

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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Mr. Abdulhamit Gül
Minister of Justice
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Dear Mr. Gül;

Re: International law obligations to release lawyer Eren Keskin

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 of the Constitution of the Republic of Turkey. Communications to the Government of Turkey have been made by LRWC regarding the cases of: Selçuk Kozağaçlı, Şebnem Korur Fincancı, Ramazan Demir, Erin Keskin, Mustafa Aydın, Can Tombul, Taner Kilic and other members of the Turkish legal profession. LRWC has also made oral and written statements to the UN Human Rights Council and submissions to the UN Human Rights Committee and 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.

LRWC is once again gravely concerned regarding the continuing and unjust persecution of lawyer Eren Keskin. Ms. Keskin has been convicted on criminal charges that are illegitimate and unfounded and faces numerous other charges that are equally baseless but could result in lengthy consecutive prison sentences that could keep Ms. Keskin incarcerated for life.

Background of Ms. Keskin

Ms. Keskin, 59 years of age, is a lawyer and vice-president of the Human Rights Association in Turkey (İHD) and the co-founder of the Legal Aid For Women Who Were Raped Or Otherwise Sexually Abused by National Security Forces. She has been a strong advocate for fundamental rights and freedoms in Turkey, especially for the Kurds, women and the LGBTQ community. As a human rights advocate for almost thirty years, Ms Keskin has contributed to the protection of minority rights, countered violence against women, campaigned to end torture and challenged militarism.

Ms. Keskin is an internationally recognized human rights defender. She is an honorary member of the Paris Bar Council, and the winner of multiple international awards for her peace and human rights work namely: the 2004 Aachen Peace Award "for her courageous efforts and activities for human rights"; the

2005 Theodor Haecker Prize for Civic Courage and Political Integrity; and the 2018 Helsinki Civil Society Award.

In support of rights to freedom of expression and a symbolic gesture of support to the imprisoned editorial staff, from 2013 to 2016 Ms. Keskin held the title of ‘editor-in-chief’ for *Özgür Gündem*, one of the few independent newspapers in Turkey critical of the government and known for its extensive reporting on the Kurdish-Turkish conflict.

The Charges, Convictions, and Ongoing Persecution of Ms. Keskin

In retaliation for her human rights activities, Ms. Keskin has been subjected to multiple instances of persecution and harassment, including assassination attempts and prosecutions based on overly broad charges that offend the legal principle of certainty and preclude both advance notice and defense. An accused person can only know the specific proscribed act(s), expression(s) or consequences after a judge has subjectively made that determination. Ms. Keskin was sentenced and imprisoned for 6 months in 1995 for using the word *Kurdistan*. In 2014, she was sentenced to ten months in prison under article 301 for insult to the state for having said “Turkey has a dirty history”.

As of December 2018 there were still 47 cases against Keskin awaiting verdicts.

Due to her title as ‘editor-in-chief’, over 120 cases have been lodged against her in Turkish courts. Ms. Keskin was criminally charged in relation to articles by other authors exercising their right to freedom of expression. According to the Turkish Press Law, editors-in-chief can be charged for publications in cases when the responsible authors cannot be held to account. Six of these cases have resulted in convictions with all appeal options exhausted. These convictions were for ‘insulting the President’ and for ‘failure to publish article corrections in the newspaper’. Fines of nearly €14,500 (TL 72,000) have been imposed on Ms. Keskin. Failure to pay the outstanding monetary fines would result in approximately 8.5 years of imprisonment.

Court sessions in trials related to her title as the ‘editor-in-chief’ of *Özgür Gündem* were held in May 3 and 7, 2018. Ms. Keskin is one of the nine defendants, including advisory board members, journalists and the editorial director of *Özgür Gündem*, in another ongoing prosecution, which includes charges of “disrupting the unity and integrity of the State” under Article 302, “establishing an organisation for the purpose of committing crime” under Article 220 and “being a member of an armed organisation” under Article 314 of the Turkish Criminal Code. The charges in this case could result in a sentence of up to 24 years in prison.

We have been informed that the 12th hearing of the trial where *Özgür Gündem*’s daily’s administrators and staff face “making propaganda for a terrorist organisation”² under charges resumed at the İstanbul 14th High Criminal Court on March 28, 2019.

In a further 69 cases, Ms. Keskin has been pronounced guilty but the cases remain under review before the Court of Appeals or the Supreme Court. Unless the decisions of the courts of first instance are reversed, a cumulative sentence of 12.5 years and a fine of approximately € 93,000 (TL 460,000) may be imposed on Ms. Keskin, in relation to following offenses:

- a. ‘spreading propaganda for an armed terrorist organisation’ (*Law on Fight against Terrorism, Article 7(2)*),
- b. ‘denigrating the Turkish nation, the Republic of Turkey, institutions and organs of the State’ (Turkish Criminal Code, Article 301),

¹*Özgür Gündem* was shut down in August 2016 by a court order following the *coup d’etat* attempt in Turkey, while several criminal charges were brought against its journalists and editors. More than 100 persons voluntarily named themselves as editor-in-chiefs on a rotating basis.

² Article 7 of the Law on Fight Against Terrorism of Turkey, Act. No. 3713

- c. ‘insulting the President’ (Turkish Criminal Code, Article 299), ‘failure to publish article corrections in the newspaper’ (Press Law, Article 18),
- d. ‘revealing the identity of the accused’ (Press Law, Article 21(c)), and ‘insult’ (Turkish Criminal Code, Article 125).

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 exercise of internationally protected rights.

As stated in our 8 May 2018 correspondence regarding Ms. Keskin, in relation to Article 314(2) 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 with overly broad charges, unfair trials and arbitrary detention has increased sharply since July 2016. In March 2019, 18 lawyers were sentenced to a total of 160 years in prison by Istanbul 37th Assize Court under Article 314 of the Turkish Penal Code. The Arrested Lawyers Initiative reports that between July 2016 and 20 March 2019 1,546 lawyers have been prosecuted, 599 have been arrested, and in some cases subjected to torture and ill-treatment and to date, 248 of those prosecuted have been sentenced to a total of 1,603 years in prison.

The above noted charges against Eren Keskin violate the international criminal law principle of legality.³ No crime or punishment can exist without a legal ground.⁴ 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 offence or there is a lack of law on the offence.⁵ The principle of legality is a general principle of international law.⁶

Nullum crimen sine lege (overlaps with some aspects of the principle of notice)

International law provides 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. This is where 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 laws⁷ (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.⁸ 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.”⁹ See decisions in the *Kononov*,¹⁰ *Lubanga*,¹¹ and *Vasiljevic* cases¹²

³ 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)

⁴ 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

⁵ Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

⁶ Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

⁷ Ja’far Habibzadeh, Dr. Mohammad, “*Nullum Crimen, Nulla Poena Sine Lege*: with an approach to the Iranian legal system,” 2 IJPS 33 2006

⁸ Sekuloski, Dr. Branko, “International Criminal Court,” in European Scientific Journal vol.9, no. 28 (2013)

⁹ 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

¹⁰ *Kononov v. Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 ehrc, Vol. 11, 129.

¹¹ *Prosecutor v. Lubanga*, ‘Decision on the Confirmation of Charges’, 29 January 2007, icc, no. icc-01/04-01/06.

This requirement of certainty and notice has its basis in customary international law¹³ and has been codified in many international instruments, including the:

- Universal Declaration of Human Rights (UDHR) (1948), Article 11(2)¹⁴
- 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 22¹⁵
 - Erdemovic case,¹⁶
 - Delalic case¹⁷

International Law Obligations

LRWC urges you to comply 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.

Furthermore, as a party to the ICCPR¹⁸, the *Optional Protocol to the International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the ECHR,¹⁹ Turkey is legally obligated to ensure that individuals within its territory enjoy,

¹² *Prosecutor v Vasiljevic*, 29 November 2002, icty Trial Chamber (tc), no. it-98-32-T.

¹³ 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

¹⁴ 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."¹⁴

¹⁵ 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)

¹⁶ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996)

¹⁷ *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment 1209-12 (Nov. 16, 1998)

¹⁸ 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>.

¹⁹ 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/>

without discrimination, rights to: the presumption of innocence, freedom from arbitrary arrest or detention, pre-trial release, to trial within a reasonable time, determination of charges and rights by an independent court and the right to obtain a remedy in relation to any rights violation(s). As Turkey is a member of the Council of Europe, the relevant recommendations of the Committee of Ministers on pre-trial detention and release also apply.

Turkey is obliged to ensure for Eren Keskin and others, freedom from prosecution for charges that fail to comply with international requirements of certainty and therefore contravene the requirement under the ICCPR of notice. Detention based on such charges is arbitrary and unlawful.

In addition, arrests and detentions by Turkish authorities must comply strictly with the requirements of the ICCPR and the ECHR. The European Court of Human Rights (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,

not 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...²⁰

Similarly, the UN Human Rights Committee (HR Committee) has clarified that “remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances”²¹ and that “[p]re-trial detention should be an exception and as short as possible”²² and must be lawful, reasonable and necessary in all the circumstances, “for example, to prevent flight, interference with evidence or the recurrence of crime”.²³ The HR Committee affirmed that pre-trial detention should remain the exception and that bail should be granted, “... except 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” and there is no means other than detention to address the established risk(s). The mere assumption by a State party that the author would interfere with the investigations or abscond if released on bail does not justify detention or an exception to the rule in article 9, paragraph 3, of the Covenant.²⁴

LRWC urges the Government of Turkey to:

- a. immediately and unconditionally release Ms. Keskin;
- b. immediately and unconditionally withdraw all charges against Ms. Keskin;
- c. immediately vacate all convictions of Ms. Keskin and the sentences imposed;
- d. put an end to all acts of harassment against Ms. Keskin;
- e. 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
- f. 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.

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²⁰ *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

²¹ Human Rights Committee, *Mikhail Marinich v Belarus*, Communication No. 1502/2006, para. 10.4;

²² CCPR General Comment No. 8, supra note 31, at para. 3.

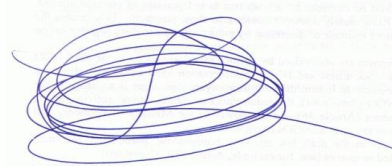
²³ Communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, at para. 9.8

²⁴ Communication No. 1178/2003, *Aleksander Smantser v. Belarus*, at para. 10.3

All of which is respectfully submitted:



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International law obligations to release lawyer Eren Keskin