Turkish Code of Criminal Procedure, in s. 150, guarantees the right to counsel.

### **1. Turkey's Anti-Terrorism Laws**

Terrorism charges have been widely and systematically misused since 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 have included not only lawyers but also human rights defenders, journalists, civil servants, teachers, politicians, police officers, and military personnel.

Many terrorism trials in Turkey lack sufficient evidence of criminal activity or acts that would reasonably be deemed terrorism. In addition, the practice of holding individuals charged with terrorism offenses in prolonged pretrial detention raises concerns that its use has become an unlawful form of summary punishment<sup>7</sup> in violation of the right to the presumption of innocence guaranteed by ICCPR, Article 14.2.

In the case of the four individuals who are the subject of this letter, we are advised that no evidence was presented in court that would reasonably support a conviction by an independent and impartial tribunal.

### **2. Lack of Legality: Vague and overbroad terrorism provisions**

Turkey's terrorism provisions are themselves too vague and overbroad to constitute internationally recognized crimes. These provisions violate the principle of legality,<sup>8</sup> a general principle of international law to which Turkey is bound. There can be no crime or punishment without a valid legal ground.<sup>9</sup> The principle of legality includes the requirement of certainty (*nullum crimen sine lege*), that is, 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 there already exists a penalty. A

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<sup>5</sup> United Nations, *Basic Principles on the Role of Lawyers*, 7 September 1990, 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, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

<sup>6</sup> Constitution of the Republic of Turkey, as amended 2017, Article 36, available at: [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf).

<sup>7</sup> Human Rights Watch World Report 2019: Turkey Events of 2018, available at: <https://www.hrw.org/world-report/2019/country-chapters/turkey>.

<sup>8</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 (2007): 301-319.

<sup>9</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.

person must be able to know in advance what is unlawful so that she or 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 laws<sup>10</sup> (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.<sup>11</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>12</sup>

The principle of legality has its basis in customary international law<sup>13</sup> and has been codified in many international instruments, including the:

- *Universal Declaration of Human Rights* (UDHR) (1948), Article 11(2);<sup>14</sup>
- *International Covenant on Civil and Political Rights* (ICCPR) (1966), Article 15;
- *European Convention on Human Rights and Fundamental Freedoms* (ECHR) (1950), Article 7.

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 of notice under the ICCPR.

Neither the Turkish Penal Code nor the *Law on Fight against Terrorism* define what constitutes an armed terrorist organization or the criteria for what constitutes membership. Absent any definition, these provisions can be, and have been, arbitrarily used to criminalize a wide range of lawful activities, including the exercise of internationally protected rights. These provisions are illegitimate by any international standard.<sup>15</sup>

The Turkish Penal Code has been used to arbitrarily arrest, detain, and convict lawyers acting for clients who are unpopular with the authorities. The vague formulation and overbroad

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<sup>10</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>11</sup> Sekuloski, Dr. Branko, “International Criminal Court,” in *European Scientific Journal* vol.9, no. 28 (2013)

<sup>12</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. Also see *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 EHRC, Vol. 11, 129; *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, ICC, no. icc-01/04-01/06; *Prosecutor v Vasiljevic*, 29 November 2002, ICTY Trial Chamber (TC), no. it-98-32-T.

<sup>13</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>14</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>15</sup> See, e.g., Office of the High Commissioner for Human Rights, Preliminary conclusions and observations by the UN Special Rapporteur on the right to freedom of opinion and expression to his visit to Turkey, 14-18 November 2016, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20891&LangID=EUN>; Council of Europe, Commissioner for Human Rights, Misuse of anti-terror legislation threatens freedom of expression, 4 December 2018, available at: <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>.

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 other human rights defenders has become common since the attempted coup on July 2016.

### 3. *International Criticism of Turkey's Abuse of Antiterrorism Legislation*

Various international bodies have criticized the way in which Turkey has applied its antiterrorism laws to target human rights defenders.

In a 2017 opinion concerning Turkey, the UN Working Group on Arbitrary Detention (WGAD)<sup>16</sup> 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.<sup>17</sup> The WGAD warned in 2017 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’.<sup>18</sup>

The ECtHR considered the issue in the 2017 and 2018 cases of *Isikirik v Turkey* and *Imret v Turkey*. The Court decided that Article 220 § 6-7 of the Turkish Penal Code did not afford legal protection against arbitrary interference to the Article 11 right to freedom of assembly and association. Such interference constitutes a breach of Article 11 of the ECHR unless it is, inter alia, “prescribed by law” (*Isikirik* § 55, *Imret* § 41). The law in question must 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 tie the status of membership of an illegal organization to the mere facts of a person 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

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<sup>16</sup> Established by resolution 1991/42 of the former Commission on Human Rights and extended regularly. The mandate was extended by resolution 42/22 of 26 September 2019 for a further three year period. See <https://www.ohchr.org/EN/Issues/Detention/Pages/History.aspx>.

<sup>17</sup> 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, available at: [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A\\_HRC\\_WGAD\\_2017\\_41\\_EN.docx](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A_HRC_WGAD_2017_41_EN.docx).

<sup>18</sup> *Ibid*, 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, available at: [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A\\_HRC\\_WGAD\\_2017\\_20\\_EN.docx](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session78/A_HRC_WGAD_2017_20_EN.docx).

membership. Neither sections define the meaning of “on behalf of” or “aiding knowingly and willingly” (*Imret* § 49). As the ECtHR concluded that Article 220 § 6-7 are not “foreseeable,” the resulting interference was not prescribed by law, and accordingly Article 11 of the ECHR 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 Article 7: no punishment without law. After summarizing the amendments made to Turkey’s anti-terror provisions over 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).<sup>19</sup>

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

#### **4. *The UN Basic Principles on the Role of Lawyers***

LRWC also draws your attention to the *UN Basic Principles on the Role of Lawyers*. Article 16 states:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; [...] 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.”

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 to advocate on behalf of their clients.

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<sup>19</sup> Ali Yildiz, Leighann Spencer, “The Turkish Judiciary’s Violations of Human Rights Guarantees: The ECtHR’s Recent *Parmak & Bakir* Judgment and Turkey’s Post-Coup Terrorism Trials, 9 Jan 2020, available at: <https://verfassungsblog.de/the-turkish-judiciarys-violations-of-human-rights-guarantees/>.

According to Human Rights Watch:

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 Kozağaçlı, 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.<sup>20</sup>

## Conclusion and Recommendations

LRWC urges the Government of Turkey to:

- a. vacate all convictions against Mr. Taner Kılıç, Ms. Özlem Dalkiran, Ms. Idil Eser, and Mr. Günal Kurşun and immediately release those still in detention.
- b. put an end to all harassment against Mr. Taner Kılıç, Ms. Özlem Dalkiran, Ms. Idil Eser and Mr. Günal Kurşun and all other human rights defenders;
- c. immediately release all other lawyers, human rights defenders, politicians and other political prisoners from detention;
- 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 treaties and other international instruments, including the ICCPR, the ECHR, and the *UN Basic Principles on the Role of Lawyers*.

Thank you for your prompt attention to this important matter. We look forward to your response.

All of which is respectfully submitted:

[signed]

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[signed]

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<sup>20</sup> Human Rights Watch, World Report: Turkey Events of 2019, available at: <https://www.hrw.org/world-report/2020/country-chapters/turkey>.



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