

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: +1 604 736 1175 – Fax: +1 604 736 1170
3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

Monday, July 17, 2017

H.E. Recep Tayyip Erdoğan
President of the Republic of Turkey
T.C. Cumhurbaşkanlığı Genel Sekreterliği
06100 Ankara, Turkey
Fax: +90 312 468 5026
Email: cumhurbaskanligi@tccb.gov.tr

Bekir Bozdağ
Minister of Justice of the Republic of Turkey
Ministry of Justice
06659 Kizilay
Ankara, Turkey
Phone: +90 312 417 7770
Fax: +90 312 419 3370
Email: info@adalet.gov.tr, bekir.bozdag@tbmm.gov.tr

Dear President Erdoğan and Minister of Justice Bekir Bozdağ;

Re: Arbitrary Arrest and Detention of Idil Eser, Director of Amnesty International Turkey, İlknur Üstün, Nalan Erkem, Şeymuz Özbekli, Günel Kurşun, Özlem Dalkıran, Nejat Taştan, Veli Acu, Ali Gharawi and Peter Steudtner

Lawyers' Rights Watch Canada (LRWC) is gravely concerned about the arbitrary arrest and detention of Idil Eser, Director of Amnesty International Turkey, and nine additional human rights defenders (HRDs) arrested on 5 July 2017.

LRWC calls on Turkey to comply with its International Human Rights Law (IHRL) obligations and immediately release **Idil Eser, İlknur Üstün, Nalan Erkem, Şeymuz Özbekli, Günel Kurşun, Özlem Dalkıran, Nejat Taştan, Veli Acu, Ali Gharawi and Peter Steudtner**. The arrests and detentions of these ten HRDs violate Turkey's IHRL obligations and are not authorized or justified by Emergency Measures Declarations.

Background

At 10 AM on 5 July 2017, Turkish police conducted an unwarranted arrest of ten HRDs attending a digital security and information management workshop¹ in Büyükdada, Istanbul. Arrested were: **Ms Idil Eser**, Director of Amnesty International Turkey; **Ms İlknur Üstün** of the Women's Coalition; **Mr. Günel Kurşun**, lawyer with the Human Rights Agenda Association; **Ms Nalan Erkem** lawyer with the Citizens

¹ Amnesty International, "Absurd 'terrorism' investigation launched into Amnesty International's Turkey Director and nine others," 6 July 2017, online: <<https://www.amnesty.org/en/latest/news/2017/07/absurd-terrorism-investigation-launched-into-amnesty-internationals-turkey-director-and-nine-others/>>.

IHRL obligations to release Idil Eser, İlknur Üstün, Ms Nalan Erkem, Şeymuz Özbekli, Günel Kurşun, Özlem Dalkıran, Nejat Taştan, Veli Acu, Ali Gharawi and Peter Steudtner

Assembly; **Mr. Nejat Taştan** of the Equal Rights Watch Association; **Ms Özlem Dalkıran** of the Citizens' Assembly; **Mr. Şeyhmuş Özbekli**, trainee lawyer and member of the Rights Initiative; **Mr. Veli Acu** of the Human Rights Agenda Association and security consultants **Mr. Ali Gharawi** and **Mr. Peter Steudtner**.

The ten HRDs named are reportedly under investigation by the Istanbul Security Directorate for alleged membership in “an armed organization with the purpose of committing the offences listed parts four and five of this chapter.” under Turkey’s Penal Code, Article 314 (2).² The detained HRDs have not been charged with or notified of, the ‘nature and cause’ of any specific charges as required by IHRL. The arrests of the ten HRDs came less than a month after the Chair of Amnesty International Turkey, Taner Kiliç was arrested and charged with membership in the “Fethullah Gülen Terrorist Organization.”

The ten HRDs were held incommunicado for over 28 hours and denied access to legal counsel and their families. Their whereabouts were unknown until 3 PM on 6 July 2017, when Turkish authorities revealed their locations and allowed access to legal counsel. Since 7 July all ten HRDs are believed to be detained at Istanbul Directorate of Security.

On 10 and 11 July police raided and searched the residences of eight of the HRDs and seized electronic equipment including flash disks, external disks, CDs and sim cards. On 11 July the prosecutor for the Terror and Organized Crime Investigation Bureau extended pre-trial detention for an additional seven days. The state of emergency declared on 20 July 2016 allows up to seven days of pre-charge detention, with a further seven days allowed on request of the prosecutor.³

On 20 July 2016, Turkey declared a State of Emergency for three months, apparently as allowed by the Constitution (Article 120) and the [Law No. 2935 on State of Emergency \(Article 3/1b\)](#) and on 21 July 2016 gave notice of reservations [to the Council of Europe](#) and [to the United Nations](#). The State of Emergency declaration has since been extended for three months periods with the most recent extension set to expire on 19 July 2017.

Turkey’s International Legal Obligations

As a member of the United Nations (UN) and the Council of Europe Turkey is obligated to ensure and respect rights guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR)⁴, the *European Convention on Human Rights* (ECHR),⁵ the *Universal Declaration of Human Rights* (UDHR) and other principles, guidelines, standards and recommendations adopted by the UN General Assembly and the Council of Europe.

Under both the ICCPR and the ECHR, Turkey is legally obligated to ensure that the ten HRDs (and all individuals within its territory), enjoy rights to, *inter alia*: liberty and freedom from arbitrary arrest or detention; pre-trial release and the presumption of innocence; judicial oversight of the legality of arrest, detention and treatment; freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom of thought and conscience, freedom of expression, and determination of charges by an impartial, independent and competent tribunal. Turkey must ensure, as part of ensuring such rights,

² *Turkey: Penal Code* [Turkey], Law No. 5237, 26 September 2004, Chapter 4 Offences against State Security – Disrupting the Unity and Integrity of the State, Articles 302 to 308 and Part 5 Offences against the Constitutional Order and its Functioning – Violations of the Constitution, Part 309 to 316. Online at <http://www.legislationline.org/documents/section/criminal-codes/country/50>

³ Salil Shetty, *Amnesty International*, “Turkey must free jailed human rights defenders,” 8 July 2017, online: <https://www.amnesty.org/en/latest/news/2017/07/turkey-must-free-jailed-human-rights-defenders/>

⁴ *International Covenant on Civil and Political Rights*, 16 Dec. 1966, U.N. Doc. A/6316, 999 U.N.T.S. 171, entered into force 23 March 1976, online at: <http://www2.ohchr.org/english/law/ccpr.htm>.

⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force 3 September 1953, online at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=24/07/2012&CL=ENG>.

that those arrested are given notice of the reason(s) for arrest, the nature and cause of any charge(s), access to a lawyer and access to a court to determine pre-trial release and the legality of detention. Turkey has violated its obligations under the ICCPR and ECHR to prevent, punish and remedy violations of these rights, by the arrests, detentions and treatments of the ten HRDs.

Non-derogability of rights under Emergency Measures

Emergency measure cannot legitimately be used to remove access to judicial safeguards against the violation of non-derogable rights or against arbitrary or illegal acts by the state, including arbitrary arrests and detentions. UN standards require, *inter alia*, that: emergency measures be imposed only in response to an imminent threat to the state that cannot be otherwise contained; the scope and duration of the emergency measures must be proportional to the threat; and, that any temporary derogation of rights effected by emergency measures be both strictly required by the exigencies of the crises and not in violation of other rights obligations including non-derogable rights.⁶

The ICCPR and the ECHR specifically prohibit any derogation from rights to: life, freedom from ex post facto prosecution and conviction, freedom of thought, conscience and religion, freedom from torture and cruel, inhuman or degrading treatment or punishment. The European Court of Human Rights (ECtHR) has determined that incommunicado detention outside any judicial framework—such as in the case of the ten HRDs—is a violation of the ECHR, Article 3 guarantee of freedom from torture and other degrading and inhuman treatment or punishment.⁷

The UN Human Rights Committee (HR Committee) has determined that the ICCPR Article 14 fair trial rights must take precedence over domestic law and “may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights...”⁸ In addition, “[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.”⁹

IHRL obligations to ensure freedom from arbitrary arrest and detention

The arrests and detentions of the ten HRDs are clearly intended to suppress legitimate human rights advocacy and freedom of thought, conscience and expression, which Turkey is required to guarantee by the ICCPR (Article 19) and ECHR (Article 10). While limitations to rights to expression are permitted, Turkey’s Penal Code provisions, Parts Four and Five do not meet the requirements of clarity, certainty and necessity required by Article 19(3) and 10(2) of the ICCPR and ECHR.

As stated by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his 2016 report, to be consistent with Article 19(3), a law seeking to impose restrictions

⁶ See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (1985) 7 Hum. Rts. Q. 3; *Study on the Implications on Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, U.N. Doc. E/CN.4/Sub2/1982/15 1982 (Questiaux Report); INTER-AM. C.H.R. La Protección de los Derechos Humanos Frente Suspensión de las Garantías Constitucionales o “Estado de Sitio”, 39 OEA/Ser.L/VII.15, doc.12 (1966) (prepared by IACHR member Daniel Hugo Martins; *The Paris Minimum Standards of the Human Rights Norms in a State of Emergency*, approved by the 61st conference of the International Law Association in 1984. and, Leandro Despouy, Special Rapporteur per Economic and Social Council res. 1985/37, *The Administration of Justice and the Human Rights of Detainees: Questions of Human Rights and States of Emergency*, E/CN.4/Sub.2/1997/19 <http://www.derechos.org/nizkor/except/despouy97en.html>

⁷ *El-Masri v. The Former Yugoslav Republic of Macedonia* (Application no. 39630/09)

⁸ Human Rights Committee, General Comment No. 32, *Article 14, Right to Equality before courts and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 4, 5, 11 & 19.

⁹ *Ibid* para. 17. Also see

“must also be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly and be made accessible to the public.”¹⁰

The accusations of membership in “an armed organization with the purpose of committing the offences listed in parts four and five of [Penal Code],” are unsubstantiated. Several of the provisions of Parts 4 and 5 are so vague and overbroad as to contravene Turkey’s IHRL obligations to ensure that criminal offences are worded with sufficient precision and certainty to: a) give notice that certain conduct is prohibited; b) allow a defense; and, c) prevent arbitrary arrests and convictions and uncontrolled discretion by police and the judiciary.

The incommunicado detention of the ten HRDs contravenes the ICCPR, ECHR and the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* which requires states to ensure that detained or imprisoned persons shall not be denied communication with the outside world and shall be provided access to legal counsel without delay.¹¹

The ECtHR has held in relation to the lawfulness of arrest and detention, that “lawful” and “in accordance with a procedure prescribed by law” in Article 5(1) of the ECHR requires,

[N]ot only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and not arbitrary... In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail...¹²

Similarly, the HR Committee has clarified that “remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances”¹³ and that “[p]re-trial detention should be an exception and as short as possible”¹⁴ and must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.¹⁵ The Human Rights Committee, affirmed that pre-trial detention should remain the exception and that bail should be granted,

[E]xcept in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State party”... The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify an exception to the rule in article 9, paragraph 3, of the Covenant.¹⁶

10 United Nations, ‘*Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*’, United Nations General Assembly, seventy-first session, 06 September 2016, UN Doc. A/71/373 <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373> accessed 30 January 2017, at paras 13-14.

¹¹ United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, 9 December 1988, A/RES/43/173 at Principles 15 and 18.

¹² *Steel and Others v. the United Kingdom* (App. No. 67/1997/851/1058), judgment of 23 September 1998, Reports 1998-VII, p. 2735, at para. 54.

¹³ Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, online:

<<http://www.ohchr.org/Documents/Publications/training9chapter5en.pdf>>, at 166.

¹⁴ *CCPR General Comment No 8*, supra note 31, at para. 3.

¹⁵ *Mukong v. Cameroon*, Communication No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994, para. 9.8.

¹⁶ *Aleksander Smantser v. Belarus*, Communication No 1178/2003, UN Human Rights Committee (HRC), para. 10.3.

The HR Committee has determined that arbitrariness “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”¹⁷

The Working Group on Arbitrary Detention has defined detention as arbitrary when one or more of the following conditions exist:¹⁸

- Category I – It is clearly impossible to invoke any legal basis justifying the deprivation of liberty;
- Category II – The deprivation results from the exercise of the rights or freedoms guaranteed by, *inter alia*, Article 19 of the UDHR and ICCPR;
- Category III – When the total or partial non-observation of international norms relating to the right to a fair trial as specified by the UDHR and ICCPR are of such gravity as to render the deprivation of liberty arbitrary.

Conclusion:

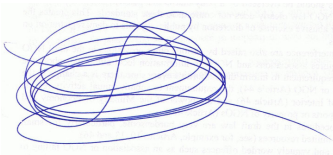
The arrests and detentions of the ten HRDs violate Turkey’s IHRL obligations under the ICCPR and the ECHR. Turkey’s failures to ensure rights to: liberty, freedom from arbitrary arrest or detention; pre-trial release and the presumption of innocence; judicial oversight of the legality of arrest, detention and treatment; freedom from torture and other cruel, inhuman or degrading treatment or punishment; freedom of thought and conscience, freedom of expression, and determination of charges by an impartial, independent and competent tribunal, are not justified by the Emergency Measures Declarations.

Recommendations

LRWC calls upon the Government of Turkey to:

1. Immediately and unconditionally release **Idil Eser, İlknur Üstün, Nalan Erkem, Şeyhmuş Özbekli, Günal Kurşun Özlem Dalkıran, Nejat Taştan, Veli Acu, Ali Gharawi and Peter Steudtner**;
2. Guarantee to persons detained on criminal charges timely access to an independent, impartial and competent tribunal for determination of charges and of the legality of arrest, detention and treatment and of the legality and applicability of emergency measures.

Sincerely,



Gail Davidson, Executive Director, LRWC

¹⁷ *Mukong v. Cameroon*, Communication No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994, para. 9.8.

¹⁸ Fact Sheet No. 26, The Working Group on Arbitrary Detention.

Copied to:

H.E. Mr. Selcuk Unal
Ambassador to Canada for the Republic of Turkey
Email: embassy.ottawa@mfa.gov.tr

UN Special Rapporteur on the Independence of Judges and Lawyers
Diego García-Saván
SRindependenceJL@ohchr.org

UN Special Rapporteur on the situation of human rights defenders
Michel Forst
defenders@ohchr.org, urgent-action@ohchr.org

UN Special Rapporteur on Freedom of Expression
David Kaye
freedex@ohchr.org

Ankara Bar Association
Adliye Sarayi
KAT 5, Sihhiye
Ankara 6251, Turkey
E-mail: ankarabarusu@ankarabarusu.org.tr

Istanbul Bar Association
Orhan Adli Apaydin Sokak
Baro Han K:2 34430
Beyoglu/ISTANBUL
E-Mail: information@istanbulbarosu.org.tr

Azat Yildirim
President of the Mardin Bar Association
13 Mart Mahallesi İl Müftülüğü Arkası 48. Sokak No:8
Yenişehir/MARDİN
Email: info@mardinbarosu.org.tr

Union of Turkish Bars
Karanfil Sokak 5/ 62
06650 Kizilay
Ankara, Turkey
E-mail: admin@barobirlik.org.tr

The Honourable Chrystia Freeland
Minister of Foreign Affairs for Canada
Email: chrystia.freeland@parl.gc.ca

Alex Neve, Secretary General, Amnesty International Canada
Email: aneve@amnesty.ca

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