

Lawyers' Rights Watch Canada

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

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30 March 2022

Mr. Recep Tayyip Erdoğan

President of the Republic of Turkey

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Mr. Abdulhamit Gül

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Dear President Erdoğan and Minister of Justice Gül,

Re: Arbitrary detention of Judge Murat Arslan

I am 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 advocates for the protection of lawyers and other human rights defenders in danger because of their advocacy.

LRWC has written to you in the past with respect to various Turkish lawyers, judges, and other human rights defenders who have either been detained, arrested, charged, and/or imprisoned. The individuals with respect to whom we have written to you include Ramazan Demir, Eren Keskin, Mustafa Aydın, Dr. Sebnem Fincancı, Can Tombul, Taner Kilic, Nurullah Albayrak, Dr. Hidayet Karaca, Ebru Timtik, Aytac Unsal, Dr. İştah Gözaydın, Turan Canpolat, Özlem Dalkıran, Idil Eser, Günal Kurşun, Aysel Tuğluk, and others.

On 10 March 2022, the Supreme Court of Appeals upheld a prison sentence of 10 years handed down to Judge Murat Arslan for being a member of an armed terrorist organization (FETÖ/PDY). LRWC requests that the Government of the Republic of Turkey (Turkey) immediately vacate all charges and convictions against Murat Arslan, cease all prosecutions of him, and unconditionally release him from prison forthwith.

Murat Arslan

Murat Arslan was president of the now-dissolved Judges and Prosecutors Association (YARSAV). He was convicted on terrorism-related charges over his alleged affiliation with the Gülen movement.

Murat Arslan is a well-known and internationally recognized human rights defender. He was awarded the Václav Havel Human Rights Prize 2017 by the Parliamentary Assembly of the Council of Europe (PACE). The Prize honours human rights defenders in Europe and beyond. He was awarded this prize based on his work to uphold the independence of the judiciary in Turkey.

Murat Arslan graduated from the faculty of law of the Istanbul University in 1999. In 2001 he began to work at the Court of Accounts (Sayıştay). He was the chair of YARSAV from 16 March 2011 to 23 July 2016. YARSAV was closed by a decree on 23 July 2016.

The Arrest and Conviction

On 26 October 2016, Murat Arslan was arrested. He was held in pre-trial detention until January 2019, when he was sentenced to 10 years in prison for "participation to a terrorist organization." There is no record of him ever calling for violence. The charges against him were based on an anonymous denunciation and the presence of the generally available ByLock messaging app on his phone.

Such charges and conviction are contrary to fair trial rights guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR),¹ which Turkey ratified on 23 September 2003. According to the UN Special Rapporteur for the independence of judges and lawyers Diego Sayan, his conviction was based on a process that lacked procedural fairness. Mr. Sayan stated:

The conviction of Judge Arslan constitutes a severe and gross attack on the independence of the judiciary in Turkey, and in a democratic state under the rule of law an independent and impartial judiciary is a fundamental guarantee for society as a whole.²

¹ 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.refworld.org/docid/3ae6b3aa0.html>.

² Turkey must ensure fair appeal for Judge Murat Arslan after gross attack on judicial independence, says UN expert, OHCHR, 6 February 2019, available at: <https://www.ohchr.org/en/press-releases/2019/02/turkey-must-ensure-fair-appeal-judge-murat-arslan-after-gross-attack?LangID=E&NewsID=24140>.

Turkey's International Human Rights Law Obligations

a. Violation of the Principle of Legality

The vague and ambiguous charge set out in Turkey's Anti-Terror Law No. 3713 violates the principle of legality under ICCPR Articles 9(1) and 15(1), which prohibit arrest, detention, and conviction on grounds that are not clearly established in pre-existing law. A criminal provision violates the principle of legality if the law is neither sufficiently foreseeable in its effects nor sufficiently accessible to the public at the time of the alleged offence, such that an individual cannot regulate his or her conduct accordingly.³ On its face, Turkey's anti-terrorism law is so overly broad as to prevent foreknowledge. For example, it creates an unrestricted and standardless sweep that allows automatic and arbitrary conviction for any act, utterance, or declaration that is determined—after the fact—to constitute impugned terrorist propaganda.

Foreseeability is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him or her criminally liable.⁴ However, the court cannot interpret existing law beyond the reasonable limits of acceptable clarification.⁵ The result must be reasonably foreseeable and consistent with the essence of the offence.⁶

The UN Working Group on Arbitrary Detention (WGAD) has characterized legality as “a cardinal principle of international human rights law”⁷ and of “modern criminal law”⁸ that is “required by the rule of law.”⁹ It is a fundamental guarantee of due process in criminal proceedings.¹⁰

In a 2017 opinion concerning Turkey, the WGAD found that the vagueness of Turkey's anti-terrorism laws, e.g., “aiding terrorist organizations, in accordance with the

³ *Prosecutor v Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No IT-99-37-AR72 (ICTY Appeals Chamber, 21 May 2003) at paras 37, 41; *GIEM SRL and Others v Italy*, Judgment (Merits), Applications Nos 1828/06, 34163/07, and 19029/11 (ECHR Grand Chamber, 28 June 2018) at para 242.

⁴ *GIEM SRL and Others v Italy*, Judgment (Merits), Applications Nos 1828/06, 34163/07, and 19029/11 (ECHR Grand Chamber, 28 June 2018) at para 242.

⁵ *Prosecutor v Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No IT-99-37-AR72 (ICTY Appeals Chamber, 21 May 2003) at para 38.

⁶ *SW v The United Kingdom*, Judgment, Application No 20166/92 (ECHR Chamber, 22 November 1995) at para 36.

⁷ WGAD, Opinion No 61/2016 (Saudi Arabia), UNHRCOR, 77th Sess, UN Doc A/HRC/WGAD/2016/61 (2016) at para 49.

⁸ WGAD, Opinion No 27/2011 (Bolivarian Republic of Venezuela), UNHRCOR, 61st Sess, UN Doc A/HRC/WGAD/2011/27 (2011) at para 38.

⁹ WGAD, Opinion No 32/2016 (New Zealand), UNHRCOR, 76th Sess, UN Doc A/HRC/WGAD/2016/32 (2016) at para 62.

¹⁰ WGAD, Opinion No 10/2018 (Saudi Arabia), UNHRCOR, 81st Sess, UN Doc A/HRC/WGAD/2018/10 (2018) at para 50.

organizational aims of these organizations, without being a member,” violated the principle of legality due to the vagueness of the provision.¹¹ 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]egitimate democratic opposition, as distinct from violent opposition, becomes a victim in the application of such laws’.¹²

The European Court of Human Rights (ECtHR) considered this issue in the 2017 and 2018 cases of *Isikirik v Turkey*¹³ and *Imret v Turkey*.¹⁴ The Court decided that Article 220 § 6-7 of the Turkish Penal Code did not afford legal protection against arbitrary interference with the right to freedom of assembly and association, protected by European Convention of Human Rights.¹⁵ Article 11. In the ECtHR’s view, paragraphs 6 and 7 of Article 220 of Turkey’s Penal Code 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 membership.

The courts in Turkey, in their application of the Anti-Terror Law No. 3713 have ignored the principle of legality, choosing instead to arbitrarily interpret the provision as capturing the lawful exercise of protected rights that are actually or potentially critical of state action, inaction or policy.

b. Lack of Judicial Independence

Since 2010, Turkey has undertaken several reforms of its judicial system that permanently curtail judicial independence and provide increased control by the government over the judiciary.¹⁶

¹¹ *Supra* note 3, para. 101.

¹² *Supra* note 3, paras. 98-99. See also, Human Rights Council 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.

¹³ *Isikirik v Turkey* [2017] ECHR 1007, available at: <http://hudoc.echr.coe.int/eng/?i=001-178506>.

¹⁴ *Imret v Turkey* [2018] ECHR 597, available at: <https://www.bailii.org/eu/cases/ECHR/2018/597.html>.

¹⁵ *Supra* note 30.

¹⁶ The Law Society of England and Wales, the Bar Human Rights Committee of England and Wales, & the International Bar Association Human Rights Institute, *Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches Concerning the Independence of Legal Profession in Turkey* (18 September 2018) at para 23.

Such corrosion of the rule of law¹⁷ in Turkey escalated dramatically after an attempted coup of 15 July 2016. Human rights defenders in Turkey, including lawyers, face dire consequences resulting from the deterioration of the rule of law and the determination of Turkey to stifle any meaningful opposition.

Since July 2016 the independence of Turkey's legal system has been destroyed through thousands of dismissals and arbitrary arrests of judges and prosecutors and intimidation of defence lawyers through arbitrary arrest, prosecution on vague and overbroad charges, incarceration, and reported torture.¹⁸ Currently, Turkey has imprisoned more lawyers than any other country in the world.¹⁹ It is reported that since July 2016 more than 1,600 lawyers have been arrested and prosecuted, while 615 lawyers have been remanded to pretrial detention. So far, 474 lawyers have been sentenced to lengthy jail terms ranging from two to more than 18 years under Turkey's vague and overbroad anti-terrorism legislation.²⁰

c. Prosecutions and Convictions Based on ByLock

The Republic of Turkey has arbitrarily prosecuted and detained thousands of individuals under anti-terrorism legislation for allegedly using the messaging application ByLock. By retroactively criminalizing a legal means of expression, Turkey has violated the principle of legality, as well as its international obligations to protect freedom of expression and abstain from arbitrary detention.

¹⁷ The UN defines the rule of law as follows:

“The “rule of law” ... refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency,” UN website, available at <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>.

Also see UN Security Council. 2004, Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, S/2004/616, para.6, available at: <https://www.un.org/ruleoflaw/files/2004%20report.pdf>.

¹⁸ Arrested Lawyers Initiative, “Extradition to Turkey: One-Way Ticket to Torture and Unfair Trial,” February 2018, <https://arrestedlawyers.files.wordpress.com/2018/02/one-way-ticket-to-torture-unfair-trial1.pdf>.

¹⁹ Arrested Lawyers Initiative, “Bar Associations of Turkey: Turkey has become the largest prisoner of lawyers,” 24 February 2020, <https://arrestedlawyers.org/2020/02/24/turkey-has-become-the-largest-prisoner-of-lawyers>.

²⁰ Arrested Lawyers Initiative, “New Report: The Crackdown against Lawyers in Turkey”, 10 December 2021 <https://arrestedlawyers.org/2021/12/10/new-report-the-crackdown-against-lawyers-in-turkey/>; European Association of Lawyers for Democracy & World Human Rights, 18 Turkish lawyers sentenced to long prison terms, ELDH, March 2019, available at: <https://eldh.eu/en/2019/03/18-turkish-lawyers-sentenced-to-long-prison-terms/https://eldh.eu/en/2019/03/18-turkish-lawyers-sentenced-to-long-prison-terms/>.

Turkey's National Intelligence Organization (Millî İstihbarat Teşkilatı or MİT) investigated connections between ByLock and the Gülen movement, whom the Government holds responsible for the attempted coup in July 2016 and thus refer to as the Fetullahist Terrorist Organization/Parallel State Structure (FETÖ/PDY). MİT issued a report concluding: "ByLock has been offered to the exclusive use of the members of the terrorist organization of FETÖ/PDY." Turkey's highest criminal courts wrongfully accepted MİT's conclusion and held that technical data proving an individual used ByLock constitutes evidence of membership in the designated terrorist organization FETÖ/PDY, a crime under art. 314 of the Turkish Penal Code.²¹ Therefore, the government has made using ByLock a de facto crime.

ByLock was publicly available for download from Google Play and Apple and was in service until 19 February 2016.

The retroactive criminalization of the use of ByLock violates the principle of legality since at the time of such alleged use (in all cases before the attempted coup) it was not the object of sufficiently precise, valid law to which a sufficiently certain sanction was attached.²² No one using ByLock would have known that their behaviour in so doing was criminal; it was not foreseeable. Using ByLock only became de facto criminal after-the-fact as a result of the MİT report and its judicial interpretation.

Further, the use of ByLock does not prove criminal guilt. Convictions based on ByLock use therefore violate the principle of legality. The so-called FETÖ/PDY members may have used ByLock, but using ByLock, a public messaging application, does not make one guilty of membership in a terrorist organization. By prosecuting and detaining individuals because they allegedly used ByLock, Turkey has violated its international obligations to adhere to the principle of legality, protect freedom of expression, and abstain from arbitrary detention.

The UN WGAD has ruled that the mere presence or use of Bylock on a phone cannot constitute criminal activity, and that conviction and detention on that basis is arbitrary.²³

In July 2021, in the case of former police officer Tekin Akgün, the ECtHR concluded that downloading or using ByLock does not constitute substantial evidence of involvement in

²¹ The Court of Cassation, 16th Chamber, Case No. 2015/3, Decision No. 2017/3 (24 April 2017); the Criminal Chambers of the Court of Cassation, General Assembly, Decision No. 2017/16.MD-956, Case No. 2017/370 (26 September 2017).

²² *Ibid.*, at para. 50.

²³ WGAD, Opinion No. 53/2019 (Turkey), 18 September 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/276/28/PDF/G1927628.pdf>; WGAD, Opinion No. 44/2018 (Turkey), 2 October 2018, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Opinions/Session82/A_HRC_WGA_D_2018_44_AEV.pdf.

an illegal or criminal action in itself and it shall be supported by other evidence raising reasonable suspicion such as the content or context of the messages written.²⁴

Despite grave concern expressed by UN Special Procedures and the European Court of Human Rights, Turkey continues to arrest and prosecute hundreds of people on charges alleging their use of Bylock. Turkey's misuse of overbroad anti-terrorism legislation against human rights lawyers and defenders and others demonstrates a widespread and systematic pattern of prolonged arbitrary detention.

Conclusion

In these circumstances, we request that Turkey immediately and unconditionally vacate all charges and convictions against Murat Arslan, cease all related prosecutions of him, and release him from prison forthwith.

All of which is respectfully submitted:

[signed]

Brian Samuels, QC, LRWC Director

²⁴ Pre-trial detention of an applicant suspected of belonging to the organization FETÖ/PDY on account of his use of the ByLock messaging application: violation of the Convention issued by the Registrar of the Court, Press release, ECHR 233 (2021), 29 July 2021, 20.07.2021, see summary at Bianet, <https://bianet.org/english/law/247530-ecthr-ruling-on-use-of-bylock-app>.

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