Human Rights Implementation Centre

# Submission to the Committee against Torture's review of Turkey at its 80th Session, 8-16 July 2024

Submitted on 10 June 2024 by:

**The Law Society of England and Wales** is the professional body representing more than 200,000 solicitors in England and Wales. Its aims include upholding the independence of the legal profession, the rule of law and human rights around the world. Established by Royal Charter (the "Charter of the Society") in 1845, its activities are established by statute. It was granted special consultative status with the UN Economic and Social Council of the in 2014.

Contact: Dr Debra Long, International Policy Manager on Rule of Law and Human Rights, debra.long@lawsociety.org.uk

**Lawyers for Lawyers (L4L)** is an independent, non-political and not-for-profit lawyers' organisation established in 1986. Its mission is to promote the independent functioning of lawyers and the legal profession across the world in accordance with internationally recognised norms and standards by supporting lawyers who are at risk as a result of discharging their professional duties. Lawyers for Lawyers was granted special consultative status with the UN Economic and Social Council in July 2013.

Contact: Tara Fiechter, Programme Officer, t.fiechter@lawyersforlawyers.nl

**The International Bar Association's Human Rights Institute (IBAHRI)** was established in 1995 under the honorary presidency of emblematic human rights defender, the late Nelson Mandela, and works with the global legal community and partner civil society organisations to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI is a substantively autonomous entity within the International Bar Association, the world's leading organisation of international legal practitioners, bar associations and law societies, with over 80,000 individual lawyers, and 190 bar associations and law societies across more than 160 countries. Under the IBAHRI's By-Laws, the Institute is governed by an independent Council and is under the Directorship of Baroness Helena Kennedy LT KC.

Contact: Zara Iqbal, Programme Lawyer, Zara.Iqbal@int-bar.org

**The Human Rights Implementation Centre (HRIC)** of the University of Bristol Law School was established in 2009 to enhance the implementation of human rights worldwide through research, education and discussion. The HRIC conducts internationally recognised research aimed at enhancing implementation of human rights. Drawing on the findings of its research, the HRIC provides expert advice on the implementation of human rights directly to treaty bodies, governments, national human rights institutions and non-governmental organisations. The HRIC is one of the leading organisations working on the prevention of torture and other forms of ill-treatment and many of its projects intersect with this issue.

Contact: Prof. Rachel Murray, Director of the HRIC, rachel.murray@bristol.ac.uk

# Contents

## Introduction

The Law Society of England and Wales (the Law Society), the International Bar Association's Human Rights Institute (IBAHRI), Lawyers for Lawyers and the Human Rights Implementation Centre (HRIC) welcome the opportunity to submit written information to the Committee against Torture (hereinafter 'the Committee') for its consideration of the fifth periodic report of Turkey at its 80th session. The information in this report relates to topics raised in the List of Issues and responds to the periodic report.

This report is based on interviews with lawyers and other research conducted by the Law Society, IBAHRI and Lawyers for Lawyers. This includes a fact-finding mission to Turkey in November 2023 conducted by the Law Society as part of an international delegation representing 27 legal and human rights organisations to interview detained lawyers and observe court hearings.[1] It also includes information gathered through conversations with lawyers and bar associations and observation missions as part of Lawyers for Lawyers' ongoing trial monitoring programme. Additionally, IBAHRI has conducted numerous trial observations and organises regular roundtables with Turkish lawyers, and in 2024 published a detailed report[2] highlighting the declining independence and targeting of the legal profession in Turkey. All other sources are referenced throughout.

## Right to access and communicate in confidence with a lawyer

The following information is provided in response to the Committee's request for information on the existence of prompt access to a lawyer for suspects detained for terrorist offences and the invocation of the Law on the Fight against Terrorism to deny access to a lawyer for the first 24 hours at the request of a prosecutor and by the decision of a judge (LOIPR, para 4).

The European Commission for Democracy Through Law (Venice Commission) in its Opinion No. 865 / 2016 on Decree Laws no. 667-76 (adopted following the failed coup), expressed regret that some temporary provisions have been made permanent in Decree Law no. 676, dated 29 October 2016, or this may be inferred from the wording of the Decree. This includes the possibility to be detained without access to a lawyer for 24 hours, in Article 154/2 of the Criminal Procedure Code, which has been made permanent.[3]

During coordinated dawns raids in Turkey on 25 April 2023, 25 lawyers were arbitrarily arrested and denied access to a lawyer based on decision no. 2023/1628 of the Diyarbakır 3rd Criminal Judgeship of Peace. The lawyers' defence counsel lodged an appeal against this decision on the same day which was rejected without justification by the aforementioned Judgeship on 28 April 2023, three days after the restriction was imposed. In both instances, their lawyers were also denied access to the case files, which prevented them from knowing the grounds of the arrest, further hampering their ability to effectively challenge the invocation of Article 154/2 of the Criminal Procedure Code with Decree Law no. 676.

---

[1] *Report of an Independent International Fact-finding Mission to Turkey Examining the Treatment of Lawyers Deprived of their Liberty and Observing Trial Proceedings, 6-10 November 2023*, February 2024, available at https://www.lawsociety.org.uk/campaigns/international-rule-of-law/news/results-of-our-recent-fact-finding-mission-in-turkey.

[2] IBAHRI and TALI, *A Profession on Trial: The Systematic Crackdown Against Lawyers in Turkey*, 13 February 2024, available at https://www.ibanet.org/Turkey-IBAHRI-and-TALI-release-report-documenting-mass-imprisonment-of-lawyers.

[3] European Commission for Democracy and Law (Venice Commission) in its opinion No. 865 / 2016 on Decree Laws no. 667-76, 12 December 2015, para. 154, available at: default.aspx (coe.int)

More recently, four lawyers (Didem Baydar Ünsal, Berrak Çağlar, Seda Şaraldı and Betül Vangölü Kozağaçlı) from the Progressive Lawyers' Association (ÇHD) were arbitrarily detained following a raid on their office in Istanbul on 6 February 2024. They were subsequently denied access to a lawyer for 24 hours on the basis of Anti-Terror Law No. 3713.

Lawyers from Asrin Hukuk Burosu (Asrin law firm) have reported severe difficulties in accessing and communicating with their clients detained at İmralı F-Type High Security Prison. According to information received, lawyers were allowed to meet their clients anytime and in any form until 2005, when the law changed and visits were restricted to one hour per week only. Lawyers then had to apply to the public prosecutor for permission for visits. In addition, the visits were to be held in the presence of a prison guard and subject to being recorded. Since July 2011, no visits by lawyers had been granted. Even after lifting the state of emergency in July 2018, all prisoners in İmralı Island Prison continued to be denied visits by their lawyers (and family).[4] Decisions to refuse access to lawyers were repeatedly taken by the competent enforcement judge, each time for a period of six months, on the basis of section 59 of the Law on the Execution of Sentences and Security Measures. Clients who have been detained since 2015 were also not allowed to correspond with their lawyers via email or telephone.

From 6 – 17 May 2019, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited İmralı Island Prison.[5] Prior to this visit, the judicial ban on lawyers' visits was lifted, which allowed lawyers from Asrin law firm to visit their client Abdullah Öcalan for the first time since July 2011.[6] Following the visit, protests by prisoners to demand their right to visits (including wide-spread hunger strikes) erupted. Consequently, the Asrin lawyers were able to visits their clients for another four times before requests were systematically refused again from 7 August 2019 onwards. Since March 2021, clients are kept in complete isolation. Complaints of torture or ill-treatment

The following information is provided in response to the Committee's request for information on complaints of torture or ill-treatment and any investigations or accountability for such actions (LOIPR, para. 11).

Among the eight detained lawyers interviewed by the international delegation during their fact-finding mission in November 2023, at least five of the lawyers (specifically Oya Aslan, Engin Gökoğlu, Barkin Timtik, Aytaç Ünsal and Özgür Yilmaz) have reported being subjected to torture and other ill-treatment while in detention. In 2017, it was reported that Özgür Yilmaz was tortured while in police detention in Istanbul. In 2016, Barkin Timtik reported being beaten while being transferred from prison. Oya Aslan made a complaint during her trial that she had been tortured following her arrest in 2019, but no action was

[4] 'Lawyers of Asrın Hukuk Bürosu severely hindered in assisting their clients', Lawyers for Lawyers, 5 April 2022, available at https://lawyersforlawyers.org/en/lawyers-of-asrin-hukuk-burosu-severely-hindered-in-assisting-their-clients/.

[5] *Report to the Turkish Government on the visit to Turkey carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT) From 6 May to 17 May*, CPT/Inf (2020) 24, available at: https://hudoc.cpt.coe.int/eng/#{%22sort%22:[%22cptdocumentdate%20descending,cptdocumentid%20ascending,cptsectionnumber%20ascending%22],%22cptstate%22:[%22TUR%22],%22cptsectionid%22:[%22p-tur-20190506-en-1%22]}.

[6] The European Court of Human Rights found violations of Articles 3, 5(4) and 6 of the European Convention on Human Rights, inter alia, due to the restrictions on access to lawyers for Mr Öcalan, see *Öcalan v Turkey (no. 1),* Application no. 46221/99 (2005), available at: https://hudoc.echr.coe.int/eng?i=001-69022; *Öcalan v Turkey (no. 2),* Applications nos. 24069/03, 197/04, 6201/06 and 10464/07 (2014), paras. 131-135, 146, available at: https://hudoc.echr.coe.int/eng?i=001-142087

taken by the Court or other authorities. Engin Gökoğlu's arm was broken by prison officers during a transfer from one facility to another. He submitted a complaint about his injury to the authorities, but this has led to him being charged with an additional offence of resisting a public officer and facing a further trial. In 2018, Aytaç Ünsal reported being beaten while being transferred to the prison. He made an individual application to the Constitutional Court. On 14 December 2023, the Court accepted the application and announced that the state violated the prohibition of torture and ill-treatment.

In addition to the absolute prohibition of torture and obligations under Article 13 of UNCAT to conduct a prompt and impartial investigation and protect complainants against ill-treatment or intimidation because of their complaint or evidence, under international law, for injuries occurring while in detention, the burden is on the State to account for the injuries and provide a satisfactory and convincing explanation as to how they occurred.[7]

Under international law, the use of force is permitted only when strictly necessary and, even then, it must be appropriate and reasonable to the situation. Rule 82(1) of the Nelson Mandela Rules requires that prison staff shall not use force "except in self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations. Prison staff who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the prison director." Rule 43 also states that instruments of restraint must never be used as a sanction for disciplinary offences.

The injuries sustained by Oya Aslan, Engin Gökoğlu, Barkin Timtik and Aytaç Ünsal while in detention indicate violations of UNCAT, as well as Article 7 of the ICCPR and Article 3 of the ECHR. They also indicate the use of force in a manner and context that is contrary to the Nelson Mandela Rules. The authorities have also failed to carry out an effective investigation into the allegations of torture and other ill-treatment, and regarding the complaint made by Engin Gökoğlu, he has faced reprisals in violation of Article 13 of the UNCAT.

## Independence of the judiciary and the administration of justice

In response to the Committee's request for updated information about Turkey's ability to ensure the independence of the judiciary and the administration of justice following the detention of 2,740 judges and prosecutors on suspicion of carrying out activities against national security in 2016 (LOIPR, para. 17), Turkey's periodic report highlights Article 159 of the Constitution and Articles 3/6 and 3/7 of the Law No. 6087 on the Council of Judges and Prosecutors, which provide for the independence of the courts and the security of tenure of judges and prosecutors.

Although Turkish law provides for an independent judiciary, in practice the executive branch dominates the Council of Judges and Prosecutors, the body responsible for assigning judges and prosecutors to the country's courts and for their discipline. Out of the 13 judges who sit on the Board, the president directly appoints six. Although the Constitution provides tenure for judges, the Board of Judges and Prosecutors controls the careers of judges and prosecutors through appointments, transfers, promotions, and discipline, including reprimands and expulsions.

[7] *Mammadov (Jalaloglu) v Azerbaijan*, European Court of Human Rights Application no. 34445/04 (2007), para. 62.

Immediately following the 2016 coup attempt, the government suspended, detained, or fired nearly one-third of the judiciary, who were accused of affiliation with the Gülen movement alleged to be behind the attempted coup.

The lack of judicial independence is evidenced by events occurring during the fact-finding mission which constitute the greatest constitutional crisis in the history of the country. Specifically, on 8 November 2023, judges from the Court of Cassation filed a criminal complaint against judges from the Constitutional Court. This incident was sparked by a Constitutional Court decision in the case of Mr Can Atalay, a prominent human rights lawyer and activist who was elected to Parliament as an opposition MP in May 2023, while serving an 18-year prison sentence. In a decision issued on 25 October 2023, the Constitutional Court ruled that Mr Atalay should be released from prison. Turkish law provides that a convicted person who is eligible to run in parliamentary elections and who is elected must be released from prison to serve in Parliament but must return to serve the remainder of their prison sentence after their term in Parliament ends. The Constitutional Court held that Mr Atalay's continued detention infringed his rights to "engage in political activities" as an MP, and instructed the Court of Cassation to reverse its earlier ruling ordering that Mr Atalay remain in prison. Subsequently, in a decision dated 8 November 2023, the 3rd Criminal Chamber of the Court of Cassation refused to comply with the Constitutional Court's decision, and, remarkably, filed a criminal complaint against those members of the Constitutional Court who had ruled in favour of Mr Atalay's release.

Commentators have widely characterised the Court of Cassation's decision as more political than legal and have emphasised that the Court of Cassation's decision on its face appears to contravene Article 153 of the Constitution, which provides that "The decisions of the Constitutional Court "are binding on the legislative, executive and judicial organs, administrative authorities, real and legal persons" (emphasis added).

As of early February 2024, the impasse between the Constitutional Court and the Court of Cassation continues. In the meantime, majority loyalists ejected Mr Atalay from Parliament on 30 January 2024. Mr Atalay's opposition party has appealed that action to the Constitutional Court.

## Diminishing independence of bar associations

Under Article 135 of the Constitution, bar associations are independent professional bodies having the characteristics of public institutions.[8] However, Presidential Decree No. 5 (Presidential Decree as to the State Inspection Institution) granted the Turkish executive the authority to inspect bar associations and to suspend their chairpersons and board members (Article 6).[9] This power to suspend a bar association's elected executives has significantly impaired their independence, impartiality, and ability to challenge systematic human rights abuses of the State, especially those targeting the legal profession.

Increasing interference by the government in the functioning of bar associations, including through the imposition of regulatory measures and administrative constraints, has curtailed the ability of bar associations to effectively protect the legal profession. The Special

[8] Article 135 of the Constitution states: Professional organizations having the characteristics of public institutions and their higher bodies are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.

[9] https://arrestedlawyers.org/2018/09/24/erdogan-gets-infinite-authority-over-the-national-and-provincial-bar-associations/

Rapporteur on the Independence of Judges and Lawyers noted that in Turkey, over 34 lawyers' associations had been shut down by 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 also been prosecuted and sentenced to long-term imprisonment.[10]

The closure or threat of closure by authorities has had a chilling effect on the ability of lawyers' associations to act independently and in the interest and protection of the legal profession. Prominent bar associations in Turkey have played an increasingly important role in documenting human rights abuses and the deep erosion of the rule of law and fair trial rights, and as a result have been targeted by the government.

The passing of a controversial law in 2020 amending the Code on Lawyers (Law no. 7249) also reduced the independence of bar associations by allowing cities with more than 5,000 registered lawyers to have multiple provincial bar associations and reforming the Union of Turkish Bar Associations (UTBA) electoral system to disturb proportional representation of provincial bar associations at the national level.[11] These amendments disempower the bigger bar associations in Turkey's main cities which have criticised the government for breaches of human rights and the rule of law.[12] This law is in clear breach of the UN Basic Principles on the Role of Lawyers and the Council of Europe Committee of Ministers' Recommendation No. R (2000) 21, which require that a professional lawyers' association be self-governing, independent of the authorities and the public, and able to exercise its functions without external interference from government or other actors.

Bar associations have been further targeted through investigations and smear campaigns for exercising their legitimate functions and roles. Following a report on torture by the Ankara Bar Association to the Ankara security directorate in July of 2019, the Deputy Interior Minister accused the Bar Association of having links with the Gülen movement; this was followed by a wave of arrests against lawyers for using the ByLock App.[13] In 2022, the Interior Minister publicly accused the Diyarbakır Bar Association of supporting terrorism several times – without providing sufficient evidence, witnesses, or legal grounds[14] – prompting criminal investigations into its board. In one instance, Turkish Penal Code Article 301, "Insulting the Turkish nation, state, government, Parliament, and its judicial bodies", was applied following the release of a press statement by the bar that referenced the Armenian Genocide.[15] Article 301 is infamously used to threaten and target members of the public who voice an opinion contrary to the official position of the government.[16] Prior to this, Turkish authorities invoked Article 216 of the Turkish Penal Code to investigate the

[10] A/73/365, para. 36.
[11] Benan Molu and İdil Özcan, *Stifling Lawyers and Bar Associations: Restrictions undermining the right to legal defense in Turkey*, March 2021, p.3. https://freedomhouse.org/sites/default/files/2021-03/03312021_Freedom_House_Turkey_Policy_Brief-1-Stifling-Lawyers-and-Bar-Associations.pdf.
[12] For example, after Law no. 7249 a provincial bar association with less than 100 lawyers such as Ardahan in northeastern Turkey will be able to send 4 delegates, where it used to be able to send 3, but a bar association like Izmir in western Turkey with over 9,500 lawyers, which used to be able to send 35, will now be able to send just 5 delegates. A delegate from Ardahan would, therefore, represent less than 25 lawyers, while a delegate from Izmir would represent approximately 1,900. Such a radical imbalance which disproportionally gives power to bar associations that have very few members and seriously diminishes the influence of bars with thousands of members is neither more democratic nor more pluralistic, despite the government's claim. See https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers
[13] https://www.al-monitor.com/originals/2019/10/turkey-nationalism-killer-penal-code-article-has-come-back.html
[14] https://www.hrw.org/news/2020/07/07/reform-bar-associations-turkey-questions-and-answers
[15] https://www.duvarenglish.com/seven-investigations-three-lawsuits-launched-on-diyarbakir-bar-for-armenian-genocide-remembrance-in-last-six-years-news-63498
[16] https://www.al-monitor.com/originals/2019/10/turkey-nationalism-killer-penal-code-article-has-come-back.html

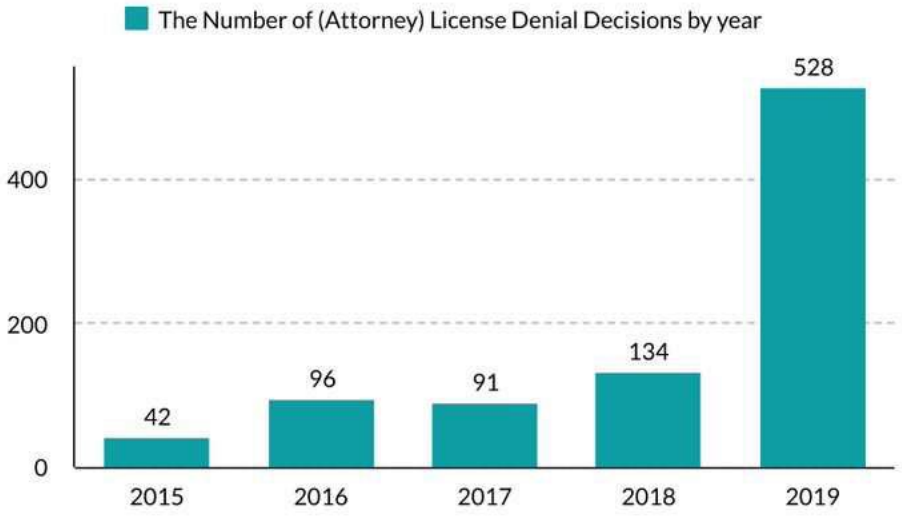
Diyarbakır Bar Association following their release of a press statement condemning anti-LGBTQ+ rhetoric by the President of Religious Affairs.

Although some prosecutions later resulted in acquittals, the initiation of these prosecutions had a significant chilling effect on the independence and legitimate activities of bar associations.

## Unlawful restrictions on admission to the legal profession

The government has also interfered with the legal profession through the process for admission to the bar, to prevent dissidents or individuals deemed 'undesirable' from practicing law in the first place. Under Law No. 1136 (the Code of Lawyers), all persons who successfully complete their apprenticeship as a lawyer or serve as a judge or prosecutor for at least five years, is admitted to the profession of lawyer. Since July 2016, however, the Turkish Ministry of Justice has interpreted the Article of the Decree Laws – that "those dismissed from service under paragraph one shall no longer be employed in public service" – to prevent dismissed public servants from entering a legal apprenticeship. In this way, school academics, judges and prosecutors who were dismissed under the Emergency Regime have been denied the profession of lawyer, despite fulfilling all legal requirements.[17]

The Ministry of Justice has also challenged the bar associations' admission decisions in administrative courts. According to a 2021 report, 'Lawyers Without Licences',[18] 1,252 annulment cases had been filed by the Ministry of Justice against decisions of the Union of Turkish Bar Associations to admit certain individuals to the profession of lawyer. In 376 cases, the licences of the lawyers were annulled; in 175 cases, the Ministry's request was denied; 701 cases were still pending. The report concluded that "interference with the profession of lawyer aims to dissuade dissident students at universities from exercising their rights and freedoms, to exclude from the profession individuals who are not deemed "agreeable", to "cleanse" the future of the profession of lawyer from individuals with certain opinions, and to leave "a certain group of people" defenceless, without lawyers."[32]




[17] https://arrestedlawyers.org/2018/02/14/erdogan-regime-grasps-control-of-the-recruitment-mechanism-for-the-profession-of-law-with-the-cooperation-of-metin-feyzioglu/
[18] Benan Molu and Idil Özcan, *Lawyers without Licences*, 2021. https://www.tahirelcivakfi.org/storage/files/ae36e3a1-90bd-44bf-8817-08321ade8533/Ruhsatsiz-Avukatlar---INGILIZCE-(1).pdf

## Violations of international and domestic legal safeguards governing lawyers

Lawyers have been targeted in Turkey because of the clients they represent and have been associated and identified with their clients causes or alleged offences, in violation of international standards. OHCHR has observed a pattern of persecution of lawyers representing individuals accused of terrorism offences, where they are associated with their clients' political views (or alleged political views) in the discharge of their professional duties and are consequently prosecuted for the same, or other related offences, for which their clients are accused.[19] This is a clear violation of the UN Basic Principles on the Role of Lawyers, particularly paragraphs 16 and 18, which protect legal professionals from identification with their clients and the right to legal recourse.[20]

Article 1 of the Turkish Code of Lawyers (No. 1136 of 1969) classifies the legal profession as an independent public service and a liberal profession. Under Articles 58- 61 of the Code, a lawyer can only be prosecuted under a special procedure, whereby lawyers cannot be detained and remanded for pretrial detention and a lawyer can only be prosecuted if the Minister of Justice gives authorisation, unless caught in flagrante delicto[21] (in the process or immediately after committing a crime).[22]

However, in violation of the special procedure, some 1,700 lawyers have been arrested and prosecuted without the ex-ante authorisation that should be given by the Minister of Justice as a prerequisite to prosecution. Moreover, at least 655 lawyers have been remanded to pretrial detention through the widespread misinterpretation of in flagrante delicto[23] and the misapplication of Article 314 of the Penal Code.

In all, the Turkish government's sustained assault on the legal profession and bar associations has severely threatened the pillars of justice and the rule of law in the country. The systematic crackdown has resulted in the erosion of the independence of legal institutions, undermining the very foundations of a democratic society. This alarming trend not only violates the fundamental principles of human rights but also raises serious concerns about the country's commitment to its international obligations.

## Targeting of lawyers as defenders of human rights and the rule of law

Since 2016, the legal profession in Turkey has faced sustained arbitrary detainment, imprisonment, unfair trials, and widespread harassment from authorities, often charged with overbroad and vague counter-terrorism offences, in violation of the UN Basic Principles on the Role of Lawyers. In 77 of Turkey's 81 provinces, lawyers have been detained,

[19] Office of the UN High Commissioner for Human Rights, *Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East. January-December 2017*, www.ohchr.org/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf

[20] UN Basic Principles on the Role of Lawyers, Paragraph 16: "Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics". Paragraph 18: "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

[21] Article 2(j) of the Criminal Procedures Code defines flagrante delicto: "1. an offence in the process of being committed; 2. an offence that has just been committed, and an offence committed by an individual who has been pursued immediately after carrying out the act and has been apprehended by the police, the victim or other individuals; 3. an offence committed by an individual who has been apprehended in possession of items or evidence indicating that the act was carried out very recently."

[22] In cases of discovery in flagrante delicto falling within the jurisdiction of the assize courts, the investigation shall be conducted in accordance with the rules of ordinary law. https://arrestedlawyers.org/2021/07/05/ecthr-arrest-and-pretrial-detentions-of-justices-erdal-tercan-andalparslan-altan-is-unlawful/

[23] Alparslan Altan v. Turkey (Application No. 12778/17) and Baş v Turkey (Application no. 66448/17).

prosecuted, and convicted due to alleged terror-related offences. This has resulted in the prosecution of over 1,700 lawyers, as mentioned above. IBAHRI reported in 2024 that at least 553 lawyers have been sentenced to a total of 3,380 years in prison. All 553 lawyers have been charged with terror-related offences; the two main charges brought against them are (a) membership of an armed terrorist organisation, and (b) forming and leading an armed terrorist organisation.

Turkey's anti-terrorism legislation consists of two separate laws: the Turkish Penal Code No. 5237 (TPC) and the Anti-Terrorism Law No. 3713. Article 314 of the TPC criminalises the establishment and/or commanding of an armed terrorist organisation, and membership of an armed organisation. 24 Under the TPC, these two offences carry a penalty of 7.5 to 22.5 years imprisonment.

Turkey has been arbitrarily using these anti-terrorism laws to target dissidents, particularly lawyers, journalists, and opposition politicians. The law's overly ambiguous and broad definition of terrorism and membership to a terrorist organisation enables the classification of lawyers, including human rights defenders, as "terrorist offenders", increasing arbitrary prosecutions and judicial intervention.

Article 314 of the TPC does not contain a definition of either an armed organisation or an armed group. The lack of legal definitions and criteria for an armed terrorist organisation, and the crime of membership in such an armed terrorist organisation, make them prone to arbitrary application. The vague formulation of the criminal provisions on the security of the state and terrorism, and their overly broad interpretation by Turkish judges and prosecutors, make all lawyers and other human rights defenders a prospective victim of judicial harassment as a result of carrying out their legitimate professional duties.

In 2020, the Grand Chamber of the European Court of Human Rights (ECtHR) concluded that Article 314 was not foreseeable and did not bear the quality of law. It further found that Article 314 does not afford adequate protection against arbitrary interference by national authorities and that its broad interpretation, without concrete evidence, equates freedom of expression with belonging to or leading an armed organisation.[25]

Additionally, lawyers charged with terrorism-related offences face a reversed burden of proof, in violation of the presumption of innocence. The Turkish Court of Cassation has ruled that the mere use of a certain bank account or secure messaging app constitutes evidence of membership of, as well as aiding and abetting, a terrorist organisation. In 2023, in response to this systematic practice by the courts and its adjudication over the use of the ByLock app, the ECtHR ruled that such an approach violated Article 7 of the ECHR to provide effective safeguards against arbitrary prosecution, conviction and punishment.[26] According to the ECtHR, this landmark judgment affects more than 8,000 pending cases and 100,000 potential cases linked to convictions under Article 314 of the TPC. The court

[24] Article 314 (1) Any person who establishes or commands an armed organisation with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years. (2) Any person who becomes a member of the organisation defined in paragraph one shall be sentenced to a penalty of imprisonment for a term of five
to ten years. (3) Other provisions relating to the forming of an organisation in order to commit offences shall also be applicable to this offence. http://www.venice.coe.int/webforms/documents/?pdf=CDL- REF(2016)011-e
[25] Selahattin Demirtaş v. Turkey (No. 2) (Application no. 14305/17), https://ahvalnews.com/selahattindemirtas/turkeys-abuse-its-anti-terror-laws-and-significance-echrs-demirtas-judgment
[26] Yüksel Yalçınkaya v. Türkiye (Application no. 15669/20)

also ordered a retrial of the applicant and the adoption of general measures to prevent similar violations.[27]

However, in total disregard of the ECtHR rulings which serve as directly applicable precedents for the case at hand, the Ankara Regional Appeal Court on 27 December 2023 sentenced 19 lawyers to more than 125 years for conducting their legitimate professional activities, including client representation.[28] The Court stated: "Although some of the defendants and their legal counsels have claimed in their oral and written submissions that the judgment of the ECtHR in Yüksel Yalçınkaya v. Turkey constitutes a precedent for them, there is no final judgment of the ECtHR regarding the violation of the European Convention on Human Rights (ECHR) and its additional protocols concerning the defendants. In light of the ECtHR judgment in Yüksel Yalçınkaya v. Turkey, … it has been concluded that the violations referred to in that judgment relate only to the finding of violations specific to the application in that particular case and that the violations of the principles of the right to a fair trial under Article 6, ECHR, and the principles of legality in criminal matters and punishment under Article 7 ECHR referred to in the judgment are not applicable to the defendants".[29]

The case of Yalçınkaya further demonstrates the strained relationship between Turkey and the ECtHR with regards to ongoing non-implementation. The Court is clear that the overall responsibility under Article 46 (1) of the ECHR for implementing its judgment rests with the state as a whole. However, it explicitly finds that the breaches in this case are systemic in nature and arise directly from the interpretation and application of national law by national courts. The Court's indication of general measures, including specific direction to the national courts, is a procedural manifestation of the principle of subsidiarity (Yalçınkaya, para. 417) – one that is in line with the ongoing dynamic evolution of the subsidiarity principle. Failure by the State to take necessary corrective action, such as a refusal by national courts to apply the ECtHR ruling, constitutes a failure to execute the judgment in accordance with Article 46. A failure to execute a ruling of the Court to which the State is party is a failure to implement the provisions of the treaty.

## Cases of lawyers from Çağdaş Hukukçular Derneği (ÇHD) and others

In response to the Committee's request for information on the current status of the Contemporary Lawyers Association (Çağdaş Hukukçular Derneği - ÇHD) and the Mesopotamia Lawyers Association (Mezopotamya Hukukçular Derneği), which were closed on 22 November 2016 by emergency decree No. 677, and on the status and whereabouts of Selçuk Kozağaçli, the head of the Contemporary Lawyers Association, who was arrested on 13 November 2017 (LOIPR, para. 19), Turkey's periodic report only noted that judicial procedures regarding these individuals continue.

On 6 November 2023, a team from the international delegation attended a hearing in the case of eight lawyers arrested on 16 March 2016. Seven of them are members of the Özgürlük için Hukukçular Derneği (ÖHD) - the Lawyers for Freedom Association, which provides legal support to victims of human rights violations. The eighth lawyer (Tamer Doğan) is a member of the Progressive Lawyers Association (ÇHD). ÖHD, like many others, was banned under the state of emergency declared in 2016.

[27] Yildiz, Ali: Strasburg Weighs In On Political Persecution In Turkey, VerfBlog, 2023/10/31, https://verfassungsblog.de/strasburg-weighs-in-on-political-persecution-in-turkey/
[28] https://arrestedlawyers.org/2024/01/31/ankara-appeal-court-defies-echr-sentences-19-lawyers-to-125-years/
[29] Ankara Regional Appeal Court's 22nd Criminal Chamber, 27 December 2023.

The lawyers in this case are accused of participation in a terrorist organisation. The hearing was short and focused on the illegality of telephone tapping and the advisability of hearing a witness at a future hearing.

During the hearing, the defence stated that the wiretaps do not contain any incriminating evidence. Furthermore, the defence argued that the wiretaps are illegal on two main grounds – first, because proceedings have been initiated against the magistrate who issued the order for the wiretaps, who has since been challenged in several other similar cases based on the magistrate's political connections; and second, because the wiretaps were extended for an excessive duration.

Regarding the request for a hearing, the defence explained that the hearing would concern an anonymous witness who was heard only during the police procedure, such that the accused had not had an opportunity to examine the witness. The defence team also argued that the veracity of the witness's testimony is questionable because authorities regularly obtain such statements in exchange for the dismissal of criminal charges against the person making the statement, under a "repentants" procedure.

The case was adjourned until 8 February 2024 to allow the hearing of the witness. During that hearing, the anonymous witness could be heard with a distorted voice. He testified that one of the other defendants in the case (not a lawyer) organised and coordinated activities on behalf of the PKK's 'committee for prisoners' between 2010 and 2024 and maintained links with the accused lawyers. The lawyers' role was allegedly to uphold contact between the PKK and the prisoners.[30] The defence challenged the reliability of the witness, based on the anonymity and claimed the witness was reading a statement prepared by the police. The witness did not respond to questions about whether he was being prosecuted himself. The defence requested more time to respond to the allegations and prepare expert reports. The case was again adjourned until 30 April 2024.[31]

During the hearing on 30 April 2024, the prosecutor requested more time to prepare his final opinion. The hearing was again adjourned until 4 July 2024.[32]

The international delegation noted that the facts which led to criminal proceedings against the lawyers fall within the scope of their professional practice, since they are accused of being associated with terrorist organisations based on their work providing legal advice for clients alleged to be members of such organisations.

Pursuant to Principle 16 of the Basic Principles, lawyers must be able to perform all their professional functions without intimidation, hindrance, harassment, or improper interference, and are not to suffer, or be threatened with, prosecution or administrative, economic, or other sanctions for any action taken in accordance with recognised professional duties, standards, and ethics. Furthermore, Principle 18 enshrines the recognised principle that lawyers must not be identified with their clients or their clients' causes as a result of discharging their functions. The court hearing that the international delegation observed raises concerns that these Principles are not being respected in practice.

[30] Lawyers for Lawyers, *Trial Observation Mission Report: hearing in the ongoing trial against ÖHD-lawyers*, 13 March 2024, p.3.
[31] Ibid.
[32] https://mezopotamyaajansi35.com/GUNCEL/content/view/240583

The international delegation is also concerned about the fundamental fairness of the trial proceedings. Specifically, doubts have been raised about the impartiality of the judge who ordered the wiretapping on which the prosecution relies. In addition, the fact that the defence team was denied the right to examine a witness for the prosecution constitutes a grave violation of the six defendant lawyers' right to equality of arms. Article 14(3)(e) of the ICCPR and Article 6(3)(d) of the ECHR require that persons being tried are permitted to examine, or have examined, the witnesses against them.

## Conditions of detention

The Committee in its LOIPR requested information on occasional abuse and degrading treatment (para. 31); access to medical practitioners and treatment (para. 48(e)); and prolonged solitary confinement (para. 49). The following information relates.

### Personal searches

While international standards permit personal searches of prisoners, such searches must be conducted in a manner that is respectful of the inherent dignity and privacy of the person being searched,[33] must not be used to harass, intimidate, or unnecessarily intrude upon a prisoner's privacy,[34] and intrusive searches - permissible only if absolutely necessary - must be undertaken by trained staff of the same sex as the prisoner.[35]

While the lawyers interviewed confirmed that personal searches were undertaken by staff of the same sex as themselves, the international delegation is concerned that personal and intrusive searches are being undertaken frequently, and, for some, whenever they have a visitor. The international delegation is concerned that searches are being conducted with excessive frequency and disproportionately so as to interfere with the dignity and privacy of prisoners in contravention of Article 10 of the ICCPR, Rule 52(1) of the Nelson Mandela Rules and other international standards.

### Access to medical services and treatment

The international delegation was informed that when prisoners require medical treatment outside of the prison, the vehicle used to transport them is one which has extremely small individual 'cells' that restrict the movement of the prisoners. These compartments are so small that the individual inside cannot move, and their arms are 'pinned' to their sides. There is also poor ventilation in these vehicles. This causes physical suffering and, for some, can trigger migraines or claustrophobia. Due to the physical suffering caused by this mode of transport, the international delegation was told that the lawyers, and other prisoners, are deciding not to be seen at healthcare facilities outside of the prisons, and consequently are not receiving necessary treatment and services.

Similarly, some of the lawyers reported that, if they are outside of the prison, they have remained handcuffed for the entirety of their medical examination and treatment. One individual reported that they remained in handcuffs while being treated for a neurological condition. Under international standards, instruments of restraint, such as handcuffs, must only be used when no lesser form of control would be effective to address the risk, and any

[33] Rule 50 of the Nelson Mandela Rules.
[34] Rule 51 of the Nelson Mandela Rules.
[35] Rule 52(1) of the Nelson Mandela Rules.

restraint must be the least intrusive method that is necessary based on the level and nature of the risks posed, and imposed only for the time period required.[36]

The CPT has expressed concern about restraining individuals when receiving a medical consultation or intervention except in exceptional cases.[37] Likewise, the European Court of Human Rights has also expressed concern about the practice of handcuffing prisoners during medical treatment, which in certain circumstances may amount to a violation of Article 3 or Article 8 of the ECHR. For example, the European Court has held that handcuffing a physically weak, sick prisoner while taking him to a hospital was a violation of Article 3 of the ECHR.[38]

The international delegation is also concerned that some of the lawyers are required to attend mandatory psychological consultations. A failure to attend will result in a loss of privileges and disciplinary measures. Rather than being a measure designed to benefit the mental health of prisoners, the international delegation is concerned that this requirement is applied as a potentially punitive measure. The obligation to provide healthcare to prisoners must be implemented in a way that respects the doctrine of informed consent.

## Small group isolation

All the lawyers interviewed during the fact-finding mission were being held in small group isolation with extremely limited contact with other individuals. Independent research has shown that the detrimental effects of small group isolation are comparable to those of solitary confinement, such as a deterioration in prisoners' mental health.[39]

Aycan Çiçek, Aytaç Ünsal, Engin Gökoğlu, Süleyman Gökten, and Özgür Yilmaz are held in Kandira¸ Edirne, and Tekirdag prisons, which are all F-type high security prisons. F-type prisons are designed around people being held in either single-person or three-person cells that include a very small 'yard' exclusive to those cells. A similar small isolation group system is also implemented in Silivri high security prison where Oya Aslan, Selçuk Kozağaçlı, Behiç Aşçı and Barkin Timtik are detained.

F-type prisons, and this type of small group isolation practice, create an isolating environment and lack of communal activities for prisoners outside of the cells. The international delegation was informed by the detained lawyers that the isolating conditions are one of the most difficult and distressing aspects of their detention. Aycan Çiçek is held in a two-person cell, while the others are held in three-person cells. They all have extremely little opportunity to socialise with individuals outside of their cell. Although the prison rules provide that prisoners may be allowed to spend a couple of hours periodically with a few people from neighbouring cells (the numbers and regularity varied between prisons), we were informed that in practice this rarely happens.

Contact with other prisoners is frequently denied or severely restricted, including as a disciplinary measure. One of the lawyers interviewed informed the delegation that although they should be entitled to 10 hours of contact per week with up to 10 people, this time was restricted to 2 hours per week due to disciplinary measures being applied. Another lawyer informed the delegation that, although prisoners should be able to have contact with up to 5 people for two hours at least once a month, this contact has been

[36] Rule 48(1) of the Nelson Mandela Rules.
[37] CPT visit report to the Slovak Republic, CPT/Inf (2010), para.105.
[38] *Mouisel v France*, European Court of Human Rights Application no. 67263/01 (2003), para. 47.
[39] Sharon Shalev, *Sourcebook on Solitary Confinement,* Mannheim Centre for Criminology London School of Economics and Political Science, October 2008.

denied and they had not had any contact with others outside of their cell for a couple of months. They stated that the only means to communicate with other prisoners was via a small hole in the cell door. Similar reports were provided by other lawyers interviewed, who use small ventilation holes to communicate with other individuals either verbally or by other means.

## Recommendations

Our organisations respectfully call on the Committee to urge the government of Turkey to:

- Immediately cease all acts of intimidation and harassment, including arbitrary arrest and detention, against lawyers in Turkey;
- Ensure that all lawyers can practice their profession without undue interference and in a free and enabling environment, in compliance with international standards on the independence of the legal profession;
- Ensure that lawyers in Turkey are not identified with their clients and clients' causes;
- Immediately end the interference in, and systematic persecution of, bar associations and lawyers' associations and the arbitrary arrest and prosecution of their members;
- Immediately and unconditionally release Oya Aslan, Aycan Çiçek, Engin Gökoğlu, Süleyman Gökten, Selçuk Kozağaçlı, Barkin Timtik, Aytaç Ünsal and Özgür Yilmaz.
- Pending the release of these lawyers, ensure that they are held in conditions that are in conformity with the UNCAT and other international standards for the treatment of prisoners;
- Urge full implementation of all ECtHR rulings, particularly those related to torture and ill-treatment of lawyers, and to ensure accountability for officials responsible for these violations;
- Conduct an independent and impartial enquiry into the alleged torture, and other ill-treatment, of Oya Aslan, Engin Gökoğlu, Barkin Timtik and Aytaç Ünsal and bring any suspected perpetrators to justice, in trials meeting international standards for a fair trial;
- Ensure the independent and prompt investigation and prosecution of all cases of torture and ill-treatment of lawyers committed by law enforcement officers, in accordance with applicable international standards;
- Ensure that all victims of torture and ill-treatment obtain redress, including an enforceable right to fair and adequate compensation and the means for as full rehabilitation as possible;
- Ensure that an immediate independent review of cases is conducted in which lawyers are presently on trial or appealing sentences handed down against them for membership in, engaging in propaganda for, or facilitating the activities of a terrorist organisation;
- Ensure that all persons deprived of their liberty receive timely and appropriate medical treatment;
- Ensure that the use of instruments of restraint on persons deprived of their liberty is in conformity with international law;
- Ensure that all persons deprived of their liberty are transported to and from their place of deprivation of liberty in conditions that are in conformity with Article 16 of the Convention; and
- End the practice of small group isolation and ensure that all persons deprived of their liberty have access to exercise and recreational activities and materials.