

Mandate of the Special Rapporteur on the independence of judges and lawyers

REFERENCE:
AL TUR 2/2019

30 January 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the allegedly arbitrary arrest, detention and conviction of the President of the Independent Turkish Judges Association YARSAV, judge Murat Arslan.

Concerns regarding dismissal, arrest, arbitrary detention and conviction of judges, prosecutors and lawyers have been expressed in a large number of communications that I have addressed to your Excellency's Government, both alone and together with other mandate holders, since the failed coup d'état of 15 July 2016 and the consequent enactment of the state of emergency (see TUR 6/2016, TUR 7/2016, TUR 5/2017, TUR 7/2018 and TUR 15/2018).

While I take this opportunity to thank you once again for the replies to these communications, I remained gravely concerned at the adverse effects that the measures adopted by your Excellency's Government have had, and continue to have, on the equal and effective enjoyment of human rights and fundamental freedoms of targeted individuals, as well as on the independence of the judiciary and the free exercise of the legal profession.

I also wish to restate that the communications mentioned above only represent a small fraction of the individual complaints that I have been receiving since July 2016.

According to the information received:

Mr. Murat Arslan is a former assistant judge at the Constitutional Court of Turkey and the president of the Turkish Association of Judges and Prosecutors (YARSAV).

In August 2015, judge Arslan was dismissed from his post as an assistant judge at the Constitutional Court of Turkey, allegedly in reprisal for his work as president of YARSAV, which included observation of political trials, newspaper interviews focusing on the country's rule of law, and participation in the activities of civil society organisations.

In October 2016, judge Arslan was arrested and charged with being members of what the Turkish authorities refer to as Fethullah Gülen Terrorist Group/Parallel

state structure or FETÖ/PYD (hereafter the Gülen movement). Since then, he has remained in pre-trial detention.

According to information received, judge Arslan's pre-trial detention was reviewed on a monthly basis, and automatically extended in accordance with emergency legislation, without any Court hearing. Allegedly, judge Arslan's lawyers did not have access to information, files and documents in possession of the court or the prosecution ahead of the trial, since they had been classified. This prevented them from providing effective legal assistance to their client.

The criminal proceedings against judge Arslan have been characterised by allegedly serious violations of the guarantee to a fair and public hearing and the fair trial rights set out in Turkish legislation and international human rights instruments to which Turkey is a party. Throughout the proceedings, the application of emergency legislation also resulted in serious violations of the principle of equality of arms, and numerous allegations and assertions made by the public prosecutor during the hearings have been interpreted by reasonable observers as politically-motivated statements that showed bias and pre-conception vis-à-vis the defendant.

According to information received, the judge presiding the proceedings has changed four times. With the exception of the first change, no explanation of the motives for those changes was provided to the defendant or his lawyers. Requests from the defence to hear the witnesses before the new presiding judge were allegedly rejected by the court on all occasions.

It also appears that evidence provided by a witness before a different court, without knowledge or presence from the defence of judge Arslan, has been used against judge Arslan. Allegedly, the identity of that witness has not been disclosed to the defence, and a request presented by judge Arslan's defence team to hear this witness was rejected by the court.

On 18 January 2019, judge Arslan's lawyers raised serious concerns over the impartiality of the judges in the panel, and requested them to recuse themselves. Following the refusal of the judges to recuse themselves, the defendant's lawyers resigned and left the courtroom.

The Court allegedly considered that the aim of this action was to prolong the trial, and decided to continue the hearing. At the end of that hearing, judge Arslan was sentenced to 10 years in prison for being member of an armed terrorist organization.

Without prejudging the accuracy of the information received, concern is expressed at the above allegations. The allegedly politically-motivated criminal proceedings against judge Arslan resulted in serious violations of several guarantees set out in article 14 of the International Covenant on Civil and Political Rights, and could

also be regarded as an inappropriate interference with, and an act of reprisal for, the legitimate exercise of the profession of judge.

The criminal proceedings against judge Arslan may also have an adverse impact on the independence of the judiciary in the country, since other judges may be deterred from exercise their judicial independence and their freedom of expression out of fear of being subject to disciplinary or criminal proceedings.

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 my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Any additional information and comments which you may have on the above mentioned allegations.
2. Detailed information on the factual and legal grounds for the dismissal of judge Arslan from the Constitutional Court in 2015, and explain how this measure is compatible with international human rights norms and standards relating to the independence of the judiciary.
3. Updated information on the ongoing criminal prosecution of judge Arslan. Please explain, in particular, how his continued pre-trial detention can be regarded as compatible with relevant human rights standards.
4. Information about the alleged violation of the principle of equality of arms mentioned above. Please also explain why the defendant was not allowed to examine witnesses following the changes in the judges presiding the hearing.
5. Detailed information on the guarantees in place to protect and promote judicial independence, including legal means that judges may use to defend themselves against any threat to their independence.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I 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(s) responsible for the alleged violations.

I am considering to publicly express my concerns in the near future as, in my view, the information available to me is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to their human rights implications. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

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

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

Annex

Reference to international human rights law

Without prejudging the accuracy of the information received, these allegations appear to constitute, *prima facie*, a violation of articles 9, 14 and 19 and 22 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003, which guarantee the universally-recognized rights not to be deprived arbitrarily of liberty, to due process and fair trial, and to freedom of opinion and expression.

Article 14 of the ICCPR establishes the right to fair proceedings before a competent, independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee observed that article 14 requires States to adopt appropriate measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them (para. 19).

The Human Rights Committee also stated that judges may be dismissed only on serious grounds of misconduct or incompetence, and in accordance with fair procedures ensuring objectivity and impartiality. The dismissal of judges without following the procedures provided for by the law and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary (para. 20).

Additionally, the UN Basic Principles on the Independence of the Judiciary state, *inter alia*, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that the judiciary shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

According to the Basic Principles, judges can be suspended or removed only for reasons of incapacity or behaviour that renders them unfit to discharge their duties, and only in accordance with fair procedures ensuring objectivity and impartiality. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure, and the judge shall have the right to a fair hearing (principle 17). Moreover, all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of

judicial conduct (principle 19), and decisions in disciplinary, suspension or removal proceedings should be subject to an independent review (principle 20).

In the Report on the impact of the state of emergency on human rights in Turkey (January – December 2017), issued on March 2018, the United Nations High Commissioner for Human Rights documented increased executive control over, and interference with the judiciary and prosecution service (para.34); the arrest, dismissal and arbitrary transfer of judges and prosecutors to other courts; and recurring instances of threats against lawyers.

According to a recent resolution of the European Parliament on the current human rights situation in Turkey (2018/2527(RSP)), recent years have seen the extension of executive control over the judiciary and prosecution, the widespread arrest, dismissal and arbitrary transfer of judges and prosecutors, and persistent attacks against lawyers.