

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL TUR 8/2017

23 June 2017

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 33/30, 33/9, 34/5, 26/7, 34/19.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged arbitrary detention and conviction of Dr. Serdar Küni for actions that pertain to his duty as a doctor to provide equal and appropriate medical treatment to everyone.**

Dr. Serdar Küni is a member of the Turkish Medical Association. He has been a physician at the Biseng Public Health Centre in Cizre since its creation on 14 March 2011. He was previously the chairperson of the Sirnak Medical Chamber between 2010 and 2012. Dr. Serdar Küni is also a member of the Human Rights Foundation of Turkey (HRFT) since October 2015. HRFT, based in Ankara, is an organization committed to the treatment and rehabilitation services of torture victims.

Previous allegations regarding the violence in the southeast of Turkey, including allegations of obstruction of access to health care and alleged attacks against health care workers, were addressed in previous communications of 24 December 2015 (UA 5/2015) and 21 January 2016 (JUA 1/2016). We thank your Excellency's Government for the reply to these communications but remain concerned at new information received concerning the situation of certain individuals.

According to the information received:

Dr. Serdar Küni, born in 1972, was detained on 19 October 2016 in Sirnak prison. On 18 January 2017, Dr. Serdar Küni was indicted under article 314.2 of the Turkish Penal Code for membership of an armed organization, under the suspicion that he had provided treatment to members of illegal armed groups during the clashes in Cizre in 2015 and 2016 without informing the authorities.

The indictment of 18 January 2017 allegedly relies on two statements taken from suspects, confirming Dr. Küni's identity on the basis of photographs and the accusations of one anonymous witness.

The anonymous witness record would have been sent by the Cizre Security Directorate on 30 November 2016 after a request from the Cizre Prosecutor on available evidence on Dr. Serdar Küni's case. Moreover, according to the allegations submitted, the statement of the anonymous witness would relate to events outside the timeframe of the charges.

On 10 March 2017, the ongoing case was merged with a second investigation, with indictment of 13 February 2017, which contained evidence collected during a search at the Biseng Public Health Centre conducted on 3 January 2017. However, this merge was only notified on the morning of 13 March 2017, the date of the oral hearing. Furthermore, according to the information received, the evidence on the search of Biseng Public Health Centre was fabricated as the premises were closed at the time of the alleged commission of the crime.

During the 13 March 2017 oral hearing, four of the referred witnesses would have declared that their statements had been obtained under torture, and that they had never met the accused. Medical reports produced by the prosecution would further point to numerous flaws and inconsistencies.

During a second hearing on 24 April 2017, the Sirnak 2nd Heavy Court ruled that the anonymous witness was under protection and thus rejected his/her declaration in court. Moreover, the court declared that the evidence allegedly obtained under torture was admissible, on the grounds that torture could not be proven and that the witnesses had been pressured into alleging being subject to torture.

By ruling of the Sirnak 2nd Heavy Court on 24 April 2017, Dr. Küni was condemned to four years and two months of imprisonment on the basis of article 220.7 of the Turkish Penal Code, for knowingly and willingly assisting a terrorist organization by treating wounded members of organisations in order to prevent them from getting caught if they went to state hospitals.

The court that sentenced Dr. Küni released him from prison on that day pending his appeal before the Gaziantep Regional High Court. According to the latest information received, the sentence has not yet been enforced and on 12 June 2017 an appeal was filed at the Şirnak Heavy Penal Court against the court ruling which is expected to transmit it to the Gaziantep Regional High Court.

Without prejudging the accuracy of these allegations, we would like to express our serious concern at the detention and conviction of Dr. Serdar Küni on the basis of legislation which equals aiding and abetting members of illegal armed groups to belonging to the group. We also express our concern at the apparent lack of definition of aiding and abetting members of illegal groups under article 220.7 of the Turkish Penal Code.

Very serious concern is expressed that this disposition criminalizes the provision of medical care against those involved in violence thus impacting negatively on the realisation of the right to the enjoyment of the highest attainable standard of physical and mental health of everyone. We are particularly concerned that such disposition may create a chilling effect on health-care providers and affect their due medical impartiality and their duty to confidentiality.

Moreover, we wish to express our concern on the allegations concerning the violations of due process during the trial of Dr. Küni, such as the use of evidence reportedly procured under torture or duress and from anonymous witnesses. We further express our alarm that, if confirmed, the above-mentioned allegations would relate to a context of intimidation and harassment of medical professionals in Turkey.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the legal grounds for the detention and detention of Dr. Serfar Küni. Furthermore, please provide information on the status of the legal proceedings against him and, in particular, whether there has been an appeal to the decision of the Sirnak 2nd Heavy Court on 24 April 2017, and whether there has been any additional investigation on the referred allegations.
3. Please provide any legal justification on how the principle of legality has been respected in the conviction of Dr. Serdar Küni as a member of an armed group.
4. Please provide any information available on the measures taken to ensure that any declaration obtained under torture is excluded from any judicial proceedings, except against a person accused of torture as evidence that the statement was made.
5. Please, provide information about measures in place to guarantee that health professionals are able to provide impartial care and services to all those affected or involved in conflict or violence.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

We would like to inform your Excellency's Government that after having transmitted a joint communication to the Government, the Working Group on Arbitrary Detention may transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such joint communications in no way prejudice any opinion the Working Group may render. The Government is required to respond separately in respect of the joint communication and the regular procedure.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Dainius Puras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable
standard of physical and mental health

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punishment

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to take this opportunity to draw your attention to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

Moreover, we would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment as codified in articles 2 and 16 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), ratified by Turkey on 2 August 1988. We also wish to reiterate that article 15 of the CAT establishes the prohibition to use any statement which is established to have been made as a result of torture as evidence in any proceedings.

We would like to refer to articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003, which establish the right not to be arbitrarily deprived of liberty, and the right to a fair trial and due process, respectively. Furthermore, we wish to recall that article 19 (3) of the ICCPR requires that any restriction must be provided by law. A restriction does not meet this requirement simply because it is formally enacted as a national law or regulation. It must also be formulated with sufficient precision to enable both the individual and those charged with its execution to regulate conduct accordingly.

We would like to refer to the article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Turkey the 23 September 2013, which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Furthermore, we wish to underline that the right to non-discrimination of any kind, including on political grounds, is a critical component of the right to health under article 2.2 of the ICESCR.

General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (GC N°14) recalls that the obligation to respect the right to health requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health (paragraph 33). Furthermore, GC N°14 underlines that states shall not limit access to health services as a punitive measure during armed conflicts in violation of international humanitarian law (paragraph 34). Thus, the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health constitutes a violation of the right to health (paragraph 50).

Refusal to treat persons wounded in conflict or violence or the provision of preferential treatment to people of the same allegiance constitutes a direct violation of the right to health. Health professionals must provide impartial care and services to all those affected or involved in conflict or violence. Therefore, doctors and other health-care workers must not be arrested, charged or sentenced for acting within their professional duty of ensuring medical impartiality (A/68/297). Furthermore, confidentiality is a duty

of healthcare professionals and an essential aspect of right to health (A/HRC/23/41/Add.3).

We would further like to recall that customary international humanitarian law establishes that medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances, and that wounded and sick must be taken care of. In particular, resolution 37/194 of the United Nations General Assembly on the Principles of Medical Ethics stipulates that States shall not punish persons for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom, under any circumstances.