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HUMAN
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WATCH

LAWYERS ON TRIAL

Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey



Lawyers on Trial

Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey

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Dedicated to the memory of Kurdish human rights lawyer Tahir Elçi (1966-2015)



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Lawyers on Trial

Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey

Summary	1
Methodology	5
I. Background	6
II. Widening the Definition of Terrorism	11
III. Undermining the Right to a Legal Defense	16
IV. Misuse of Terrorism Charges Against Lawyers	22
V. Prosecution of Lawyers as a Form of Reprisal	39
VI. Role of the National Union of Turkish of Bar Associations and Provincial Bar Associations	46
VII. International Standards on Right to a Lawyer and Fair Trial	48
Recommendations	53

Summary

Since the July 2016 coup attempt, Turkey has seen mass arrests and trials on terrorism charges of thousands of people not involved in any violent act. Among them are journalists, human rights defenders and opposition politicians tried in proceedings which rights groups have documented as politicized and unfair. While lawyers always have a critical role to play in protecting the rights of suspects in police custody and defendants in court, their role in protecting the rule of law and human rights is all the more fundamental in the context of the current crackdown in Turkey. Yet, or more likely because of that, as this report demonstrates, authorities have also targeted lawyers, in particular criminal defense lawyers.

The report examines a pattern of prosecutors investigating and opening cases against lawyers. It documents cases in which prosecuting authorities have criminalized lawyers for activities undertaken to discharge their professional duties and have associated them without evidence with the alleged crimes of their clients. Some of these prosecutions appear to have come about in reprisal for their efforts to document police abuse and other human rights violations and to protect the rights of their clients. The report also documents cases where police have threatened and intimidated lawyers, obstructing and interfering in their professional duties. The report concludes that the authorities' unwarranted and abusive targeting of lawyers for prosecution has undermined a key guarantor of the right to a fair trial in Turkey.

The majority of those on trial for terrorist offenses in Turkey at time of writing are charged as members of what the courts and government term the “Fethullahist Terror Organization” (commonly abbreviated to FETÖ) because they accuse the movement, connected with the US-based Muslim cleric Fethullah Gülen, of being responsible for the attempted coup. The second largest group facing terrorism charges are prosecuted as members of the armed Kurdistan Workers’ Party (PKK). A smaller number of people have been charged with terrorism offences for links to smaller outlawed leftist groups and the extremist group Islamic State (IS).

In November 2018, Ministry of Justice figures revealed that 17 percent of Turkey’s entire prison population (44,930 individuals out of the total prison population of 260,144)

consisted of inmates either convicted of or on trial for terrorism offences and facing sentences typically in the range of seven and a half to twelve and a half years for membership of a terrorist organization to much higher sentences for those facing multiple charges. Tens of thousands more individuals being prosecuted for terrorism offenses are at liberty. In the period since the attempted coup, the authorities have considerably widened the already overly broad and vague definition of terrorism.

The majority of lawyers on trial for terrorism are charged with being FETÖ members and a smaller number are on trial for PKK membership or links to outlawed leftist groups. In the case of those prosecuted for PKK membership or links to leftist groups, the prosecution is often based on statements they gave to the media or their participation in press conferences or demonstrations. A civic group, the Arrested Lawyers Initiative, reported in April 2019 that 1,546 lawyers have been prosecuted, with 274 among them convicted in first-instance courts of membership of a terrorist organization, and 598 having been held in pretrial detention for varying periods.

In the months after the July 15, 2016 attempted coup, detainees accused of being members of FETÖ often had difficulty getting lawyers to represent them, with delays even in getting enough compulsory legal aid lawyers to be present during their interrogation by prosecutors and appearance before courts. Antipathy to the Gülen movement in Turkish society as a whole may account for some of the reluctance of lawyers to step up and be involved in FETÖ cases, but lawyers were also concerned they themselves could be prosecuted for taking on these cases. This report shows that such concerns were justified.

The increase in cases of lawyers being threatened and prosecuted has occurred in a context where the Turkish authorities have also imposed rigorous restrictions on the right of individuals in pretrial detention accused of terrorist crimes to benefit from legal counsel and to prepare for defending themselves in court.

Several measures introduced under the state of emergency by decree and subsequently made law and incorporated permanently into Turkey's Criminal Procedure Code (CPC) and Law on the Execution of Sentences and Security Measures undermine the right of a suspect to legal counsel and a defense. For example, prosecutors have the power, routinely invoked, to authorize police, with post facto court approval, to restrict lawyers from meeting with clients during the first 24 hours of their police custody. Lawyers'

privileged communication with their clients in pretrial prison detention has been effectively abolished as authorities are permitted to record and monitor all communications between lawyer and client, and the number of lawyers permitted to represent a client in court in a terrorism case is limited to three.

Lawyers can find themselves barred from acting for a client facing a terrorism investigation for up to two years, if they themselves are under investigation for terrorism; and courts can restrict named lawyers from accessing investigation files of individuals in police custody on suspicion of terrorism offenses. Police also regularly use such court decisions to prevent named lawyers from meeting with detainees. Measures that undermine equality of arms and the adversarial elements of trial proceedings inherent to building a defense, also include allowing courts to conduct hearings and issue verdicts without lawyers present if they rule the lawyers have not provided reasons for their absence; to reject lawyers' requests to hear witnesses if they deem the aim is to prolong the trial; and to hear some protected witnesses remotely, with their voices altered or faces screened, so they cannot be cross-questioned in person in court. Similarly, another provision has led to courts routinely barring defendants in prison from attending their court hearings in person but rather having them join remotely by video linkup to the prison (known in Turkey as Ses ve Görüntü Bilişim Sistemi, SEGBIS).

Lawyers interviewed by Human Rights Watch reported that, in terrorism trials, courts have become increasingly unresponsive to their petitions to have evidence critically examined or tested and to hear witnesses for the defense. Lawyers said they were little more than "extras" in court hearings. Equality of arms between the prosecution and the defendant cannot be preserved if the defendant's lawyer is with no valid justification barred from mounting an effective defense and if the adversarial elements of proceedings become little more than a formality.

In addition, under the state of emergency the government closed down many lawyers' organizations, most notably three which have a strong focus on human rights cases and supporting the rights of defendants in terrorism cases, namely the Contemporary Lawyers Association, the Free Lawyers Association and the Mesopotamian Lawyers Association. Scores of other lawyers' associations, such as the Ankara-based Law and Life Association (Hukuk ve Hayat Derneği), were closed under first state of emergency decree in July 2016 accused of having Gülenist affiliations.

All the lawyers interviewed for this report told Human Rights Watch that the Union of Turkish Bars, the professional body to which all Turkey's provincial bar associations are affiliated, was reluctant in the post-coup period to offer a robust defense of the principles of the right to a fair trial and the right to legal counsel for all suspects and defendants. Similarly, they argued, bar associations and the Union of Turkish Bars have failed for the most part to employ their institutional strength and authority to uphold the rights of lawyers in a principled and impartial way. They have been unwilling to support lawyers faced with serious obstacles in discharging their professional duties and have often failed to support lawyers subjected to arbitrary investigation and prosecution.

Methodology

Research for this report was carried out in July 2018 and between November 2018 and February 2019. A Human Rights Watch researcher conducted interviews with 35 lawyers either in person in Ankara, Urfa and Istanbul, or by phone. In all the criminal cases against lawyers discussed the case file numbers are included and lawyers mostly named. In some cases, the names of lawyers interviewed were withheld at their own request but are known to Human Rights Watch. All interviews were conducted in Turkish. Human Rights Watch also examined written records such as prosecutors' indictments and supplementary dossiers of evidence, records of court hearings and first-instance court decisions, where they were available.

I. Background

For courts to see no distance between a lawyer and their client is a new development. If a lawyer defends a Kurd these days that makes him a Kurdish nationalist. If he defends a FETÖ suspect he is a FETÖ member. As a lawyer you meet your client in prison and you have no possibility of confidential communication since there's a prison guard present, a microphone, and a camera. In court, the judges accept none of your requests, such as hearing independent expert witnesses. We are seeing eight-hour trial hearings which are purely symbolic and in which nothing is taken seriously. The courts are completely unresponsive to lawyers. There is no equality of arms left, no possibility of being able to look the judge in the eye.¹

– Ankara lawyer, July 2018

In the aftermath of the failed July 15, 2016 military coup in Turkey, legitimate efforts by the authorities to prosecute those who planned and were involved in the violent events have often been obscured amidst a much more widespread crackdown on critics, dissidents and political opponents of the government. Alongside the trials of military personnel, thousands of civilians not involved in any violent act have found themselves prosecuted and jailed for terrorism.

The majority of those on trial for terrorist offenses in Turkey at time of writing are charged as members of what the courts and government term the “Fethullahist Terror Organization” (commonly abbreviated to FETÖ) because they alleged the movement which they designate a terrorist organization headed by US-based cleric Fethullah Gülen, was responsible for the attempted coup.² The second largest group facing terrorism charges are prosecuted as members of the armed Kurdistan Workers’ Party (PKK). A smaller number of people have been charged with terrorism offences for links to smaller outlawed leftist groups. In November 2018, the Minister of Justice announced statistics showing that 17 percent of

¹ Human Rights Watch interview with Ankara-based lawyer, July 12, 2018 (name withheld at his own request).

² In June 2018, the Ministry of Justice announced that 83,722 people were on trial for links to FETÖ, and another 203,518 were under investigation. Reported in Hürriyet newspaper, June 19, 2018: <http://www.hurriyet.com.tr/gundem/FETÖ-davalariyla-ilgili-cok-onemli-ayrintilar-40871816> (accessed December 13, 2018).

Turkey's entire prison population consisted of inmates either convicted of or on trial for terrorism offences.³ Tens of thousands more individuals under prosecution for terrorism offenses are at liberty. While all professional groups in Turkey have been affected, this report focuses on the prosecution and targeting of lawyers. As with other groups, the majority of lawyers on trial for terrorism face the charge of being FETÖ members while others are on trial for PKK membership or links to outlawed leftist groups.⁴ For the latter two groups it is often their statements to the media or participation in press conferences or demonstrations that has led to their prosecution.⁵

Several lawyers Human Rights Watch spoke to while preparing this report reported accounts of police threatening them or making semi-threatening remarks to them, such as “Watch out. Representing these suspects could be bad for you,” and “It’ll be your turn next”, when they went to police stations to see detainees. In the months after the July 15, 2016 attempted coup, FETÖ detainees often had difficulty getting lawyers to represent them. In addition to antipathy to the Gülen movement within Turkish society, a key reason for this was the concern that in taking on these cases lawyers could themselves be criminalized. This report shows that such concerns were justified.

The threatening and prosecution of lawyers is occurring in a context where the Turkish government has also imposed rigorous restrictions on the rights of individuals accused of terrorist crimes to benefit from legal counsel while in pretrial detention and to prepare their defense for court. For example, under the state of emergency imposed following the

³ As of November 16, 2018, 17 percent (44,930) of the total prison population (260,144) had been charged with or convicted of terrorism offences, according to figures provided by the Minister of Justice. Of the 44,930, 31,442 were held for alleged Gülenist (FETÖ) links, and 9,731 for alleged links to the outlawed Kurdistan Workers’ Party (PKK), and 1,150 for alleged links to the extremist Islamic State (ISIS) group. The Minister provided the figures during a parliamentary planning and budget commission hearing. Turkish Grand National Assembly, record of planning and budget hearing 31, November 23, 2018, page 146: https://www.tbmm.gov.tr/develop/owa/komisyon_tutanaklari.goruntule?pTutanakId=2228 (accessed January 12, 2019). Those prosecuted and convicted include journalists, civil servants, teachers and politicians as well as police officers and military personnel.

⁴ A civic group, The Arrested Lawyers Initiative, claimed in April 2019 that 1546 lawyers have been prosecuted over the past two years, with 274 among them convicted in first-instance courts of membership of a terrorist organization, and 598 having spent periods in pretrial detention. The Arrested Lawyers Initiative, “Incarceration of Turkish Lawyers: Unjust Arrests and Convictions (2016-2018),” report no. 9, April 1, 2019. See: <https://arrestedlawyers.org/2019/04/01/new-report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2019/> (accessed April 1, 2019).

⁵ See the detailed list of 78 cases of lawyers on trial in the appendix to the report by the Human Rights Association (İnsan Hakları Derneği), Yargı baskısı altındaki avukatlar (Lawyers under judicial pressure), June 1, 2016: <http://www.ihd.org.tr/wp-content/uploads/2018/06/Avukat-Raporu.doc> and for English version: <http://ihd.org.tr/en/index.php/2018/07/25/lawyers-under-judiciary-pressure/> (accessed January 13, 2019).

coup attempt, President Erdoğan's cabinet restricted the rights of defendants in detention to privileged communication with their lawyers. When the state of emergency was lifted in July 2018, the restrictions remained in place because parliament had made them law and at time of writing they are a permanent part of Turkey's Criminal Procedure Code and Law on the Execution of Sentences and are routinely applied.

Lawyers have reported to Human Rights Watch that, in terrorism trials, courts have also become increasingly unresponsive to their petitions to have evidence critically examined or tested and to hear witnesses for the defense. They often see themselves as little more than "extras" in court hearings. Equality of arms between the prosecution and the defendant is severely undermined when the role of the defendant's lawyer is unduly restricted and the adversarial aspects of trial proceedings are little more than a formality.

In addition, under the state of emergency the government closed down many lawyers groups, most notably three which have a strong focus on human rights cases and on supporting the rights of defendants in terrorism cases, namely the Contemporary Lawyers Association, the Free Lawyers Association and the Mesopotamian Lawyers Association.⁶ Scores of other lawyers associations, such as the Ankara-based Law and Life Association (Hukuk ve Hayat Derneği) were closed down under the first state of emergency decree, accused of having Gülenist affiliations.⁷

All the lawyers interviewed for this report told Human Rights Watch that the Union of Turkish Bars, the professional body of which all Turkey's provincial bar associations are members, were reluctant in the post-coup period to offer a robust defense of the principles of the right to a fair trial and the right to legal counsel for all suspects and defendants. Similarly, they argued, bar associations and the Union of Turkish Bars failed for the most part to employ their institutional strength and authority to uphold the rights of lawyers in a principled and impartial way. They have been unwilling to support lawyers faced with serious obstacles in discharging their professional duties and have often failed to support lawyers subjected to arbitrary investigation and prosecution.

⁶ State of emergency decree no. 677 (KHK no 677), Official Gazette, November 22, 2016, list no. 6: <http://www.resmigazete.gov.tr/eskiler/2016/11/20161122-1.htm> (accessed January 14, 2019).

⁷ State of emergency decree no. 667 (KHK no. 667), Official Gazette, July 23, 2016, list no. 3: <http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8-1.pdf> (accessed January 14, 2019).

In a rare exception to this trend, bar associations from around the country and the head of the Union of Turkish Bars condemned accusations against the Diyarbakır Bar by the minister of interior, Süleyman Soylu. In June 2018, in the run up to presidential and parliamentary elections, Soylu accused the Diyarbakır Bar and other civil society groups of supporting the PKK, and even threatened legal action against the Diyarbakır Bar.⁸ In response, the bar lodged a formal complaint that the Interior Minister's comments were inciteful, exposed the bar to risk of attacks, were defamatory and a misuse of the minister's position.⁹ However, in December 2018, media reported that following complaints against the Diyarbakır Bar Association, the Diyarbakır prosecutor was investigating the former board of the Diyarbakır Bar for public statements in the period 2016-18 which "insulted the Turkish nation, the state and state institutions and organs" under article 301 of the Turkish Penal Code.¹⁰

Several lawyers complained that in southeast Turkey the police very often label lawyers on the basis of the clients they represent and that this can be a serious obstacle to the right to an adequate legal representation. One lawyer from Diyarbakır told Human Rights Watch:

I attempted repeatedly to visit my client in police custody but they didn't let me see him and told me that he didn't want me to represent him anymore and that they had called a legal aid lawyer from the bar. Ten days later, after my client was released, he visited me to tell me the police had said to him, "Your lawyer works for the PKK and it will be bad for you to be represented by him. My client had agreed to have a legal aid lawyer from the bar instead because of what the police had said about me."¹¹

⁸ See Cumhuriyet daily newspaper, "Soylu'nun tehditleri durmuyor: gereğini yapacağız" (Soylu's threats don't stop: we'll do what's necessary), June 20, 2018: http://www.cumhuriyet.com.tr/haber/siyaset/1003010/Soylu_nun_tehditleri_durmuyor_Gereğini_vapacagiz.html (accessed January 23, 2019).

⁹ Communication to Human Rights Watch from Ahmet Özmen, former head of the Diyarbakır Bar Association, July 8, 2018. See also, Cumhuriyet newspaper, Süleyman Soylu hakkında suç duyurusu (Complaint about Süleyman Soylu), June 22, 2018: http://www.cumhuriyet.com.tr/haber/siyaset/1005227/Suleyman_Soylu_hakkinda_suc_duyurusu.html (accessed January 23, 2019).

¹⁰ See report from the Bianet online news website, "Article 301 investigation for Diyarbakır Bar Association press statements," (Diyarbakır Barosunun Basın Açıklamalarına 301 Soruşturması), January 2, 2019: <https://bianet.org/bianet/insan-haklari/204091-diyarbakir-barosunun-basin-aciklamalarina-301-sorusturmasi> (accessed January 11, 2018).

¹¹ A Human Rights Watch representative participated in a meeting of the lawyers' rights centers of several southeastern bar associations, Urfa, July 14, 2018.

This report first looks briefly at the government's move to widen the definition of terrorism. Then it analyzes the legislative changes restricting the right to legal counsel. Finally, the report focuses, at greater length, on actual prosecutions of lawyers and the readiness of prosecutors and courts to treat the activities connected with discharging professional duties as a lawyer as though they were a crime.

II. Widening the Definition of Terrorism

Under the state of emergency imposed after the failed July 15, 2016 military coup in Turkey, the president and cabinet issued a series of decrees which dismissed over 130,000 public officials, closed down media outlets, schools and civil society organizations, and changed many existing laws.¹² The main target of the crackdown was the Fethullah Gülen movement, an extensive religious network led by US-based Sunni Muslim preacher of that name, whom authorities in Turkey say was behind the coup. While the measures in the decrees should have been limited to the period of the state of emergency, they became permanent when, after October 2016, parliament, controlled by the President Erdoğan's Justice and Development Party (AKP), passed legislation incorporating them into Turkey's regular law.

Before considering the restrictions in the legislation imposed on the right to a legal defense, it is important first to describe how the government greatly increased the scope for prosecuting people for links with terrorism.

Turkey's Anti-Terror Law (law no. 3713) has been in place since 1991 and has been revised multiple times. The UN Special Rapporteur for the Promotion and Protection of Human Rights while Countering Terrorism criticized the law following a country visit to Turkey in 2006. In particular, the special rapporteur recommended that the definition of terrorist crimes be brought in line with international norms and standards "including defining more precisely what crimes constitute acts of terrorism and confining them to acts of deadly or otherwise grave violence against persons or the taking of hostages". The special rapporteur warned that "only full clarity with regard to the definition of acts that constitute terrorist crimes can ensure that the crimes of membership, aiding and abetting and what certain authorities referred to as 'crimes of opinion' are not abused for purposes other than fighting terrorism."¹³

¹² For a summary of the measures taken, see Human Rights Joint Platform, "21 July 2016 – 20 March 2018 State of Emergency in Turkey: Updated Situation Report," April 17, 2018: http://www.ihop.org.tr/wp-content/uploads/2018/04/SoE_17042018.pdf (accessed January 14, 2019).

¹³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Turkey (April 16-23, 2006), November 16, 2006: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/149/42/PDF/G0614942.pdf?OpenElement> (accessed February 16, 2019).

The UN special rapporteur's report has gone unheeded in Turkey where, over many years, authorities have misused terrorism laws to criminalize and incarcerate individuals who have not committed violent acts, incited others to violence, or provided logistical support to armed groups. Various studies have demonstrated the misuse of terrorism laws. Human Rights Watch itself has documented the use of terrorism charges against protesters, political activists, rights defenders and academics.¹⁴ The Council of Europe Commissioner for Human Rights has criticized Turkey's use of terrorism charges to restrict freedom of expression.¹⁵ The designation of armed groups as terrorist organizations is formally dependent on decisions of Turkey's top court of appeal, although in practice it appears merely to rubber stamp the government's proposed designations.

When the authorities embarked on the project of dismissing a large number of public officials suspected of links to the Gülen movement after the attempted military coup, they widened still further the criteria for what constituted links to terrorist organizations and the kinds of activities that counted towards labelling people terrorists. In this way, the authorities were able to transform a movement that had once been a political ally of the ruling party into what they now described as a "sui generis criminal organization" and named the "Fethullahist Terror Organization" or FETÖ for short.¹⁶ In the first decree issued under the state of emergency dismissing public officials, the government's wording targeted people "assessed to have been members of or acted in union with or been in contact with terrorist organizations or structures, entities or groups that the National Security Council has decided are engaged in activities against national security."¹⁷

¹⁴ See Human Rights Watch report, "Protesting as a Terrorist Offense: the Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey," November 2010; and multiple statements and reports over many years on the misuse of terrorism laws to criminalize speech and non-violent political activities, including news releases, "Kurdish Party Members' Trial Violates Rights," April 18, 2011 <https://www.hrw.org/news/2011/04/18/turkey-kurdish-party-members-trial-violates-rights>; "Rights Defenders on Trial for Doing their Work," October 24, 2017: <https://www.hrw.org/news/2017/10/24/turkey-rights-defenders-trial-doing-their-work>, and "Academics on Trial for Signing Petition," December 5, 2017

¹⁵ Commissioner of Human Rights of the Council of Europe, "Freedom of Expression and Media Freedom in Turkey," July 12, 2011: <https://rm.coe.int/16806db752>; and most recently "Memorandum on Freedom of Expression and Media Freedom in Turkey," February 15, 2017: [https://rm.coe.int/ref/CommDH\(2017\)5](https://rm.coe.int/ref/CommDH(2017)5) (accessed February 16, 2019).

¹⁶ The term is widely used in Turkish government statements and indictments; see, for example, Ministry of Foreign Affairs powerpoint, "15 July Coup Attempt against the Turkish People and Democracy," August, 2016: see http://15.07.gov.tr/assets/files/doc/presentation_mfa.pdf (accessed December 10, 2018).

¹⁷ The wording was first used in the first state of emergency decree (Olağanüstü Hal Kapsamında Alınan Tedbirlere İlişkin Kanun Hükmünde Kararname, no. 676) issued July 23, 2016, and reads in Turkish: "Terör örgütlerine veya Milli Güvenlik Kurulunca Devletin milli güvenliğine karşı faaliyette bulunduğu karar verilen yapı, oluşum veya gruplara üyeliği, mensubiyeti veya iltisakı yahut bunlarla irtibatı olduğu değerlendirilen..."; see <http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm> (accessed December 9, 2018).

This extremely vague wording was intended to allow the authorities to ensnare the greatest number of people in their dragnet. Among the activities treated by prosecuting authorities as clear evidence of “having acted in union with” an outlawed group were: having a bank account with the Bank Asya, a bank the government said was a Gülenist bank; sending children to a Gülenist school; participating in religious conversation groups run by the Gülen movement; working for an institution such as a private school or hospital run by Gülen followers; staying in a student hostel run by Gülen followers; downloading particular cell phone encryption communication applications – principally ByLock – alleged to be have been widespread among Gülen followers; evidence of bank transfers of money which could be charitable donations to Gülen movement institutions or private accounts; and having close relatives connected with the movement.

While these criteria were introduced to enable mass dismissals from the civil service, they also became the blueprint for determining who else could be subject to criminal investigation and prosecution. It is evidence like this which makes up the bulk of the accusations in indictments against those accused of FETÖ membership, or aiding and abetting FETO, and, in a lesser number of cases, the crime of attempting to overthrow the constitutional order. Trials of military personnel and civilians for involvement in the coup are another matter and are not considered here.¹⁸ In the case of prosecution of civilians many indictments fail to establish a causative link between the criteria for links with the Gülen movement and actual participation in any conspiracy or activities that were outlawed at the time they were committed.

Countless indictments against people accused of being associated with the Gülen movement provide a chronology showing how, after the movement broke with the ruling Justice and Development Party (AKP), the Turkish government’s approach to it evolved from viewing the group as a “threat to national security” and an “illegal” organization to be combatted by administrative and criminal investigations, to declaring it a terrorist organization.¹⁹

¹⁸ In June 2018, the justice minister gave figures for the overall number of FETÖ prosecutions, plus prosecutions of military for the coup. A total of 83,722 individuals were on trial for FETO membership and 203,518 still under investigation. A total of 5,370 individuals (all but a few military personnel) were on trial for the coup. See <http://www.hurriyet.com.tr/gundem/feto-davalariyla-ilgili-cok-onemli-ayrintilar-40871816> (accessed January 14, 2019).

¹⁹ This chronology appears, for example, in the indictment of 52 lawyers for FETÖ membership (case discussed in this report), Ankara Chief Prosecutor, investigation no. 2016/110911, esas no. 2017/19962, dated June 14, 2017.

The Gülen movement was first officially termed a terrorist organization by Turkey's National Security Council, chaired by President Erdoğan, on May 26, 2016. On June 16, 2016 the Erzincan Heavy Penal Court pronounced the movement a terrorist organization. In June 2017 the Court of Cassation upheld a decision to convict two judges for membership of FETÖ as an armed terrorist organization, providing appellate court authority upholding the definition of the Gülen movement as a terrorist organization.²⁰ The designation of the Gülen movement as a terrorist organization by the government and later the top court has enabled the mass arrests and prosecutions that followed.

In Turkey, the Court of Cassation had long held the prosecution needs to establish a pattern of affiliation proving the individual has a place in the hierarchy of a proscribed group on a continual, varied and intense basis over a period of time, in order for a court to find an accused guilty of membership of a terrorist organization.²¹ Continuity and variety of instances showing intensity of association are regarded as the criteria for proving an “organic link” to a terrorist organization and a position within its hierarchy rather than actual evidence of engagement in criminal activities or direct incitement to commit crimes.

In one report Human Rights Watch examined the flawed application of Turkey's terrorism laws and the wide application of these criteria to target people such as protestors who have not engaged in activities which could or should be described as terrorism.²² One of the cases in the report concerning a demonstrator convicted of acting on behalf of and full membership of a terrorist organization was subsequently referred to the European Court of Human Rights which found a violation of article 11 of the European Convention and stated that it had not been “foreseeable” that joining a demonstration would result in the authorities' application of widely drawn terrorism charges against the applicant and that the charges constituted an “arbitrary interference with his right to freedom of assembly” since the Turkish courts “had made no distinction between him—a peaceful

²⁰ Reported in the media, see *Sabah* newspaper, “Silahlı terör örgütü tanımı yargıtay kararıyla tescillendi,” (Armed terror organization definition registered by court of cassation decision) June 17, 2017:

<https://www.sabah.com.tr/gundem/2017/06/17/silahli-teror-orgutu-tanimi-yargitay-karariyla-tescillendi>

²¹ For an article discussing a recent Court of Cassation ruling including this criteria, see Ersan Sen, “Yargıtay 16. Ceza Dairesi'nin Son Kararına Göre Örgüt Üyeliği” (Membership of an organization according to the latest ruling of the Court of Cassation's 16th Penal Chamber), November 3, 2017: <https://www.hukukihaber.net/yargitay-16-ceza-dairesinin-son-kararina-gore-orgut-uveligi-makale.5508.html> (accessed January 23, 2019).

²² See Human Rights Watch report, “Protesting as a Terrorist Offense: The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey,” November 2010.

demonstrator—and an individual who had committed offences within the structure of the PKK.”²³

Concerning the characterization of individuals affiliated with the Gülen movement as terrorists, the logic is even more flawed because, at the time the individual engaged in the pattern of affiliation, the Gülen movement had not been outlawed and in general there is no evidence in indictments examined that the activities engaged in at the time they took place amounted to actual criminal activity. While President Erdoğan and his government clearly expressed antipathy towards the group in the period 2014-16 and made it clear to the public that they regarded it as highly undesirable to be associated with it, it is not credible, nor in any way legally sustainable, to argue that any follower of the Gülen movement could or should have foreseen their association with the movement would at a future date constitute criminal, let alone terrorist, activity.

²³ See ECHR: *Iskirik v. Turkey* decision (*Application no. 41226/09*), November 14, 2017: [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-178506\"\]}](https://hudoc.echr.coe.int/eng#{\) (accessed January 14, 2019).

III. Undermining the Right to a Legal Defense

Several of the measures that the government of President Erdoğan introduced by decree under the state of emergency, and that the parliament later passed into law, directly erode the rights to a full legal defense of individuals facing criminal investigation and trial for terrorism offences and crimes against the state. Because of these measures, lawyers are restricted in their ability to discharge their professional duties in ways compatible with fair trial standards including the principle of equality of arms.

Among nine limitations the government has placed on the powers of lawyers since July 2016, perhaps the most critical is the severe restriction on client-lawyer privileged communication both for individuals held in pretrial detention and for convicted prisoners. Meetings between lawyers and their clients in prison can now be strictly limited in duration and subject to the condition that public officials are present and that conversations are recorded in full.²⁴ Lawyers interviewed for this report told Human Rights Watch that over the past two years while in theory such restrictions are discretionary and could be the exception, in practice they have been widely implemented and has become the rule rather than the exception for FETÖ detainees.

One lawyer commented on the widespread implementation of this measure:

²⁴ State of emergency decree no. 667, dated July 23, 2016, introduced this measure and it was later codified into law in a legal amendment to article 59/5 of the Law on the Execution of Penalties and Security Measures (no.5275) reads “Where there is a risk that public security and the security of the penitentiary institution is endangered, that the terrorist organization or other criminal organizations are directed, that orders and instructions are given to them or secret, clear or crypto messages are transmitted to them through the remarks during the interviews between the prisoners and their lawyers; the interviews may be recorded by audio or audio-visual devices, prison officers may be made present during interviews between the prisoner and his/her lawyer with a view to monitoring the interview, documents or document templates and files given by the prisoner to his/her lawyer or vice versa, and the records kept by them of the interview between them may be seized, or the days and hours of the interviews may be limited upon the public prosecutor’s order. In the event that the interview with the prisoner is understood to be made for the aim set out above, the interview shall be immediately ended, and this fact shall be recorded into minutes together with the grounds thereof. The parties shall be warned about this issue prior to the interview. In the event that such minutes are drawn up in respect of a prisoner, the Criminal Peace Judge could ban the prisoner from meeting with his/her lawyers, upon the public prosecutor’s request. Decision on banning shall be immediately served on the prisoner and the relevant Bar Presidency with a view to assigning a new lawyer. The public prosecutor may ask for replacement of the lawyer commissioned by the Bar...” See, <http://www.mevzuat.gov.tr/Metin1.aspx?MevzuatKod=1.5.5275&MevzuatIliski=0&Tur=1&Tertip=5&No=5275> (accessed January 13, 2019).

There is no privileged communication when a meeting between lawyer and client takes place in the presence of a prison guard and the whole meeting is recorded on camera. You can't discuss the case with your client.²⁵

The lawyer went on to note that rather than make a case by case decision based on the gravity of the offence the detainee is charged with “the authorities make no distinction between monitoring a prison meeting between a lawyer and suspect who is simply accused of attending Gülenist religious meetings and the more serious case of a lawyer meeting with a suspect who is charged with FETÖ membership as an intelligence officer.”²⁶

Another lawyer commented on the impossibility of preparing a defense as a result of this measure:

Prison visits took place in the presence of a prison guard and were filmed on camera. Sometimes the guard would warn us by saying things like “Don't talk in coded language”. Any written note had to be given to the guard who would show it first to the camera. All this together becomes very humiliating. You couldn't even put a pen in your pocket. In this context you cannot talk about anything. You can't ask your client basic questions like such as “Did you have ByLock on your phone or not?”²⁷

Human Rights Watch documented one case in which a lawyer was placed under criminal investigation for allegedly violating the prohibition on confidential communication with a client in prison. Lawyer Sabiha Nur Gümüş told Human Rights Watch that on March 26, 2018 she visited a FETÖ suspect client, Şahin Söğüt, in police custody. Seeing that he had a black eye and had difficulty sitting up Gümüş filed a complaint that he had been tortured in police custody.²⁸ She visited him again at Sincan prison on April 11, 2018. The April 11 prison visit was strictly monitored by camera and with a prison guard present throughout. Gümüş told Human Rights Watch that one day after the prison visit police detained her in the carpark of the Ankara courthouse and held her for 2 to 3 hours at the police station

²⁵ Human Rights Watch interview with Kayseri lawyer Özcan Akıncı, Ankara, July 2018.

²⁶ *Ibid.*

²⁷ Human Rights Watch interview with lawyer (name withheld at his own request), Istanbul, August, 2018.

²⁸ Human Rights Watch interview with lawyer Sabiha Nur Gümüş, Ankara, July 2018.

before bringing her before a court. The police accused Gümüş of secretly communicating with her client during her April 11 visit by attempting to show him a note when the prison guard's back was turned. The incident had been recorded on camera. Gümüş denies the charge against her and claims her actions were misunderstood. The court conditionally released her – subject to an overseas travel ban and regular signing in at the police station – and at time of writing there was an ongoing investigation against her for membership of a terrorist organization.²⁹ Police searched her office, car and home and have seized her notebooks, computer, phone, and other digital material. The November 2018 indictment against her client Söğüt and 28 other defendants, mentions Gümüş by name and alleges she secretly communicated with her client although she had only acted for him in terms of filing a complaint he had been tortured in police custody and had not even represented him in the criminal case against him.³⁰ The ongoing criminal investigation against Gümüş is separate from that case.

Another measure introduced under the state of emergency greatly extends the scope for courts to bar certain lawyers from acting for clients under investigation or on trial for terrorism offenses. Lawyers can now be barred for up to two years from representing clients in terrorism-related cases if they themselves face criminal investigations for terrorism offenses (under Criminal Procedure Code, CPC, article 151/3-4). In the past, lawyers could by law be barred from representing a client only if there was an ongoing terrorism prosecution against them, though Human Rights Watch has not documented any case of lawyers being barred from cases under CPC article 151/3-4 in the period prior to the 2016 attempted military coup. Human Rights Watch saw several examples of this practice.

A July 2018 court order barred one Istanbul lawyer who represented officers on trial for the attempted coup from acting as a lawyer on such cases for a year because she herself was under investigation but not yet indicted for terrorism membership (FETÖ).³¹ A December 2018 court order bars 131 lawyers who are either under investigation or on trial on terrorism

²⁹ The Ankara chief prosecutor's investigation against lawyer Sabiha Nur Gümüş continues (investigation no. 2018/77428).

³⁰ The reference appears in the indictment against 28 individuals including Şahin Söğüt accusing them attempting to being part of a Gulenist conspiracy to overthrow the constitutional order and murder for alleged links to a police officer who shot dead former Russian ambassador Andrey Karlov in Ankara on December 19, 2016: Ankara chief prosecutor, investigation no: 2016/181251; Esas No: 2018/535522/11/2018; indictment no: 2018/14397.

³¹ Decision by the Istanbul Criminal Peace Court no. 6, 2018/3936, dated July 10, 2018, concerning lawyer Lale Beşe whose case is discussed in this report.

charges from representing any suspect accused in a current investigation into people accused of links with the outlawed Marxist Leninist Communist Party (MLKP).³² A December 2017 Istanbul court order placed a one-year ban on 322 lawyers from different provinces who were on trial or under investigation for FETO membership from representing any clients under investigation or on trial for FETO membership.³³

Kayseri lawyer Özcan Akıncı told Human Rights Watch a court order had restricted him from representing suspects detained for alleged FETÖ membership for four months in 2017 while a prosecutor investigated him on suspicion of being a member of a terrorist organization (FETÖ).³⁴ The prosecutor concluded that there were no grounds to prosecute the lawyer but the court order restricting him from discharging his professional duties meant that while the investigation was ongoing, he was barred from visiting clients in police custody or in Nevşehir prison.³⁵ Furthermore, while the court order referred only to him being barred from acting for suspects at the investigation stage and not on his acting for clients during their trials, the Kayseri heavy penal court no. 4 ruled that he could not represent a client during trial hearings in that court.³⁶ The Kayseri Heavy Penal Court No. 4 also complained about Akıncı to the Kayseri Bar Association's disciplinary board which imposed its own three-month ban on Akıncı on the grounds that Akıncı's conduct didn't befit the profession.³⁷ Akıncı has appealed to the Union of Turkish Bar Associations. Akıncı told Human Rights Watch, "Had I not taken on the cases I did, many suspects in Kayseri would not have had lawyers." It appears that the authorities launched the investigation against him because he had represented suspects accused of FETÖ membership.³⁸

Another practice which has become common over the past two and a half years has been the practice of courts to issue decisions restricting named lawyers under investigation for

³² Istanbul Criminal Peace Court no. 5 2018/6716, dated December 26, 2018, bans 131 lawyers from representing suspects at investigation or trial stage in the Istanbul chief prosecutor's investigation no. 209444. Human Rights Watch notes that this ruling included in the case are two lawyers who have not been prosecuted for terrorism offenses but for the offense of violating the law on demonstrations and public assemblies (no. 2911) and for whom there is therefore no legal basis on which they can be banned under CPC 151/3.

³³ Istanbul Criminal Peace Court no. 2, decision no. 2017/6021, dated December 18, 2017.

³⁴ Kayseri Criminal Peace Court no. 1, decision no. 2017/3503, dated July 27, 2017.

³⁵ Kayseri chief prosecutor decision not to prosecute no. 2017/29519, dated November 21, 2017.

³⁶ Kayseri Heavy Penal Court no. 4 ruled during a hearing on October 19, 2017 that Akıncı could not represent a defendant on trial in case no. 2017/100 and 2017/10.

³⁷ The Kayseri Bar Association disciplinary board issued a decision in November 16, 2018, citing articles 34, 134 and 136 of the Lawyers Law (No. 1136).

³⁸ Human Rights Watch interview with lawyer Özcan Akıncı, Ankara, July 2018 and January 28ö 2019.

terrorism from accessing investigation files. This measure has always existed in the Criminal Procedure Code (CPC article 153/2). While the restriction applies to accessing the investigation file and should not prevent the lawyers from being able to visit a detainee in police custody after the first 24 hours, two Istanbul lawyers informed Human Rights Watch that in practice if a lawyer was named in such an order the police would arbitrarily restrict the named lawyers from all access to their clients for the duration of their police custody.³⁹

Several measures introduced under the state of emergency by decree and subsequently made law and incorporated permanently into Turkey's Criminal Procedure Code (CPC) undermine the right of a suspect to legal counsel and a defense. These include prosecutors routinely authorizing police, with post facto court approval, to restrict lawyers from meeting with clients for the first 24 hours of their police custody (CPC article 154/2), and a limitation on the number of lawyers permitted to represent a client in court in a terrorism case to just three (CPC article 149/2).⁴⁰ Measures undermining equality of arms and the adversarial aspects of trial proceedings also include granting courts the power to carry out hearings and issue verdicts without lawyers present if the court deems they have not provided reasons for their absence (CPC articles 188/1 and 216/3), to reject lawyers requests to hear witnesses if the court rules the aim is to prolong the trial (CPC article 178), and to hear some protected witnesses remotely, altering their voices or screening their faces, rather than bringing them to court hearings where they could be cross-questioned in person (CPC article 139/3). Similarly, courts now routinely do not permit defendants in prison to attend their court hearings in person but rather have them join remotely by video linkup (known in Turkey as Ses ve Görüntü Bilişim Sistemi, SEGBIS) to the prison (CPC article 196/4).

Lawyers acting for suspects accused of involvement in the coup attempt complained that they have particular difficulty in getting any of their petitions to courts to examine evidence accepted. One lawyer working on a trial of air force personnel from the Akıncı airbase,

³⁹ Information supplied by two Istanbul lawyers, January 28, 2019.

⁴⁰ Articles of the Criminal Procedure Code (law no. 5271) which were amended with provisions that were first introduced by state of emergency decree and then made law by parliament are shown in brackets. The date of the amendments are shown in each article:
<http://www.mevzuat.gov.tr/Metin1.aspx?MevzuatKod=1.5.5271&MevzuatIliski=0&sourceXmlSearch=&Tur=1&Tertip=5&No=5271> (accessed January 12, 2019).

central to the organization of the coup attempt, told Human Rights Watch: “The judges see us lawyers as a curse and wish they could do without us altogether.”⁴¹

The measures first introduced by state of emergency decrees and now permanently included in the Criminal Procedure Code and Law on the Execution of Penalties significantly erode the role of legal counsel and suspects and defendants’ rights and signal a climate in which the authorities increasingly mistrust lawyers and suspect them of hampering the effective prosecution and trial of terrorism suspects, rather as a crucial part of the court system that sustains rule of law and fair trial. Several detailed commentaries on these measures by bar associations and human rights groups indicate how the measures conflict with internationally accepted basic standards on the role of the lawyer and due process.⁴²

⁴¹ Human Rights Watch interview with lawyer, Ankara, July 2018.

⁴² Bar Human Rights Committee of England and Wales, International Bar Associations Human Rights Institute, The Law Society of England and Wales, 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: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=deaf1861-f198-4352-b570-7d08e5c0c53a>; Human Rights Association (İnsan Hakları Derneği), Yargı baskısı altındaki avukatlar (Lawyers under judicial pressure), June 1, 2016: <http://www.ihd.org.tr/wp-content/uploads/2018/06/Avukat-Raporu.doc> and for English version: <http://ihd.org.tr/en/index.php/2018/07/25/lawyers-under-judiciary-pressure/> (accessed January 13, 2019).

IV. Misuse of Terrorism Charges Against Lawyers

Over a thousand lawyers have been prosecuted for terrorism offenses in the past two and a half years, with several hundred held in prolonged pretrial detention. A civic group, the Arrested Lawyers Initiative, claimed in April that 1,546 lawyers have been prosecuted since the coup, with 274 among them convicted in first-instance courts of membership of a terrorist organization, and 598 having spent time in pretrial detention.⁴³

The majority have been prosecuted and convicted for alleged links to what the authorities call the Fethullahist Terrorist Organization (FETÖ). A lesser number have been prosecuted for links with leftist or Kurdish groups and over the past ten years at least three such trials have involved multiple lawyers as defendants.⁴⁴ In 2009, four Ankara lawyers known for their work for Turkey's oldest human rights group (the Human Rights Association) were prosecuted and received finalized convictions in December 2016 for membership of a terrorist organization. The proceedings against them were flawed and the evidence consisted of an alleged tip off to the police that they were acting for the PKK, witness statements against them that the witnesses subsequently retracted and claimed were extracted under pressure, wiretaps of their conversations showing no criminal activity and their attendance at press conferences and demonstrations.⁴⁵ While one of the lawyers is currently serving a six-year-three-month prison sentence, three have sought asylum elsewhere in Europe.

The efforts to prosecute lawyers on flimsy evidence for alleged terrorist links is reminiscent of tactics used in the 1990s, during Turkey's long state of emergency and conflict in the south east of the country with the PKK. In one such case in 1993, under the pretext of charging them with terrorist offences, authorities detained, tortured and otherwise ill-treated 16 lawyers including Tahir Elçi, to whom this report is dedicated. The lawyers'

⁴³ The Arrested Lawyers Initiative, "Incarceration of Turkish Lawyers: Unjust Arrests and Convictions (2016-2018)," report no.9, April 1, 2019. See: <https://arrestedlawyers.org/2019/04/01/new-report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2019/> (accessed April 1, 2019).

⁴⁴ These include the trials referred to in media close to the government as the "KCK lawyers trial", the "DHKP-C lawyers trial" and a second lawyers trial charging 20 lawyers with membership of the DHKP-C described below.

⁴⁵ Ankara Heavy Penal Court no. 11, case no. 2009/309 esas, reasoned decision, dated January 24, 2013. Decision upheld by the Court of Cassation, December 7, 2016. Documents seen by Human Rights Watch.

offices were also illegally searched and seizures carried out.⁴⁶ While confirming that Turkey committed serious violations, including torture, the European Court of Human Rights made clear it wanted to “... emphasize the central role of the legal profession in the administration of justice and the maintenance of the rule of law. The freedom of lawyers to practice their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of the provisions of the Convention, in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the Convention system. For this reason, allegations of such persecution in whatever form, but particularly large-scale arrests and detention of lawyers and searching of lawyers' offices, will be subject to especially strict scrutiny by the Court.”⁴⁷

In many of the current ongoing cases examined by Human Rights Watch, prosecutors allege lawyers have demonstrated a pattern of association with FETÖ. This typically means that they are accused of using the encrypted communication application ByLock, participation in Gülenist conversation groups, sending children to Gülen-affiliated schools, periods of residence in student hostels linked to the Gülen movement, donations via bank accounts to different parts of the Gülen movement, possession of a bank account with Bank Asya (which was linked to the Gülen movement), and membership of particular organizations linked to the Gülen movement. These activities are not specifically connected to discharging the duty of being a lawyer but rather demonstrate that the cases against lawyers resemble the thousands of other prosecutions for FETÖ membership whether of public officials or people in the private sector.

In some cases however, prosecutors chose to prosecute multiple lawyers in a single trial, alleging that they were part of what they call a “FETÖ lawyers structure”. In these cases, prosecutors appear to see the defendants as undertaking their professional activities according to orders issued by a hierarchical criminal group (i.e. FETÖ). According to the

⁴⁶ The 16 lawyers were charged under Turkey's previous penal code with membership of an armed organization, a charge that the court later converted to aiding and abetting an armed organization in order that the trial exceed the statute of limitations and be dropped. Information provided to Human Rights Watch by Diyarbakır lawyer Mesut Beştaş, one of the 16, March 11, 2019.

⁴⁷ *Elçi and Others v. Turkey*, Applications 23145/93 25091/94, Judgment of November 13, 2003, para. 669. Judgement available at <http://hudoc.echr.coe.int/eng?i=001-61442> (accessed March 11, 2019).

prosecutors, the lawyers in question had discharged their professional duties in the service of an outlawed group, thus subverting a legitimate professional function and transforming it into a criminal activity.

Currently mass trials involving multiple lawyer defendants, about which the media has also chosen to use the label “FETÖ lawyers’ structures”, are taking place in at least eight provinces in Turkey (Ankara, Bursa, Samsun, Antalya, Trabzon, Manisa, Denizli, and Konya). In several of these those prosecuted, and sometime convicted, include the heads of the bar associations.⁴⁸

“FETÖ Ankara Lawyers’ Structure” Case

One such mass trial against lawyers is the case of the “FETÖ Ankara lawyers’ structure”. The Ankara prosecutor’s office indicted 52 lawyers for crimes ranging from attempting to overthrow the constitutional order (Turkish Penal Code article 309) to membership of a terrorist organization (article 314). The prosecutor includes as evidence the allegation that some lawyers allocated case files to other lawyers, implying a hierarchical relationship. The indictment repeatedly includes as evidence the fact that between 2014 and 2016 the defendants represented individuals linked to the Gülen movement: police officers prosecuted in that period for alleged irregular wiretapping of thousands of people and individuals prosecuted for their alleged involvement in cheating in civil service entry exams (KPSS exams) by distributing or receiving examination questions or answers in advance of the exams.⁴⁹

While prosecutions for abuse of public office, such as the involvement of police officers in illegal wiretapping or civil servants cheating in examination, are a legitimate and important function of law enforcement, it is a perversion of the rule of law to prosecute lawyers for defending the individuals charged with those offences, where the supposed criminal acts

⁴⁸ The Arrested Lawyers Initiative reported in April 2019 that since the failed coup attempt, four serving heads of bar associations had been arrested, removed from their positions and prosecuted. Two have received convictions (now at appeal) with prison sentences ranging from eight to ten years five months and the cases against the other two continued. Ten former heads of bar associations had also been prosecuted and those convicted so far had received sentences ranging from two years to 13 years. See The Arrested Lawyers Initiative, “Incarceration of Turkish Lawyers: Unjust Arrests and Convictions (2016-2018),” report no. 9, April 1, 2019. Available at: <https://arrestedlawyers.org/2019/04/01/new-report-incarceration-of-turkish-lawyers-unjust-arrests-and-convictions-2016-2019/> (accessed April 1, 2019).

⁴⁹ Charges outlined in indictment prepared by Ankara chief prosecutor, investigation 2016/110911 esas no. 2017/19962, dated June 14, 2017. Copy of indictment seen by Human Rights Watch.

by the lawyers amount to no more than the discharge of their professional obligations and functions. The prosecutor in the Ankara case alleges that the lawyers voluntarily acted for their clients without being appointed by the legal aid service of bar associations and labels 17 instances when the lawyers were carrying out legitimate activity for their clients as “aiding suspects and in the investigations against them creating an impression in favor of FETÖ and against the state and making statements to the media constituting propaganda that the investigations and trials were unfair.”⁵⁰

Indictments portraying the work of a defense lawyer in these terms but void of any evidence of engagement in criminal activity threatens the very core of fair trial, by attempting to smear the essential role and function of defense lawyers in ensuring respect for rule of law. When governments, prosecutors and courts treat the representation of certain clients as evidence of criminal activity by the lawyers, they are effectively eliminating the right to legal representation against criminal charges which is fundamental to a fair trial.

Defendants in the Ankara lawyers trial were detained in August 2016, weeks after the attempted coup, and the majority spent periods of up to 16 months in pretrial detention before being conditionally released subject to restrictions such as a ban on overseas travel and regular signing in at a police station. At the time of publication two defendants in the trial were in pretrial detention, and 14 defendants were being tried in absentia. On March 29, the court convicted 21 of the defendants to sentences ranging from 6 years 3 months to 8 years 1 month. Sixteen defendants were acquitted and the case files of the absent 14 have been separated out.

M. D., a defendant in the Ankara lawyers trial, reported to the Ankara Criminal Court of the Peace No. 7 that the police tortured him. He said they had stripped him, threatened him with rape, hit him in front of the lawyer appointed by the bar association to represent him, and that the same police officer who beat him accompanied him to a routine medical examination. M.D. reported this to the court in a handwritten note transmitted via the Sincan prison directorate once he was placed in pretrial detention.⁵¹ M.D. said in the note

⁵⁰ Ibid.

⁵¹ Copy of defendant M.D.’s hand-written note to the Ankara Criminal Judge of the Peace No. 7, dated August 22, 2016 seen by Human Rights Watch.

that he had visible bruises to his chest and arms from the torture and that he had been too frightened to complain at the time. Lawyers facing prosecution alongside M.D. in the same case told Human Rights Watch that there had been no information about an investigation into M.D.'s allegation of torture.⁵²

Bursa Cases and Siddik Filiz Case

Amongst the evidence against three lawyers charged with – and on September 18, 2018, convicted of – being members of FETÖ in a trial in the western town of Bursa, the prosecutor referred to one defendant who “worked as a lawyer in the period 2011-16 in Bursa and during this time acted as a lawyer for the suspects who were in union with or in contact with the FETÖ armed terrorist organization.”⁵³ The three spent periods of up to 17 months in pretrial detention before being bailed, and their case is at appeal. Another Bursa trial of 46 lawyer defendants included among the evidence against them their membership of the same lawyers’ group (the Ahenk Hukuk Derneği) alongside their use of ByLock, Bank Asya bank accounts, participation in Gülenist conversation groups and charitable donations.⁵⁴

Some indictments and court decisions against lawyers list by name the FETÖ suspect clients they represented amongst the evidence against them. In November 2018 a court convicted Istanbul lawyer Siddik Filiz to a seven-year-nine-month prison sentence for membership of FETÖ and spreading FETÖ propaganda. The judge in the case emphasized as grounds for conviction Filiz’s alleged use of the ByLock encrypted messaging application allegedly used by Gülenists, even though a police report stated there was no ByLock on his phone. Other grounds given for his conviction included his telephone contacts with ByLock users, witness testimonies alleging he participated in Gülenist conversation groups, and membership of a lawyers’ association with alleged Gülenist links. But the decision also dwells at length both on the fact that Filiz represented named police officers prosecuted for being members of FETÖ and on Filiz’s tweets discussing the trials of these police officers.⁵⁵ Filiz has been in pretrial detention since February 2017 and is appealing his conviction.

⁵² Information supplied to Human Rights Watch by lawyer prosecuted in same trial, November 2018.

⁵³ Bursa Chief Prosecutor’s indictment Esas 2016/18990. Copy of indictment seen by Human Rights Watch.

⁵⁴ Bursa Chief Prosecutor indictment Esas 2017/2730, dated April 20, 2017. Copy seen by Human Rights Watch.

⁵⁵ Istanbul Heavy Penal Court no 36, Reasoned decision: case no.: 2017/194 esas decision no.: 2018/209 Prosecutor esas No.: 2017/31730, dated November 12, 2018. Copy of decision seen by Human Rights Watch.

Antalya Case and Two trials Against Münip Ermiş

A 90-page indictment accusing 24 lawyers in the southern city of Antalya of FETÖ membership consists of 74 pages on the history and alleged illegal activities of the Gülen movement, with a mere 16 pages devoted to the alleged evidence specific to the defendants.⁵⁶ There is no effort made to establish the alleged connection between the defendants beyond some being members of the same lawyers' association (Kural Hukukçular Derneği) in Antalya that was closed down by emergency decree in July 2016. There is, in other words, no account of how this alleged FETÖ lawyers structure worked. The prosecutor includes as evidence in the indictment the names of lawyers' clients who were prosecuted for FETÖ membership, allegations by witnesses mostly saying no more than that the defendants were "FETÖ lawyers," and information about the social media accounts and news websites they followed. The main charge against most is the allegation they had the ByLock encrypted messaging app on their phones and Bank Asya accounts. Without explanation, the US-based Fethullah Gülen himself is included as a defendant in this Antalya indictment. The court decided to separate out each case and try the defendants individually and not in a mass trial.

In a further unexplained twist in this same case, the prosecutor claimed that the lawyers' alleged Kurdish or leftist political sympathies, was evidence of being FETÖ members. One such lawyer is Münip Ermiş, a well-known socialist human rights lawyer and deputy chair of the Contemporary Lawyers Association (closed down by emergency decree in 2016) who has frequently represented torture victims among others. The prosecutor listed as evidence against Ermiş his affiliation with the Contemporary Lawyers Association, the social media accounts he followed, two alleged tip-offs by named people Ermiş said he did not know claiming he supported terrorist organizations, and the fact that Ermiş visited a prosecutor who was arrested and jailed as a FETÖ member. Ermiş explained to the court that he had visited the prosecutor at his home as he was being detained as an act of solidarity because he considered the detention of prosecutors a serious matter regardless of their political views or alleged affiliations. The Antalya court acquitted Ermiş on December 13, 2018.⁵⁷

⁵⁶ Antalya Chief Prosecutor indictment, investigation no: 2016/58280, esas No: 2017/8214, dated May 18, 2017. Copy of indictment seen by Human Rights Watch.

⁵⁷ Copy of acquittal decision of Antalya Heavy Penal Court no. 10, dated December seen by Human Rights Watch.

Another lawyer indicted in the same case, Hakan Evcin, was accused of visiting and providing legal counsel to that same prosecutor. On November 28, 2018, the court also acquitted Evcin of all charges. Afterwards, Evcin commented to the media on the implications of being prosecuted and detained:

Because I was in pretrial detention, I have been dropped by most of my clients. Because I've been harmed by this both the prosecutor and the court reminded me I could open a compensation case and put that on record. I was in prison for ten and a half months. Then they said sorry and acquitted me.⁵⁸

In the cases against the other lawyers tried individually, the court convicted seven to six years and ten months in prison for membership of FETÖ and acquitted some of the others.⁵⁹

Although acquitted in the case against Antalya lawyers for FETO membership, Münip Ermiş soon heard that in the same month the Antalya prosecutor had opened a new investigation against him. He was called to testify on December 31, 2018 on suspicion of spreading terrorist propaganda and this time the outlawed organization he was accused of working with was not FETÖ but the outlawed armed leftist Revolutionary People's Liberation Party-Front (DHKP-C). An Antalya court placed an overseas travel ban on Ermiş the same day on the grounds that he might flee. In January 2019, the Antalya Heavy Penal Court No. 10 accepted the prosecutor's January 11 indictment of Ermiş which had opted for a charge accusing him of "membership of an armed organization (DHKP/C)".

On the basis of Ermiş's attendance at six legal press conferences in the period 2006-13, 32 Tweets and 16 Facebook posts which did not in any way advocate violence, and the testimonies of one protected witness and two named witnesses who claimed Ermiş was a lawyer who acted for the DHKP/C but provided no evidence or specific detail of any kind, the court concluded: "It is understood that there is concrete and sufficient evidence in the documents to open a trial against the suspect for committing the crime of being a 'member

⁵⁸ "FETÖ'den 10,5 ay hapis yatan avukata beraat" ("Lawyer jailed for 10 and a half months for being a FETO member acquitted"), *Hürriyet* daily newspaper, November 25, 2018: <http://www.hurriyet.com.tr/verel-haberler/antalya/fetoden-10-5-ay-hapis-vatan-avukata-beraat-41033629> (accessed March 13, 2019).

⁵⁹ Information communicated to Human Rights Watch by Münip Ermiş, January 16, 2019.

of an armed organization’ for acting according to the aims and strategy of the organization by accepting the organization’s ideas and objectives, activities and actions, and establishing an organic link with the hierarchical structure of the DHKP/C and its sub sections with activities that demonstrated continuity, depth and variety, and also of committing the crime of spreading propaganda for the armed terrorist organization by sharing via social media postings that praised and legitimized the armed activities of the DHKP/C terrorist organization and its open structures and members.”⁶⁰

At time of publication Ermiş was at liberty with his trial set to begin on June 20, 2019. Ermiş told Human Rights Watch that he regards this latest case against him as a direct reprisal for his work as a human rights lawyer and his affiliation with the Contemporary Lawyers Association over many years.⁶¹ The prosecution of lawyers from the Contemporary Lawyers Association as DHKP-C members is discussed below.

Lale Beşe Case

The Istanbul-based lawyer Lale Beşe has been a defense lawyer for a number of military personnel arrested in connection with the July 15 coup attempt. On June 26, 2018, she was herself detained on suspicion of being a member of FETÖ. On July 10, a court ruled that she be placed in pretrial detention. After 18 pages (out of 22) on the history and illegal activities of the Gülen movement, the indictment against her cites as evidence of her alleged FETÖ membership her social media postings commenting acerbically on members of the military and political developments, and some highly critical postings about President Erdoğan in the period before the April 2017 referendum. The prosecutor also accuses her of insulting the president (Turkish Penal Code article 299/1-2) and provoking people to disobey the law (article 217/1).

A key sentence in the indictment says, “The suspect Lale Beşe who has been acting as legal defense particularly in coup attempt and FETÖ trials has continually and insistently made lots of social media posts using her identity as a lawyer to establish respectability

⁶⁰ Antalya Chief Prosecutor indictment, investigation no. 2018/103358, E. 2019/1345, p. 42. Copy seen by Human Rights Watch.

⁶¹ Human Rights Watch telephone interviews and communications with Münip Ermiş, January 16 and February 17, 2019, and copy of Ermiş’ December 31, 2018 statement to Antalya prosecutor seen by Human Rights Watch.

and validity in the eyes of the society for the purpose of serving the aims of the organization [FETÖ] to create chaos and to reorganize itself.”⁶²

Beşe was released from prison and placed under house arrest with an electronic tag after her first trial hearing on December 18, 2018. She has been banned by court order from representing the clients she was representing in the coup trials or in any other terrorism case. At the time of writing her trial was ongoing.⁶³

Associating Lawyers with the Alleged Crimes of Their Clients

One very experienced lawyer who had served as the provincial bar association chair reflected on the concern many lawyers had about the dangers of being associated with FETÖ:

After July 15, 2016 I was astonished to see that lawyers really didn’t want to take the cases. The state started to put lawyers under intense pressure. The legal aid service of our bar association is 321 and it dropped to 15, or even less than that. Those lawyers willing to take the cases were working around the clock and practically sleeping at the police stations. Most lawyers were worried about being called FETÖ members. That was how great the atmosphere of fear in the country was at that time immediately after the coup. It has normalized now but many still refuse to accept those cases. In our profession we shouldn’t have this fear. This didn’t happen after the September 12 military coup. In those days there wasn’t the broken society we have today. Nowadays the fear is that taking on those cases will affect everything in your life – your ability to be on a board, to take the exam to be a judge, to go into politics, because accepting those cases will show up and be used against you. In one police report on a lawyer client I represented, the police had written, “He was a lawyer for FETÖ militants and so he aided and abetted FETÖ.”⁶⁴

⁶² Istanbul chief prosecutor indictment no. 2018/109956 Esas 2-18/42025, p. 18, November 5, 2018. Copy seen by Human Rights Watch.

⁶³ Information provided to Human Rights Watch by Lale Bese, January 20, 2019. A copy of the court order by the Istanbul Criminal Peace Court no. 6, 2018/3936, dated July 10, 2018, banning her from representing clients in coup trials or any terrorism case seen by Human Rights Watch.

⁶⁴ Human Rights Watch interview with lawyer at the Urfa bar association, July 2018.

The content of the FETÖ indictments against lawyers gives credence to the view that in these cases the authorities closely associate lawyers with the alleged crimes of their clients.

Lawyers known for defending leftist or Kurdish clients, or families of victims of crimes perpetrated by state officials, have also been associated with the crimes and profile of their clients and targeted with prosecution. There have been at least three trials over the past ten years involving multiple lawyer defendants.⁶⁵ This report focuses on the period from 2016 onwards.

Case Against 12 Free Lawyers Association Lawyers for Kurdistan Workers' Party (PKK/KCK) Membership

On March 16, 2016, the Istanbul police detained 12 lawyers who were members of the Free Lawyers Association (Özgürlükçü Hukukçular Derneği), and 24 non-lawyers, on suspicion of being members of the armed Kurdistan Workers' Party (PKK/KCK). A court initially released all the detainees, but the prosecutor appealed, and lawyers Ramazan Demir and Ayşe Acinikli were rearrested and placed in pretrial detention where they remained for a period of five months. A hastily prepared prosecutor's indictment accused the two, along with 10 other lawyers and 38 other people of "membership of a terrorist organization", with the specific charge being that they acted as couriers transmitting information between prisoners on trial or convicted for PKK membership and members of the PKK outside prison. Demir and Acinikli were released at their first trial hearing on September 7, 2016.

The evidence in the indictment against the 12 lawyers (among the 50 defendants) details almost no evidence against them other than referring to a few Tweets and indicating that the main evidence came from wiretaps of their telephone communications and other surveillance the details of which the indictment does not mention. Supplementary dossiers to the indictment include wiretapped telephone calls over many months.

⁶⁵ The first was the prosecution of four lawyers for PKK membership in 2009 (p.22 of this report), then the mass trials linking 46 lawyers to the armed Kurdistan Workers' Party (PKK/KCK) in 2011, and linking 22 lawyers to the outlawed DHKP-C in 2013 (a trial similar to the trial in 2018 against many of the same lawyers discussed in this report, p.33.), then in 2016 the trial of 12 lawyers among 50 charged with PKK membership (discussed here, p.31).

Human Rights Watch has examined the evidence in the supplementary dossiers against Ramazan Demir which includes his conversations with the media, with friends and with some other individuals named in the indictment and many Tweets he posted but no concrete evidence of him passing political messages back and forth between prisoners and people outside the prison.⁶⁶ Nor do his Tweets constitute criminal activity. As such, the case against him seems to lack compelling or credible evidence of wrongdoing.

Ramazan Demir told Human Rights Watch that he believes the police operation and arrest of the lawyers, and himself in particular, was an attempt to prevent them from discharging their professional duties as lawyers and from speaking out and sharing social media posts on the subject of the December 14, 2015 to March 1, 2016 blanket curfew and the military and police operations against PKK-affiliated groups in the southeast town of Cizre.⁶⁷ Demir was one of several lawyers who had applied repeatedly in the months before they were detained to the European Court of Human Rights on behalf of clients whose relatives were injured and trapped in Cizre and in urgent need of medical assistance. The European Court had in January 2016 issued separate injunctions – known as “interim measures” – in five cases involving injured people in Cizre neighborhoods requiring Turkish authorities to protect their life and physical integrity. Only one of the five applicants in whose favor the court had issued an injunction was given medical treatment.⁶⁸

The former Council of Europe Commissioner for Human Rights, Nils Muiznieks, provided a third-party intervention in the ongoing case at the European Court examining the conduct of the security forces in Cizre. In his opinion, he raised serious concerns about the prosecution of Demir which, he suggested, occurred “whether primarily or incidentally, in connection with his legitimate role of bringing cases to the Court.”⁶⁹ Indeed on November 15 and December 10, 2018 immediately following Demir’s November 13 attendance at hearings before the European Court in Strasbourg on behalf of his clients, the Ministry of Justice through its human rights section and the General Directorate of Law and Legislation

⁶⁶ Evidence in supplementary dossiers to indictment seen by Human Rights Watch. Istanbul Chief Prosecutor investigation no. 2014/65291, Esas no. 2016/17427.

⁶⁷ Human Rights Watch interview with Ramazan Demir, January 22, 2019.

⁶⁸ See Human Rights Watch, “Turkey: State Blocks Probe of Southeast Killings,” July 11, 2016: <https://www.hrw.org/news/2016/07/11/turkey-state-blocks-probes-southeast-killings> (accessed January 23, 2019).

⁶⁹ See “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights,” dated April 25, 2017: <https://rm.coe.int/168070cfff9> (accessed January 23, 2019).

wrote to the Public Prosecutor and the Istanbul Bar Association to seek a disciplinary investigation be opened against him. In response, the Istanbul Bar Association opened an investigation on January 3, 2019 which could lead to Demir's disbarment from the legal profession.⁷⁰

At time of publication the criminal trial against Demir and the others was continuing.⁷¹

Case Against 20 Lawyers for Membership of the Revolutionary People's Liberation Party-Front

In September 2017, the authorities charged 20 lawyers who are members of the now closed Contemporary Lawyers Association with being members or leading members of the Revolutionary People's Liberation Party-Front (DHKP-C), an outlawed armed group which has claimed responsibility for deadly attacks on Turkey's police and security forces.⁷² The prosecution of the lawyers began with police detaining 14 out of 20 of them on September 12, 2017 two days before the first trial hearing of Nuriye Gülmen and Semih Özakça, an academic and teacher respectively who had been detained for a months' long hunger strike protesting their dismissal from their jobs under the state of emergency. The lawyers had played a leading public role in defending Gülmen and Özakça whose case had received extensive coverage in the domestic and international media at the time. Arresting the lawyers shortly before Gülmen and Özakça's first court hearing appears to have been a calculated effort to limit public campaigning around the case of the two jailed hunger strikers at the time they went on trial. In the subsequent week, 17 out of 20 named lawyers were placed in pretrial detention, while three whose whereabouts was not known, were charged in absentia.

⁷⁰ Translations of relevant correspondence from the General Directorate of Law and Legislation of the Ministry of Justice, the Istanbul Public Prosecutor and the Istanbul Bar Association on file with Human Rights Watch.

⁷¹ The case has been monitored by bar associations in Europe and lawyers organizations including The Law Society of England and Wales which with Lawyers' Rights Watch Canada published an amicus brief on the case (<http://communities.lawsociety.org.uk/international/international-rule-of-law/lawyers-at-risk/amicus-for-constitutional-court-turkey/5057590.fullarticle>), the European Association of Lawyers for Democracy and World Human Rights (see their listing of trials in Turkey they monitor: <https://eldh.eu/en/2018/12/31/political-trials-against-lawyers-and-political-activists-in-turkey-and-other-countries/>), Lawyers for Lawyers and other groups.

⁷² See, for example, a news report about the killing of a prosecutor by individuals linked with the group: <https://www.independent.co.uk/news/world/europe/turkish-prosecutor-mehmet-selim-kiraz-held-hostage-by-armed-militants-over-protest-death-10146286.html> (accessed January 18, 2019).

The evidence in the indictment against the 20 lawyers makes scant mention of the case of Gülmen and Özakça although witness statements discredit the hunger strike as a stunt organized by the DHKP-C. The indictment mainly focuses on digitally stored messages and notes about (non-violent) political organization and activities the Istanbul prosecutor argues are evidence that some of the defendants were in contact with the DHKP-C under the direction of individuals outside the country, as well as statements against them by witnesses. As in many of the FETÖ cases, the witnesses in this case are “confessors”, individuals themselves on trial for links with the illegal organization who testify against others in return for reduced sentences.

The underlying claim of the indictment is that in providing legal representation to individuals charged with links to the outlawed DHKP-C, in some cases including alleged involvement in armed attacks, the lawyers are themselves members of the illegal group. For each lawyer charged in the indictment, the prosecutor lists the number of their clients who have been prosecuted for links with DHKP-C. The indictment also states that “as a legal structure of” the DHKP-C, the People’s Law Office (where some of the lawyers worked) and its lawyers “provide legal aid to detained or prosecuted members of the DHKP-C, consolidate these individuals and their relatives sense of connectedness and belonging to the organization, prevent the detained members of the organization from giving statements and revealing organizational secrets, and communicate important information on behalf of the terrorist DHKP-C to its structures”.⁷³

By presenting the allegations about the lawyers in this way, the prosecutor construes a lawyer’s entirely permissible advice to a suspect not to give a statement to the police (that is to exercise their right to remain silent) as evidence of the “the outlook of an illegal organization” and conflates it with much more serious charges such as activities that could amount to acting as a “courier” between an illegal organization and its followers.

The detained lawyers remained in pretrial detention for periods of up to a year before their first trial hearing in September 2018.⁷⁴ The court ruled that all be released while the trial

⁷³ Istanbul Chief Prosecutor, Investigation no. 2017/105607; Esas no. 2018/12766, Indictment dated March 22, 2018, p. 416. Copy seen by Human Rights Watch.

⁷⁴ The case has been monitored and reported by various bar associations and lawyers organizations, including the European Association of Lawyers for Democracy and World Human Rights (see their listing of trials in Turkey they monitor with reports on hearings: <https://eldh.eu/en/2018/12/31/political-trials-against-lawyers-and-political-activists-in-turkey-and-other-countries/>), and other groups.

against them continued, a decision the prosecutor in the hearing immediately appealed against. A day later, despite the absence of any new evidence to justify reversing its own decision, the same court ordered the re-arrest of 12 of the 17.

By the second week of hearings in December 2018, six lawyers had been rearrested. Among them was Selçuk Kozağaçlı, the chair of the Contemporary Lawyers Association, closed down by emergency decree in 2016. Between December 3 and 7 the court released one lawyer but extended the detention of the other five.⁷⁵ At the hearing on March 20, the court ruled that 18 lawyers be convicted and the case files of two who were missing be separated out. Six lawyers were convicted of aiding and abetting a terrorist organization and received prison sentences of up to three years nine months. Eleven were convicted of membership of an armed terrorist organization and received sentences of eight years ranging to thirteen years six months. Among them, Kozağaçlı received a sentence of 11 years three months. Barkin Timtik was convicted of being a leading member of an armed terrorist organization and sentenced to 18 years nine months. The lawyers have appealed their convictions. The final hearing was attended by representatives of bar associations in Turkey as well as of the Paris bar association. The heads of 39 bar associations across Turkey released a statement in which they condemned “repeated violations of the right to a fair trial, of the criminal procedure code and of provisions of the law by the court.”⁷⁶ The Paris bar association also issued a statement calling for the release of the lawyers and condemning the serious procedural violations by the court.⁷⁷

Many of the same lawyers are also on trial in a separate process which began in 2013 and contained similar kinds of evidence, none of it linking them to armed attacks or advocating violence.⁷⁸

⁷⁵ Ibid, p. 419.

⁷⁶ Statement to the media on the trial of ÇHD members by the heads of 39 bar associations available at: <http://www.divarbakirbarosu.org.tr/39barodanchduvesimeslektaslarimizinvargilanmasinailiskinortakbasinaciklamasi-/1564> (accessed March 31, 2019).

⁷⁷ Statement by the Paris Bar Association calling for the release of the lawyers available at <http://www.avocatparis.org/turquie-18-avocats-condamnes-iusqua-18-ans-de-prison-le-barreau-de-paris-appelle-leur-liberation> (accessed March 31, 2019).

⁷⁸ Istanbul chief prosecutor, investigation 2012/2250, esas no. 2013/277, indictment dated July 1, 2013. Copy seen by Human Rights Watch.

Lawyers Charged with Membership of the Marxist-Leninist Communist Party

Three lawyers were also included in a trial against 23 individuals accused of spreading propaganda for and membership of the Marxist-Leninist Communist Party (MLKP), an outlawed group in Turkey which has on occasion claimed responsibility for attacks on police units in Turkey and has armed units fighting the extremist Islamic State (ISIS) alongside Kurdish forces in Syria. Police detained two of the lawyers, Özlem Gümüştas and Sezin Ucar, in the early hours of the morning on October 19, 2017. Following a court decision on October 26 to place them in pretrial detention, the two lawyers spent almost 12 months in prison before being granted bail on October 5, 2018. The other lawyer in the case, Gülhan Kaya, later gave a statement to the prosecutor but was not jailed pending trial.⁷⁹ The case was ongoing at the time of writing and all three lawyers were tried in the same proceedings as other defendants they might otherwise have represented as lawyers, as the prosecution tried to link the lawyers to the alleged crimes of their clients. The evidence cited against them concerned their attendance at memorials and funerals for MLKP militants and social media postings on the same.

Case Against Lawyers Cemo Tüysüz and Gülay Koca from Urfa, Southeast Turkey

On December 12, 2016 police detained Cemo Tüysüz on suspicion of being a member of a terrorist organization in an operation targeting 24 Kurdish political party officials and activists, another lawyer and two elected mayors. Tüysüz had previously been held in pretrial detention in 2011 in the context of an investigation and ongoing trial targeting 46 lawyers who had visited jailed PKK leader Abdullah Öcalan in prison.⁸⁰ Tüysüz had also represented many Kurdish activists and politicians in previous cases, and the 2016 operation placed him in the same investigation as people he might otherwise have represented as a lawyer.

On January 4, 2017, a court placed Tüysüz in pretrial detention where he spent the next 16 months, before he was released on May 11, 2018. The evidence against him consisted of a wiretap of a phone call with a friend who had called him when he was in Öcalan's birthplace, the town of Halfeti, and joked that he was "beside the leader," an August 2013

⁷⁹ Istanbul chief prosecutor, investigation 2017/28997; esas no. 2018/7483; indictment dated March 3, 2018. Copy of indictment seen by Human Rights Watch.

⁸⁰ Human Rights Watch interview with Cemo Tüysüz, Urfa, July 2018. Tüysüz is being tried with 46 others, the majority lawyers, by Istanbul Heavy Penal Court no. 19. The trial is continuing.

SMS Tüysüz sent to friends in celebration of a religious holiday (bayram) where he called for peace in “Rojava, Kurdistan and the whole Middle East”, an end to children dying and for Öcalan’s release, as well as Tüysüz’s alleged participation in three public political gatherings. The prosecutor also accused him of participating in the activities of a non-government platform called the Democratic Society Congress, which the authorities allege is part of the outlawed PKK although it has never been closed down and continues to function.⁸¹ The case against Tüysüz resting on this scant evidence was continuing at this writing after being separated from the case against the others.

Tüysüz told Human Rights Watch: “I don’t visit clients at the police station any more. After being prosecuted like this it wouldn’t do them any good for me to show up. The police have labelled me as a PKK lawyer.”

In the same operation on the same day police arrested Gülay Koca, another Urfa-based lawyer and once head of the Human Rights Association Urfa branch. She was held for six months in pre-trial detention, released on June 14, 2017, and on July 2018 received a seven-year-six-month prison sentence for membership of the PKK.⁸² Her case was at appeal at the Court of Cassation at this writing after the sentence was upheld by the local court of appeal.⁸³ The evidence against Koca focused on her attendance at 12 press conferences and demonstrations in the period 2013 to 2016 which the prosecutor deemed to be “organized by supporters of the PKK” though there was no suggestion they had been banned or called for any form of incitement to violence. She was also accused, like Tüysüz, of being involved with the Democratic Society Congress and a notebook printed with its name was found in her home, with handwritten notes in it, listing various public political meetings in different cities. An expert report proved it was not her handwriting in the notebook. She argued that it in fact belonged to the political advisor of Peoples’ Democratic Party member of parliament, Dilek Öcalan, who had stayed in her home and who travelled with the MP. Dilek Öcalan had attended the public assemblies the advisor had noted in the notebook. However, the court ignored this explanation and linked the notebook with what

⁸¹ Details of evidence against all 24 individuals discussed in Şanlıurfa Heavy Penal Court no. 6 reasoned decision case file no. 2017/154, prosecutor esas no. 2017/6754, dated July 17, 2018. Decision seen by Human Rights Watch.

⁸² “Urfa’da siyasetçilere ceza yağdı” (Sentences for politicians in Urfa), Mezopotamya Ajansı news agency, July 17, 2018: <http://mezopotamyaajansi12.com/tum-haberler/content/view/29827> (accessed March 14, 2019).

⁸³ The Council of Bars and Law Societies of Europe (CCBE) raised their cases in a January 13, 2017 letter: [https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey - Turquie/2017/EN_HRL_20170113_Turkey_Lawyers-detained-in-Urfa-13-01-2017.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS_LETTERS/Turkey_-_Turquie/2017/EN_HRL_20170113_Turkey_Lawyers-detained-in-Urfa-13-01-2017.pdf)

they argued was Koca's connection to the Democratic Society Congress. There was no discussion by the prosecutor or court of the notes written in it.

Koca told Human Rights Watch that she believes there was an element of reprisal in the case brought against her and that it came about after she worked on documenting torture cases in Urfa as a human rights lawyer and also her activities as a member of the local municipal council in Urfa.⁸⁴ Human Rights Watch as well as the Urfa bar association and the Human Rights Association have repeatedly documented reports of torture and ill-treatment in police custody in Urfa city and other towns in the province. The issue of reprisals against lawyers is discussed with further examples in the next chapter.

The cases against both Tüysüz and Koca and the other lawyers' cases discussed in this chapter demonstrate that prosecutors in Turkey do not refrain from imposing serious terrorism charges despite the absence of any evidence, far less compelling evidence, of criminal activity, and courts readily prolong pretrial detention for individuals facing such unsubstantiated charges.

⁸⁴ Communication from Gülay Koca to Human Rights Watch, January 18, 2019.

V. Prosecution of Lawyers as a Form of Reprisal

In several of the individual terrorism prosecutions against lawyers examined by Human Rights Watch it appears that the authorities targeted lawyers as reprisal for taking on legal cases against the police or for getting into arguments with the police. Human Rights Watch has also come across cases where the police file counter charges against lawyers in response to themselves being accused of abuse of a lawyer. Police officers in Turkey have a well-documented history of lodging counter charges against individuals who have accused them of excessive use of force, ill-treatment, or torture. The tactic is specifically designed to thwart investigations of these abuses by intimidating as well as undermining the credibility of accusers, discouraging prosecutors to pursue complaints robustly and providing a basis for police to refuse to cooperate with investigations.⁸⁵ Bringing prosecutions for terrorism offences against lawyers because they engaged in disputes with the police, took up cases against the police, or in order to cover up police misconduct or abuse is a perversion of prosecutorial powers.

Kazım Bayraktar

Human Rights Watch examined the prosecution of Ankara-based lawyer Kazım Bayraktar who is on trial, along with nine other defendants, for membership of an armed terrorist organization. The prosecutor accused him of belonging to the outlawed Union of Revolutionary Communists of Turkey (Türkiye İhtilalci Komünistler Birliği, TİKB), an organization the April 2016 indictment itself makes clear no longer has an active armed wing.⁸⁶ However the case against Bayraktar appears to be linked to the fact that Bayraktar was representing the family of a man killed by a police officer.

The evidence against Bayraktar focuses specifically on his activities as a lawyer for the family of Ethem Sarısülük, a 27-year-old man who died on June 14, 2013, two weeks after

⁸⁵ Previously documented by Human Rights Watch, “Turkey, Closing Ranks against Accountability,” chapter 7, <https://www.hrw.org/report/2008/12/05/closing-ranks-against-accountability/barriers-tackling-police-violence-turkey> (accessed January 21, 2019). The main kinds of counter complaints the police lodge are under two articles of the Turkish Penal Code: “preventing a public official from performing his duty” (article 265) and “insulting a public official” (article 125/3- a).

⁸⁶ Ankara Chief Prosecutor investigation no. 2102/155886; Esas no. 2016/10391, indictment dated April 15, 2016. Indictment states on page 5, “Bu yapılanma [örgütün silahlı kanadı] günümüzde faal değildir.” (“This entity [the organization’s armed wing] is not active today.”) Indictment seen by Human Rights Watch.

being shot in the head by a police officer during the Ankara protests which followed the mass anti-government demonstrations in Istanbul known as the Gezi Park protests.

The indictment against Bayraktar alleges that Sarısülük was a member of the TİKB and that the organization “claimed him” as a martyr to its cause.⁸⁷ The indictment further alleges that on September 23 and October 28, 2013 Bayraktar made speeches which incited and motivated members of TİKB who gathered to protest outside the courthouse in which police officer Ahmet Şahbaz was on trial for Sarısülük’s killing. According to the indictment, the protesters had shouted slogans, sprayed red paint on the court building, blocked traffic, and on one occasion broken windows.⁸⁸ The slogans the indictment lists called for the state to be held accountable for Sarısülük’s death and political slogans which did not amount to incitement to violence.⁸⁹

The indictment accused Bayraktar of acting on behalf of the TİKB in court by seeking – successfully – for the judges hearing the case to be recused on the grounds that they had not acted impartially over two hearings. The indictment also accused him of making statements to the media “which demeaned members of the judiciary and police.” According to the indictment, the prosecutor assessed these statements as “attempting to legitimize violence against the police” because they suggested that popular outrage about the trial was to be expected “in a legal system where there is no fair trial, no detention [of the police officer] and no necessary punishment.”⁹⁰

As of this writing both the case against Bayraktar and the case against Şahbaz, the police officer charged with killing Sarısülük continued. In the case of Şahbaz, after an initial court verdict of murder and a seven-year-nine-month sentence, on appeal the charge against the officer was converted to manslaughter and the most recent verdict saw Şahbaz receive a low prison sentence which the court then converted to a 15,000 Turkish Lira fine (at the time 3,800 US dollars).⁹¹ Şahbaz was not detained until 13 months after shooting Sarısülük and spent 14 months in pretrial detention before being released in September 2015.

⁸⁷ Ibid, indictment page 125.

⁸⁸ Ibid, page 125-26.

⁸⁹ Ibid.,.

⁹⁰ Ibid., p. 127.

⁹¹ See Bianet news website, March 21, 2018: <https://m.bianet.org/bianet/insan-haklari/195385-ethem-sarisuluk-u-vuran-polis-sahbaz-in-cezasi-5-bin-lira-daha-artirildi> (accessed January 21, 2019).

By contrast in the case against Kazim Bayraktar, the lawyer faces a jail sentence of 5 to 10 years for membership of an armed organization, with the penalty automatically increased by one half because it is a terrorism offense. At time of publication his trial was continuing.

Adem Kaplan

Adem Kaplan is another lawyer who was prosecuted for being a member of an armed organization as a direct result of an altercation with police officers at a police station.⁹²

Ankara-based lawyer Kaplan told Human Rights Watch that on November 21, 2017 he was at a police station to represent five FETÖ suspects when a police officer verbally insulted him. The argument escalated. In the course of what started as a verbal altercation a police officer fell against a table at which stage approximately 15 other police officers then joined in and beat Kaplan before detaining him on charges of being a FETÖ member.

The police kept Kaplan overnight in the station and questioned him the next day before bringing him before a court which ruled that he be released pending investigation. The police and prosecutor accused him of having installed on his phone the encrypted communication application ByLock allegedly used by Gülen movement supporters. Turkey's courts routinely use this as evidence of FETÖ membership. But Kaplan strongly denies the charge and believes that this is a made-up accusation. He told Human Rights Watch that the police had previously told him they had checked his telephone number and ID and that he did not appear on the ByLock list.⁹³

In his statement to the police he said: "I believe this accusation I have ByLock which hasn't been brought up until today is brought up because I uncovered a case of torture at a police station ... and because I acted as a lawyer for two people who were abducted by the National Intelligence Agency (MIT)."⁹⁴

Following the police's opportune alleged discovery of ByLock on his phone after the altercation, the prosecutor indicted Adem Kaplan for FETÖ membership in March 2017 and

⁹² Ankara Chief Prosecutor investigation no. 2017/194528, esas no. 2018/13289, indictment dated March 6, 2018. Copy seen by Human Rights Watch.

⁹³ Human Rights Watch interview with lawyer Adem Kaplan, Ankara, July, 2018.

⁹⁴ Copy of Adem Kaplan's statement to the police seen by Human Rights Watch, dated November 22, 2017.

his trial was ongoing at this writing. The indictment devotes 20 pages to the Gülen movement and just under a page to the allegation that Kaplan had used the ByLock application. Kaplan told the court that police had threatened him countless times because of the profile of those he represented and because he had exposed rights violations and filed complaints about abductions by suspected members of the security services of men accused of being FETÖ members.⁹⁵ The trial continues.

Lawyer Threatened After Altercation with Police

Human Rights Watch was told by another lawyer that the police had also detained him overnight after an altercation and made a threat that they would also discover ByLock on his phone if he was not careful. That lawyer (name withheld for his own safety) told Human Rights Watch that he has subsequently avoided visiting clients in police custody.⁹⁶

Emin Baran

Lawyers vulnerable to being targeted by the police and prosecutors are often those working directly to document human rights violations by the authorities such as Emin Baran from Suruç, a town in Urfa province bordering the Syrian town of Kobane.

Baran was on the board of the Urfa Bar Association and the coordinator of the bar's Human Rights and Refugee Rights Centre when he learned that an Urfa court had issued a warrant for his arrest on suspicion of being a member of a terrorist organization.⁹⁷ Human Rights Watch has examined the case file against him.

The police claimed they received a tip-off that he and two others were “using their identity as lawyers to avoid having their homes and cars searched and to operate freely.” Moreover, the tip-off claimed, “these individuals are supporters of the PKK terrorist organization, and shelter PKK militants coming from outside in their homes, prepare actions, and are preparing an action against the government-appointed mayor (*kayyum*) of Suruç.”⁹⁸

⁹⁵ Ankara Chief Prosecutor indictment, dated March 6, 2018, seen by Human Rights Watch.

⁹⁶ Human Rights Watch interview with Ankara lawyer, April 2017.

⁹⁷ Human Rights Watch interview with lawyer Emin Baran, Urfa, July 14, 2018.

⁹⁸ Suruç district Security Directorate petition to the Urfa chief prosecutor's office, December 15, 2016. Copy seen by Human Rights Watch.

The police searched Baran's home and office in his absence on December 16, 2016, seizing a computer, telephone and other digital material along with copies of a legal pro-Kurdish journal, a few pages of a legal newspaper in Kurdish and some old CDs given away with a Gülenist journal. With no compelling evidence to support the claims in the tip-off and despite the fact that Baran turned himself in (he had been away at the time the arrest warrant was issued), on February 8, 2017 a court remanded Baran to pretrial detention.

After being indicted on March 21, 2017 for membership of a terrorist organization and spreading terrorist propaganda, he was released during his trial on July 7, 2017. At a hearing in October 2018 the Urfa court acquitted him on the PKK membership charge but convicted him of spreading propaganda. The court deferred the pronouncement of sentence on the condition he does not reoffend within five years. In the end, the court dismissed all evidence against Baran except for three social media tweets which, despite the fact they did not advocate or incite violence and fall squarely within the boundaries of protected speech, were the basis of the propaganda conviction.⁹⁹

Baran believes that the case against him was a deliberate reprisal for his human rights work including efforts to document abuses by the police.¹⁰⁰

Büşra Demir

Şırnak lawyer Büşra Demir told Human Rights Watch about several criminal investigations she has faced simply, she believes, because she has been vocal in acting for clients who have been the victim of human rights violations and was actively engaged in documenting and reporting violations for the Human Rights Association. Demir is on the board of the Human Rights Association.

Most of these investigations concern the period during and after the intense military and police operations against PKK-affiliated groups entrenched in towns in Şırnak province from September 2015 to April 2016. Demir and a few other lawyers attended autopsies and documented the torture of individuals including children whom the police detained in the course of the conflict and during blanket curfews imposed on the towns. While the Justice

⁹⁹ Şanlıurfa Heavy Penal Court no. 5, reasoned decision, case no. 2017/209, decision no. 2018/681, dated October 8, 2018. Copy seen by Human Rights Watch.

¹⁰⁰ Human Rights Watch interview with Emin Baran, November 2018.

Ministry did not grant permission to the prosecutor to prosecute Demir for “insulting the Turkish nation and state institutions” and two investigations into allegations against her for “spreading terrorist propaganda” and “misconduct” ended in decisions not to prosecute, she is still under investigation for membership of a terrorist organization and spreading terrorist propaganda.

As part of the open investigation against her, the Cizre prosecutor questioned Demir on August 1, 2018 about her social media postings on Twitter and a photograph of Demir in a Human Rights Association delegation, all of which Human Rights Watch has examined. There is nothing in the social media postings or the photograph which could amount to any criminal act, and all fall squarely within the bounds of peaceful freedom of expression. Demir told Human Rights Watch:

The fact of being under investigation has a disabling effect on your capacity to do your job. There is a continuing prosecutor’s investigation against me now and previously I was under investigation after documenting the death of two boys in Şırnak prison as a result of a fire. I had to stop acting for the families of the boys because I was placed under criminal investigation for misconduct after I visited the prison to report on the incident for the Human Rights Association and the prison authorities complained I had misused my position. I didn’t want that investigation to have a negative impact on the investigation into the boys’ deaths and the responsibility of the prison authorities. The investigation against me was later dropped.¹⁰¹

Filiz Ölmez

Lawyer Filiz Ölmez works in the southeastern town of Cizre, in Şırnak province. She told Human Rights Watch about the altercation she had with special team police officers on March 2, 2016.¹⁰² She was taking photos of graffiti on a wall in the early morning following a prolonged curfew and military operations in the town, when a Shorland armored car pulled up nearby. As she later described it in court:

¹⁰¹ Human Rights Watch interview with Büşra Demir, January 2019. Relevant documents seen by Human Rights Watch.

¹⁰² Information supplied to Human Rights Watch by lawyer Filiz Ölmez, Cizre, March 2016. Several bar associations from the region made a statement condemning this incident and the detention of lawyers in Istanbul: <http://www.sirnakbarosu.org.tr/Detay.aspx?ID=68585> (accessed January 21, 2019).

From inside the vehicle a voice shouted: “Come here!” I got out my ID card and said I was a lawyer. At that, the defendant Halil [the police officer on trial] threw me into the vehicle, jumped on me, squeezed my throat with his two hands and swore at me. Had he not been sure I was a lawyer he would have killed me.¹⁰³

Ölmez filed a complaint to the prosecutor, got a medical report documenting scratches to her hands and red blotches (*kızarıklık*) on her throat, and beyond that was deeply affected by the incident for many months afterwards.

The Cizre prosecutor opened a case against police officer Halil Alkan for “intentional injury” of Ölmez, but Alkan filed a counter complaint against her, claiming that she insulted and threatened him and that he had not assaulted her. So the prosecutor has also opened a case against Ölmez.

Other police officers present when the incident happened gave identical witness statements supporting Alkan’s testimony and during the trial the police informed the court that the footage from the camera inside the Shorland armored vehicle was not available. The court rejected Ölmez’s lawyers’ requests to have the hard drive of the camera examined to see if the footage might have been erased.

On November 22, 2018, the court convicted Ölmez of insulting and threatening police officer Alkan and handed her a 15-month prison sentence converted to a 9,000 Turkish lira [\$1,862] fine. Ölmez had opted not to have the court defer the pronouncement of sentence on the grounds that in doing so she would have forfeited the right to appeal against the conviction. Her appeal was ongoing at the time of writing. Police officer Halil Alkan was convicted of “intentional injury” but received the much lower 3,000 Turkish Lira [\$560] fine. The court suspended the fine and deferred pronouncement of the verdict on the condition that he not re-offend within a five-year period and no right of appeal.¹⁰⁴

¹⁰³ Cizre Penal Court of First Instance No. 2, case no. 2017/130 Esas, decision hearing, November 22, 2018, page 2. Copy seen by Human Rights Watch and information supplied by Filiz Ölmez, November 22 and December 5, 2018.

¹⁰⁴ Ibid.

VI. Role of the National Union of Turkish of Bar Associations and Provincial Bar Associations

Among the duties of the Union of Turkish Bar Associations and its executive board is “to defend the law profession and members of the profession against violations of rights directed at the profession and its members,” and “to defend and protect the rule of law and human rights and to realize these concepts.”¹⁰⁵ In 2004 the Union of Turkish Bar Associations established lawyers’ rights centers within regional bar associations. Among the functions of such centers is “to stand beside and ensure active support to lawyers subjected to attacks and rights violations because of their professional activities and identities” and “to be concerned with lawyers who are prosecuted and detained in pretrial detention in connection with their professional activities.”¹⁰⁶ To date the Union of Turkish Bar Associations has made few public statements about lawyers under attack or on trial. Human rights centers which exist in some bar associations have also failed to take up cases against lawyers or to play a vocal role in addressing rights violations against them. In general, provincial bar associations pay little attention to lawyers on trial, but there is significant variety between the associations and some of them have made important efforts on particular cases. For example, the Ankara bar association recently took resolute action in the case of a police officer attacking, beating and ripping the clothing of a female lawyer at the Ankara courthouse and the case of an official forcibly removing another lawyer acting in her defense and in the process injuring her arm. The Ankara Bar Association announced that it was temporarily suspending legal aid services and was pursuing formal complaints with the public prosecutor against the police officer and court official.¹⁰⁷

In another positive example, the head of the Union of Turkish Bar Associations, Metin Feyzioğlu, took up the case of police ill-treatment of the former head of the Urfa Bar

¹⁰⁵ The function of the Union of Turkish Bar Associations is laid out in the Lawyers Law (Avukatlık Kanunu, law no. 1139), see inter alia articles 95/4, 94/21, 110/17: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.1136.pdf> (accessed March 16, 2019).

¹⁰⁶ Türkiye Barolar Birliği Avukat Hakları Merkezi Yönergesi (Union of Turkish Bar Associations Directive on the Lawyers’ Rights Centre), articles 4/13 and 4/22, dated January 3, 2014. See <http://d.barobirlik.org.tr/ahmyonergesi.pdf> (accessed March 16, 2019).

¹⁰⁷ Statement by Ankara Bar Association, November 14, 2018: <http://www.ankarabarasu.org.tr/HaberDuyuru.aspx?DUYURU&=1943> (accessed December 7, 2018).

Association, Ahmet Tüysüz.¹⁰⁸ Feyzioğlu's intervention was instrumental in securing assurances from the authorities that full disciplinary and criminal investigations into the allegations of ill treatment would be pursued.¹⁰⁹ After his release, Tüysüz complained both to the prosecutor and to Turkey's Ombudsman Institution, which examined security camera footage of the incident and recommended prosecution of the police.¹¹⁰ The matter appears to have been taken seriously by the ombudsman because Ahmet Tüysüz was at the time the head of the Urfa Bar Association and because Metin Feyzioğlu supported him. It is regrettable that there are so few similarly positive examples to report.

Provincial bar associations and the Union of Turkish Bar Associations should use their considerable institutional power to ensure that the union's own lawyers' rights center and those of provincial bar associations play a forceful role in protecting the rights of lawyers who are prosecuted and held in pretrial detention and in following cases against lawyers through full trial monitoring and reporting. They should also focus as a matter of priority on assaults on the role of the lawyer and erosion of the right to legal counsel.

The Union of Turkish Bar Associations, in particular, should play a resolute role in advocating for lawyers' rights with the government, in supporting the right of all defendants to a defense regardless of their political profile or the nature of the crime they are accused of and, more generally, in promoting the role of the lawyer as central to a fair trial and with a key role to play in the protection of human rights. The legal amendments to the Criminal Procedure Code and the Law on the Execution of Penalties and Security Measures, and the widespread use of court rulings to ban lawyers from certain cases and measures to prevent privileged communication between lawyers and their clients in prison, have significantly undermined the role of the lawyer. Such measures conflict with the international standards explained in the next chapter. The Union of Turkish Bar Associations has a central role to play in addressing these serious setbacks and championing fair trial rights.

¹⁰⁸ Ahmet Tüysüz told Human Rights Watch how on September 22, 2017, while he was visiting a detained client in the courthouse in the southeastern town of Viranşehir, the police seized and manhandled him. The incident occurred as Tüysüz was about to join his client who was to be interrogated before the prosecutor. A police officer made some insulting comments to him. When he answered back, the officer immediately called over other officers and his superior who ordered them to handcuff and detain Tüysüz. The police physically manhandled Tüysüz and took him away for questioning. Ahmet Tüysüz gave an account of the incident on Evrensel Web TV, uploading on to youtube, September 22, 2017 <https://www.youtube.com/watch?v=Q5qTXAgMi6c> (accessed December 9, 2018).

¹⁰⁹ Metin Feyzioğlu statement on to local TV channel uploaded on Youtube, September 25, 2017 <https://www.youtube.com/watch?v=TzXYtgfg-Ak> (accessed December 9, 2018).

¹¹⁰ Report and recommendation of the ombudsman institution (TBMM Kamu Denetçiliği Kurumu, application no. 2017/16076, dated June 13, 2018). Copy seen by Human Rights Watch.

VII. International Standards on Right to a Lawyer and Fair Trial

The Role and Responsibilities of Lawyers

The leading international instruments relevant to the responsibilities of lawyers include the 1990 UN Basic Principles on the Role of Lawyers and, on a regional level, the Council of Europe Committee of Ministers Recommendation No. R (2000) 21 on the freedom of exercise of the profession of lawyer. These standards explicitly recognize that lawyers play an essential role in the justice system and the protection of human rights such as the right to a fair trial, the right to challenge detention, the right to freedom from inhuman and degrading treatment, and the right to an effective remedy for violations of human rights.

With respect to governments' obligations to protect lawyers from harassment and reprisals and to respect their independence, the OSCE Guidelines on the Protection of Human Rights Defenders provide in paragraph 30 that states should protect, in law and practice, human rights defenders who are engaged in litigation from retaliatory charges, arbitrary prosecutions and other legal actions in response to cases that they file. They also explicitly state that lawyers engaged in human rights work should not face intimidation or reprisals, such as the threat of disbarment, for their defense of human rights, which includes the right to a fair trial.

The UN Basic Principles provide that “governments shall ensure that lawyers ... are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference” and specifically in principle 18 that “lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions”.¹¹¹

As noted above the European Court of Human Rights has confirmed “the central role of the legal profession in the administration of justice and the maintenance of the rule of law.” It has ruled:

¹¹¹ Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, September 1990 principles 16 and 18 respectively:
<https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx> (accessed March 16, 2019).

The freedom of lawyers to practise their profession without undue hindrance is an essential component of a democratic society and a necessary prerequisite for the effective enforcement of [human rights], in particular the guarantees of fair trial and the right to personal security. Persecution or harassment of members of the legal profession thus strikes at the very heart of the [human rights] system.¹¹²

In 2016 the commissioner for human rights of the Council of Europe, made a third-party intervention in the case of *Bagirov v. Azerbaijan* which analyzed a pattern of repression against human rights lawyers in Azerbaijan.¹¹³ In that submission the commissioner noted that the safeguard in principle 18, “underpins the principle of independence of the legal profession” and “aims at enabling lawyers to perform their professional duties freely, independently and without any fear of reprisal.” The commissioner repeated how he and his predecessor have “expressed concerns about harassment, abusive prosecutions and other forms of pressure on lawyers – including threats of criminal proceedings – who have defended sensitive cases, as well as reports of impediments that lawyers had encountered in exercising freely their profession, such as difficulties in accessing penitentiary establishments and meeting their detained clients, violation of the lawyer-client confidentiality principle in such cases, or difficulties in obtaining access to detainees’ medical and other files.”

The commissioner noted that such pressure “seriously impairs defence rights and prevents lawyers from effectively serving the cause of justice,” going on to say that “it is crucial that defence lawyers can operate without impediments and in full confidentiality when providing legal assistance to their clients. Moreover, they should have free and unimpeded access to their clients in prison in order to ensure that the right to defence is fully implemented in practice.”

These concerns are similar to those expressed in 2014 by the UN Special Rapporteur on the Independence of Judges and Lawyers who warned about “cases in which lawyers have

¹¹² See para. 669 of *Elçi and Others v. Turkey*, Judgment of November 13, 2003, available at <http://hudoc.echr.coe.int/eng?i=001-61442> (accessed March 16, 2019).

¹¹³ Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, in Application No. 28198/15, CommDH (2016) 42, November 22, 2016: <https://rm.coe.int/16806da74c> (accessed March 16, 2019).

been sanctioned because of political activities, advocacy work, confusion between the lawyer's cause and his/her client's cause, and involvement in the legal representation of clients in sensitive cases." She called on governments "to refrain from criminally convicting or disbarring lawyers for the purposes of silencing them, preventing them from criticizing public policies or obstructing them in their legal representation of specific clients."¹¹⁴

The Turkish authorities both in failing to protect lawyers from intimidate, hindrance and harassment in the discharge of their functions, and also in identifying lawyers with the cause of their clients are violating their obligations to respect the independence of the judicial system, which includes respecting the independence and role of lawyers.

The Right to a Lawyer and to a Fair Trial

Lawyers' ability to exercise their functions freely and independently is central to the capacity of the justice system to protect the right to a fair trial enshrined in article 6 of the European Convention on Human Rights (ECHR) and article 14 of the International Covenant on Civil and Political Rights (ICCPR). Lawyers need access to their clients and to be able to give prompt, unhindered and confidential legal advice to ensure the right to fair trial.

Article 1 of the Basic Principles provides that "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." This reflects what is required by relevant treaties. For example, the European Court of Human Rights has made clear that, in order to ensure the right to a fair trial is "practical and effective," article 6, as a rule, requires that access to a lawyer "be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right." However, the Court has also emphasized that even where compelling reasons may exceptionally justify denial of access to a lawyer from the commencement of detention, such restriction must not unduly prejudice the rights of the accused.

¹¹⁴ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/HRC/26/32, 28 April 2014, para. 68: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/139/18/PDF/G1413918.pdf?OpenElement> (accessed March 16, 2019).

The Court has also identified that the right of access to a lawyer includes the right to give confidential instructions to the lawyer and the ability of the lawyer both to be physically present and to participate in the initial police interview and any further questioning during the pre-trial proceedings. Restrictions such as hindering, or refusing to allow, a lawyer to access the case file at the earliest stages of the criminal proceedings or during pre-trial investigation and excluding the lawyer from participating in investigative actions have also been identified by the Court as undermining the fairness of criminal proceedings.¹¹⁵

The United Nations human rights committee has issued General Comment No. 32 on the right to a fair trial, under article 14 ICCPR, in which it sets out the role of the lawyer in guaranteeing the right including the relations between a lawyer and their clients. In particular the committee emphasized that there is a right to prompt access to a lawyer, and that “counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.”¹¹⁶

The measures in place in Turkey which interfere with or deny a lawyer’s access to persons in detention, that deny confidentiality of privileged communications between lawyers and their clients, that hinder access to investigation files, deprive defendants of the right to call witnesses, and challenge witnesses against them on an equal basis all violate the right to fair trial protected under international law.

Abuse of Power Against Lawyers

Article 18 of the ECHR prohibits states from invoking restrictions permitted under the convention for any purpose other than those for which they have been prescribed. The purpose of the article is to prohibit authorities’ misuse of power.¹¹⁷ Violations of Article 18 include many cases in which detentions and prosecutions against lawyers and other

¹¹⁵ See e.g. *Beuze v Belgium*, Application No. 71409/10, Judgment November 9, 2018: [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-187802\"\]}](https://hudoc.echr.coe.int/eng#{\)

¹¹⁶ General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, August 23, 2007, CCPR/C/GC/32, para. 34: <https://undocs.org/CCPR/C/GC/32> (accessed March 16, 2019).

¹¹⁷ See *Travaux préparatoires of the Convention*, (CDH (75) 11; *Merabishvili v. Georgia* [GC], Application No. 72508/13, Judgment of November 28, 2017: [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-178753\"\]}](https://hudoc.echr.coe.int/eng#{\) (accessed March 16, 2019).

human rights defenders were pursued for an ulterior purpose using charges that were not based on a “reasonable suspicion.”¹¹⁸

Turkey’s unwarranted detentions and prosecutions of lawyers, including in retaliation for human rights work and to undermine the right to fair trial of those accused of terrorism charges, constitute a violation of article 18 of the ECHR.

¹¹⁸ See e.g, Ilgar Mammadov v. Azerbaijan, Application No. 15172/13, Judgment May 22, 2014; Rasul Jafarov v. Azerbaijan, Application No. 69981/14, Judgment of March 1, 2016, Aliyev v. Azerbaijan, Application No. 68762/14, Judgement of September 20, 2018: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-144124%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-144124%22]}) (accessed March 16, 2019).

Recommendations

To the Turkish Government

- Allow lawyers to effectively perform their professional functions in accordance with the guarantees provided for in Article 14 of the ICCPR, Articles 5 and 6 of the ECHR, and the UN Basic Principles on the Role of Lawyers, including by reminding police and prosecutors of the protected role and function of lawyers;
- Immediately end the systematic abusive detentions and prosecutions of lawyers, judges, prosecutors, and court officials; drop the charges against and, where relevant, release those accused of no more than vague association and affiliations with proscribed groups, unless there is probative evidence of specific criminal misconduct presented in proceedings that comply with international fair trial standards;
- Immediately end the interference in and targeting of bar associations and lawyers' associations as well as the arbitrary arrest and prosecution of their members.
- Repeal the state of emergency amendments passed into law concerning the right of lawyers to discharge their professional duties, the rights of suspects to legal counsel, the right of lawyer-client privileged communication and other amendments outlined in this report. These concern specifically: amendments to Criminal Procedure Code articles 139/3, 149/2, 151/3, 154/2, 188/1, 216/3, 178, 194/4; and amendment to the Law on the Execution of Penalties and Security Measures article 59;
- End arbitrary powers assumed by the police to bar a lawyer from visiting detainees in police custody if a court has issued a restriction order (under Criminal Procedure Code article 153/2) preventing that lawyer from accessing documents in case files at the criminal investigation stage;
- End the use of Criminal Procedure Code article 151/3 to bar lawyers from acting on particular cases when they themselves are under investigation for terrorism offenses without clear and specific reasoning justifying such an intervention;
- End the practice of prosecuting lawyers, based in whole or in part, on whom they have represented as clients and actions which constitute discharging their duties as a lawyer;
- End mass trials of lawyers in particular on disproportionate charges such as the charge of membership of a terrorist organization;

- End the arbitrary and abusive application of terrorism charges and in particular the widely used charge of “membership of an armed organization” (Turkish Penal Code article 314);
- Promptly accede to requests by the UN Special Rapporteur on Judges and Lawyers to conduct a country visit.

To the Union of Turkish Bar Associations and Provincial Bar Associations

- Advocate resolutely with the Turkish government in support of the above recommendations and for Turkey’s adherence to international standards on the role of the lawyer and fair trial;
- Send a strong message to the prosecutorial authorities and police that violence, intimidation and abuse against lawyers will not be tolerated;
- Publicly defend the right of all suspects to an effective defense regardless of their profile or charges;
- Publicly reiterate that the government and authorities have an obligation to ensure that no lawyer who defends a suspect is identified with the alleged crimes of his or her client;
- Actively monitor and report on the ongoing cases against lawyers and in particular the mass trials of lawyers prosecuted for membership of a terrorist organization regardless of the political profile of the cases;
- Actively collect statistics and documentation on cases against lawyers and where appropriate consider providing third party interventions to courts reminding them of the basic principles protecting lawyers discharging their professional duties;
- Strengthen the capacity of lawyers’ rights centers in the Union of Turkish Bar Associations and in provincial bar associations to conduct monitoring and reporting and to report regularly to the boards they report to;
- Involve the human rights centers of bar associations in protecting and promoting the rights of lawyers and the right to a fair trial and strengthen the capacity of human rights centers to conduct regular monitoring and reporting;
- Advocate for an end to the arbitrary and abusive application of terrorism laws.

To the European Union and Member States plus Norway, the Council of Europe

- Advocate with the government of Turkey in support of the above recommendations;
- Conduct trial monitoring and reporting on the prosecution of lawyers in Turkey and seek meetings with the Turkish government and with the Union of Turkish Bar Associations and provincial bar associations in Turkey to discuss findings;
- Increase scrutiny of court decisions, the functioning of the criminal justice system, the erosion of the right to a fair trial and specifically the legal framework as it protects the right to legal counsel and to a defense in criminal proceedings.
- Refrain from opening the negotiation for a modernized Customs Union between the European Union and Turkey until the government of Turkey can demonstrate genuine progress towards guaranteeing respect for the rule of law, including ending the persecution, harassment and ensuring the independence of legal professions;
- Develop and fund programs to provide professional and independent legal assistance to lawyers facing unfair prosecution in retaliation of their professional activities, to advocate for the protection of the independence of legal professionals and to conduct monitoring and reporting on the ongoing cases against lawyers; and ensure that all programs funded to support Turkey's judiciary contributed to strengthening the independence of lawyers and guaranteed protection against any form of attack.

To the UN Special Rapporteur on the Independence of Judges and Lawyers

Renew a request for a country visit to Turkey to examine all relevant aspects covered by the mandate of the special rapporteur and, in the meantime, raise concerns privately and publicly about on-going attacks on legal professionals;

To Bar Associations and Lawyers' Associations in Europe, Canada and the US:

- Advocate for the above recommendations;
- Privately and publicly express concern at the interference in the work of legal professionals in Turkey and press the Turkish authorities to respect the rights of lawyers and end arbitrary arrests, harassment, retaliations and attacks on lawyers;
- Conduct trial monitoring and reporting on the prosecution of lawyers in Turkey and seek meetings with the Turkish government and with the Union of Turkish Bar Associations and provincial bar associations in Turkey to discuss findings.

- Offer support to Turkish lawyer associations on how to structure their work to protect lawyers against interference and pressure, to monitor cases against lawyers and, when relevant, to provide third party interventions to courts; provide support and assistance to lawyers faced by retaliation for their legitimate activities.

LAWYERS ON TRIAL

Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey

In a period of mass arrests and politically motivated trials of journalists, rights defenders, and opposition politicians on terrorism charges, lawyers in Turkey have a critical role to play in protecting the rights of suspects in police custody and defendants in court. *Lawyers on Trial: Abusive Prosecutions and Erosion of Fair Trial Rights in Turkey* examines how since the July 2016 failed military coup, police and prosecutors have targeted lawyers with criminal investigation and arbitrary detention, associating them with the alleged crimes of their clients, charging them after they have exposed rights abuses, and readily accusing them with little or no evidence of membership of terrorist organizations. Targeting of lawyers has occurred at a time when the Turkish authorities have widened the definition of terrorism and imposed rigorous restrictions on the right of suspects accused of terrorist crimes to benefit from legal counsel and to prepare for defending themselves in court.

Concluding that the unwarranted and abusive prosecution of lawyers has undermined a key guarantor of the right to a fair trial in Turkey, the report urges the Turkish authorities to protect the role and function of lawyers and uphold the right of suspects to benefit from legal counsel.



Lawyers march in Istanbul on January 24, 2019 Day of the Endangered Lawyer. The banner reads: "To silence the lawyer's voice is to deprive the citizen of breath."

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