

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 33/30, 35/11 and 31/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **a number of law decrees adopted during the state of emergency, which could undermine the right of access to justice and jeopardise the right of legal practitioners to carry out their professional activities.**

We would also like to refer to **the arrest, detention and criminal investigation of a wide number of lawyers**, which have taken place since the failed coup attempt of 15 July 2016 and which, if confirmed, constitute serious interferences in the independence of the legal profession.

Concerns relating to various measures implemented under the state of emergency declared on 20 July 2016 and their reported serious negative impact on the enjoyment of fundamental human rights were expressed in a series of communications addressed to your Excellency's Government. The most recent ones include OL TUR 5/2017, UA TUR 12/2017, AL TUR 13/2017, UA TUR 1/2018, OL TUR 2/2018, UA TUR 3/2018, UA TUR 4/2018, AL TUR 5/2018 and UA TUR 7/2018.

Concerns were also expressed in a number of recent opinions adopted by the Working Group on Arbitrary Detention, notably opinions no. 1/2017, 38/2017 and 41/2017, in four press releases issued on 19 August 2016, 14 July 2017, 13 November 2017 and 17 January 2018, respectively, and by the Office of the High Commissioner for Human Rights (OHCHR), in its recent report issued on 20 March 2018 on human rights concerns in Turkey in 2017, with a focus on the consequences of the state of emergency on the enjoyment of human rights.

Mandate holders wish to restate that, given the limited resources available, they are not in a position to address separately the very large number of individual complaints received since July 2016.

According to the information received:

On 15 July 2016, a coup d'état was attempted in Turkey against State institutions, including the Government and the President, H.E. Mr. Recep Tayyip Erdoğan.

On 21 July 2016, the Turkish government declared a state of emergency pursuant to Article 120 of the Constitution and the State of Emergency Law No 2935. Under the state of emergency, Turkey suspended provisions of international and regional human rights treaties and adopted 31 emergency law decrees, which were subsequently incorporated in ordinary legislation adopted by the Turkish Parliament. It is alleged that this legislation has a long-lasting adverse impact on the right to be assisted by a lawyer of one's choice and the free and independent exercise of the legal profession.

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to us by the Human Rights Council, we would like to raise the following issues:

1) *Emergency law decree No. 667*

Emergency law decree No. 667 of 23 July 2016, codified by Law No. 6749, provides that the prosecution may request the replacement of a defence lawyer chosen by the client upon arrest or detention or when charged with a criminal offence with a lawyer appointed by the Bar Association. Furthermore, it imposes restrictions on the right of a detainee to be visited while in custody, and provides that consultations between lawyers and their clients take place in the presence of the police or law enforcement officials.

In particular, article 6 undermines the confidentiality of communications between lawyers and their clients, allowing for consultations to be recorded, and for the seizure of documents related to the detainee's case, when security reasons so require. It also authorises the limitation of consultations between detainees and their lawyers upon the public prosecutor's order.

This decree raises a number of concerns with regard to the right of arrested, detained or imprisoned persons to be assisted by a lawyer of their own choice and to have adequate opportunities, time and facilities to be visited by, and to communicate and consult with, their lawyer. This right, which is set out inter alia in article 14, para. 3 (b), of the International Covenant on Civil and Political Rights, provides that all persons are entitled to call upon the assistance of a lawyer of their choice (principle 1 of the Basic Principles on the Role of Lawyers), and require States to adopt all appropriate measures to ensure that all persons arrested or detained, with or without criminal charge, have prompt access to a lawyer (principle 7), and be provided with adequate opportunities, time and facilities to be visited by, and to communicate and consult with, a lawyer, without delay, interception or censorship and in full confidentiality (principle 8).

In this regard, the Basic Principles require State authorities to recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential (principle 22). The principle of confidentiality

refers to all types of communications between lawyer and client. One of the most common violations of this principle is the monitoring of consultations between lawyers and their clients that take place at detention facilities. Lawyers defending political prisoners or people accused of terrorism are particularly subject to harassment and illegally searches, and often have their documents, cell phones and other electronic devices carefully scrutinized by prison authorities prior to their meeting with clients in detention facilities.

2) *Emergency law decree No. 668*

Emergency law decree No. 668, codified by Law No. 6755, provides that the prosecutor may restrict the defence lawyer's right to examine, or make copies of, the case-file whenever the prosecutor considers it necessary to preserve the aim of the investigation or when the information contained in the file is considered to be an issue of national security.

Article 3 of the emergency decree No. 668 restricts access to indictments by the defence lawyer before the trial. Moreover, this provision grants prosecutors the authority to order searches of private premises and offices (including lawyers' offices), as well as inspection of computers, databases and software in urgent cases and without the order of a judge.

These provisions raise concerns with regard to their compatibility with the principle of equality of arms, which requires both parties to a criminal proceeding to be treated in the same manner, and constitute a breach of the duty of the competent authorities to ensure that lawyers have "access to appropriate information, files and documents in their possession or control in sufficient time" to enable them to provide effective legal assistance to their clients (principle 21 of the Basic Principles).

Criminal defence lawyers working on cases related to the attempted coup or anti-terrorism legislation seem to be subject to high levels of harassment and improper interference, in violation of the principle requiring States to adopt all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference (principle 16 (a)).

Attacks on lawyers are frequently the direct consequence of the identification of lawyers with their clients or their clients' interests. In this regard, the Basic Principles clearly state that lawyers should not be identified with their clients or their clients' causes as a result of discharging their functions (principle 18). This safeguard, which underpins the principle of independence of the legal profession, aims at enabling lawyers to perform their professional duties freely, independently and without any fear of reprisal. Lawyers who represent people who are accused under counter-terrorism laws or are particularly stigmatized, both by State authorities and the general public, and are often subjected to defamatory remarks in the media and social networks.

3) *Emergency law decree No. 676*

Emergency law decree No. 676 of 29 October 2016, codified by Law No 7070, introduces new limitations to the right of persons who have been arrested, detained or imprisoned under counter-terrorism legislation to call upon the assistance of a lawyer of their choice. Pursuant to this decree, a magistrates' court has the power of restricting access to a lawyer for 24 hours for individuals accused of crimes falling within the scope of the Anti-Terror Law.

Furthermore, lawyers facing criminal investigations are banned for two years from representing clients in terrorism-related cases. Prior to the enactment of emergency decree No. 676, lawyers could be banned from representing a client only when there was a pending prosecution against them. The new decree extended this limitation to the existence of a pending investigation against a lawyer for forming organised groups with the intention of committing a crime (article 314 of the Criminal Code) or for establishing an armed organisation (article 312 of the Criminal Code).

These provisions undermine both the right of arrested, detained or imprisoned persons to be assisted by a lawyer of their own choice (principle 1 of the Basic Principles) and the right of lawyers to not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics (principle 16 (c)).

4) *Attacks against lawyers and bar associations*

Between January and December 2017, some 570 lawyers were arrested, 1,480 faced some kind of prosecution, 79 were sentenced to long-term imprisonment, and approximately 34 lawyers' associations or law societies in 20 different provinces have been shut down on the ground of alleged affiliation to a terrorist organization. According to the Office of the United Nations High Commissioner for Human Rights, it is possible to draw "a pattern of persecution of lawyers representing individuals accused of terrorism offences" in Turkey while discharging their official functions, and consequently prosecuted for the same or related crime attributed to their client.

In OL TUR 5/2017, we have expressed our concerns on the arrest, detention and criminal investigation of lawyers and the closure of several lawyers' associations following the failed coup attempt of July 2016.

In Turkey, the right of lawyer to discharge their professional duties or to participate in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights is hampered by a wide campaign of attacks and harassment against those who freely express their opinion (especially if such opinion is critical of the Government's policies). Such dissent is often silenced through prosecuting lawyers and others on terrorist-related charges.

According to the information received, lawyers who have voiced opposition against law reforms and actions taken by the State prior and subsequent to the failed coup

attempt, as well as those who conduct human rights advocacy, have been targeted and prosecuted for breaches of the anti-terrorism law No. 3713. These lawyers have also faced prosecution for other offences, such as establishing organisations for the purpose of committing crimes (Article 220 of the Criminal Code), or establishing, commanding or being a member of an armed organisation (Article 314 of the Criminal Code).

For instance, lawyers denouncing the violations allegedly perpetrated by State authorities in South East Turkey or representing individuals who have been arrested and detained in this region have reportedly been subject to threats and intimidation by soldiers and law enforcement officials.

The Basic Principles on the Role of Lawyers provide that lawyers, like other citizens, are entitled to freedom of expression, association and assembly, including the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights (principle 22).

The European Court of Human Rights considers that an impermissible restriction of a lawyers' right to freedom of expression would not only result in a breach of article 10 of the ECHR (right to freedom of expression), but could also give rise to a breach of article 6 of the ECHR (right to a fair trial), because of the impact this may have on any trial in which that lawyer carries out his professional functions. (ECtHR, *Kyprianou v Cyprus*, Application no. 73797/01, 15 December 2005, para 175; ECtHR, *Steur v The Netherlands*, Application no. 39657/98, 28 October 2003, para 37; ECtHR, *Nikula v Finland*, Application no. 31611/96, 21 March 2002, para 26.)

It is also alleged that the Ministry of Justice's National Judiciary Informatics System (UYAP) network has been asked to prepare a list of lawyers who represent political opponents of the government to be sent to the prosecution services.

We consider that this would constitute a serious breach of State's obligation to adopt all appropriate measures to ensure that lawyers are able to carry out their professional activities without any intimidation or interference (principles 16 and 17), as well as a violation of the principle of non-identification of lawyers with their clients or the cause they pursue (principle 18).

The Special Rapporteur on the Independence of Judges and Lawyers expressed on a number of occasions concerns about the closure of professional associations of lawyers by the authorities (see for example A/64/181, para. 25). In his latest report to the General Assembly, devoted to the issue of bar associations, he noted with concern that in Turkey, 34 lawyers' associations have been shut down by emergency decrees and had all their assets confiscated without compensation following the declaration of the state of emergency in June 2016. Chairs, board members and ordinary members of those associations have been prosecuted and sentenced to long-term imprisonment (A/73/365, para. 36).

On 15 July 2018, Presidential Decree No. 5 created a State supervisory board (acting under the order of the Presidency) in charge of monitoring, overseeing, and investigating, among others, public institutions (including Bar Associations and the Union of Turkish Bar Associations). According to this new decree, the supervisory board can request access to any document, including confidential material, from public institutions. The president of the State supervisory board has been granted widespread disciplinary powers, and can dismiss public officials working in public institutions.

Taken together, these measures amount to a severe breach of the Basic Principles, which provide that lawyers have the right to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity (principle 24). The Basic Principles also acknowledge the vital role that these professional associations of lawyers play with regard to facilitating access to a lawyer and legal services (principles 3 and 4), promote their continuing education and training (principle 9), regulating non-discriminatory access to, or continued practice within, the legal profession (principle 10), protecting their members from persecution and improper restrictions and infringements (principle 24), adopting and enforcing codes of professional conduct (principle 26) and handling disciplinary proceedings against its members (principles 28 and 29).

Recommendation 21 (2000) of the Council of Europe provides that “Bar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public” (principle V.2). These associations “should take any necessary action, including defending lawyers’ interests with the appropriate body, in case of: a. arrest or detention of a lawyer; b. any decision to take proceedings calling into question the integrity of a lawyer; c. any search of lawyers themselves or their property; d. any seizure of documents or materials in a lawyers’ possession; e. publication of press reports which require action on behalf of lawyers” (principle V.5). Finally, we would like to point out that following the entry into force of this new legislation, the number of available independent lawyers who represent litigants before Turkey courts has significantly dropped. These actions hinder the ability of lawyers to freely carry out their professional duties and severely restrict access to justice in Turkey, with a consequent erosion of the rule of law.

In light of the above, we would like to recommend that your Excellency’s Government:

1. reconsider the aforementioned legislative changes with a view to ensuring their compliance with existing international human rights standards (as explained, *inter alia*, in paragraph 47 and 48 of the report (A/HRC/37/52) of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism human rights), and ensure that any such review be carried out in consultation with practicing lawyers to address their legitimate expectations and concerns;

2. amend the anti-terror legislation (including the new Anti-Terrorism Bill adopted on 25 July 2018), and provisions in the Criminal Code as recommended by the Council of Europe, the European Court of Human Rights, and the European Union;
3. ensure that lawyers are not identified with their clients or clients' causes and can perform their duties without intimidation, hindrance, harassment or improper interference, in accordance with the principles 16, 17 and 18 of the Basic Principles on the Role of Lawyers;
4. ensure that lawyers are entitled to form and join independent and self-governing professional associations as protected by principle 24 of the Basic Principles on the Role of Lawyers by adopting all appropriate measures to facilitate access to the Bar of legal practitioners that meet the criteria provided for by national legislation and international human rights standards.

We also recommend that your Excellency's Government adopt all appropriate measures to protect the independence of the legal profession, and to ensure that lawyers are in a position to discharge their professional functions without intervention or interference of any sort.

It is also our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Therefore, we would be grateful for any additional information and any comment you may have on the above mentioned allegations. We would also welcome any clarifications on measures taken to ensure the compliance of the aforementioned legislation with Turkey's obligations under the aforementioned international human rights law and standards.

Finally, we would like to inform your Excellency's Government that this communication will be made available to the public and posted on the web page of the mandate of the Special Rapporteur on the independence of judges and lawyers (<https://www.ohchr.org/EN/Issues/Judiciary/Pages/Legislation.aspx>). It will also be included in the periodic communication reports of the Special Procedures to the Human Rights Council.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will also be made public on the webpage referred to above and included in the periodic communication reports to be presented to the Human Rights Council for its consideration.

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

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

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental
freedoms while countering terrorism