

**MISSION REPORT GD – OIAD, ISTANBUL
OHP Trial (Propaganda/Cizre protest facts)**

**HEARING BEFORE THE 36THD HIGH CRIMINAL COURT OF ISTANBUL
(Heavy Criminal Division)
8th November 2018**

1. Objectives

Italian lawyer from the Italian Democratic Lawyers Association, Elena Esposito, participated as international observer at the Court Hearing held on the 8th of November before the High Criminal Court of Istanbul (Turkey) for the trial on the events known the *Cizre* protest facts. The mission belongs to the wider international observation activity carried ahead by the Democratic Lawyers in trials where violation of fair trial principles and fundamental human rights on behalf of National Institutions is feared and where fellow lawyers are feared to be persecuted for their profession that could not exercise with the due autonomy, independency, freedom and respect. The Italian delegation was also representing the *Observatoire International des Avocats* and participated to the observation jointly with other international observers from France and the Netherlands.

Main objectives of the mission are:

- offer support to our colleagues;
- promote both internal and international accountability of the Judicial Institutions;
- guarantee fundamental principles of the profession and fundamental rights of the individual, *id est* freedom and independency of the defence, freedom of speech and right to a fair trial.

2. Background information: Turkish context

Following a failed attempt of a *coup d'état* (15th of July 2016), Turkey declared the State of Emergency on July, 21st of 2016, extending it seven times since (last extension occurred on April 2018 before the 24th June elections). State of Emergency declaration had the double effect of (i) centralizing more powers in the hand of the Chief of the executive power and (ii) allowing several derogations to the respect and protection of fundamental human rights and freedoms under the shield of public order and security.

Under such State of Emergency, a Constitutional Referendum was held with 18 proposed amendments affecting 72 articles of the Constitution. The referendum process was observed by a

high number of international observers in the whole Country¹, among which a delegation of the Italian Democratic Lawyers Association.

The Human Rights Watch World Report on Turkey for 2018 summarizes recent human rights developments as follows: *“An April 2017 referendum, which voters approved by a slim margin, introduced constitutional amendments switching Turkey to a presidential system of governance, the most significant change to its political institutions in decades. [...]*

The new presidential system, which consolidates the incumbent’s hold on power, is a setback for human rights and the rule of law. It lacks sufficient checks and balances against abuse of executive power, greatly diminishing the powers of parliament, and consolidating presidential control over most judicial appointments. The presidential system will come fully into force following elections in 2019.”²

As also underlined with alarm by Human Rights Watch and by the UN Commissioner for Human Rights, several concerning measures were undertaken against human rights defenders and associations, with arbitrary arrests and close-downs, pretrial detentions and ill-treatments.

More specifically, the situation regarding the free exercise and independence of the profession is believed to be very critical: lawyers are being target of an alarming trend of arrests and criminal prosecution across Turkey.

Data and statistics recently shared by local civil society organizations and initiatives acknowledge that lawyers have been prosecuted and detained on terrorism-related accusations in 77 out of the total 81 Turkish provinces. As of 25th October 2018 and since the 15th of July 2016:

- 590 lawyers have been arrested;
- 1548 lawyers are under prosecution;
- 196 lawyers were sentenced to long imprisonment, so far;
- some of the arrested lawyers were subjected to torture and ;
- 14 of detained or arrested lawyers are presidents or former presidents of provincial Bar Association;
- 34 lawyers’ societies or associations have been shut down with the confiscation of all assets and no compensation.³

All persecuted lawyers are being charged under offenses punished by the Anti-Terror Law no. 3713 of 1991⁴ (lastly amended on July 2018, right after the end of State of Emergency 2-years period), such as being member or supporters of armed terrorist organisation or making propaganda in favour of terrorist organizations. As a result of the joint-provision of Anti-Terror special criminal provisions

¹ OSCE, International Referendum Observation Mission, Republic of Turkey – Constitutional Referendum, 16 April 2017, <file:///C:/Users/user/Downloads/OSCE%20pr%20f%20e%20c.pdf>.

² HUMAN RIGHTS WATCH, World Report 2018, Turkey, <https://www.hrw.org/world-report/2018/country-chapters/turkey>.

³ THE ARRESTED LAWYERS INITIATIVE, Statement by The Arrested Lawyers Initiative on the occasion Of European Lawyers Day, <https://arrestedlawyers.org/2018/10/24/statement-by-the-arrested-lawyers-initiative-on-the-occasion-of-european-lawyers-day/>.

⁴ Turkey: Law No. 3713 of 1991, Law to Fight Terrorism [Turkey], 12 April 1991, available at: <http://www.refworld.org/docid/4c4477652.html> [accessed 15 November 2018].

and the Turkish Penal Code regulation, terror-related charges are punished with the highest imprisonment penalties existing in Turkish legal system, with a related concern on the proportionality of the sentence.

Better explained by our Turkish fellow colleagues from The Arrested Lawyers Initiative:

*“Turkey’s anti-terrorism legislation consists of two separate laws: the Turkish Penal Code (5237) (“TPC”) and Anti-Terrorism Law (3713). Many articles of the Anti-Terrorism Law were rescinded but article 5, which is still in force, stipulates the aggravation of the terrorism-related sentences by half.”*⁵

Article 314 of the Turkish Criminal Code⁶ is one of the rules most often recalled by specific provisions of the Anti-Terrorism Law as per the penalty treatment, notwithstanding its critical and vague formulation. Indeed, *“Turkish Penal Code contains neither the definition of what constitutes armed organizations and armed groups nor the offense of membership. The lack of legal definitions [...] makes these articles prone to arbitrary application and abuse”*.⁷

As duly noted by the European Court of Human Rights in the case *Contrada vs. Italy* (case no. 66655/13, 14.04. 2015), a criminal offence formulated in a vague or unclear way not allowing to know and understand with certainty its essential and constitutive elements would violate art. 7 of the European Convention.

3. Background information: the trial

The trial originates from facts that happened in Istanbul on 15th of September 2015.

Accusations by the competent authority were brought against a group of lawyers for organizing a pacific demonstration and reading a press statement to protest against the curfews imposed by the Government and the (widely documented) human rights violations occurred in the city of Cizre (Sirnak district, Turkish Kurdistan) between the 4th and 15th September 2015.

The severe human rights violations occurred in Cizre in the indicated time period comprehended violent armed attacks on civilians, ill-treatment and torture of civil population of the area, denied access to emergency medical assistance, drugs, water, food and other vital services and goods⁸.

⁵ THE ARRESTED LAWYERS INITIATIVE, Abuse of the Anti-Terrorism laws by Turkey is steadily increasing, <https://arrestedlawyers.org/2018/08/23/abuse-of-the-anti-terrorism-laws-by-turkey-is-steadily-increasing/>.

⁶ Ibid : *“Sub-section 1 (Article 314/1) of Article 314 of the Turkish Penal Code criminalises the establishment and/or commanding an armed terrorist organisation, and the subsection 2 (Article 314/2) criminalises the membership to an armed organisation. Under the Turkish Penal Code, these two offences carry the penalty of 7.5 to 22.5 years imprisonment”*.

⁷ Ibid.

⁸ GIURISTI DEMOCRATICI, Rapporto Informativo Sulle Violazioni Dei Diritti Umani Nella Città’ Turca Di Cizre, Barbara Spinelli:http://www.staticfiles.it/clients/ggdd/file/reposit/posts/2015/09/20150921110852/documents/ggdd_20150921110852.pdf.

The defendants are 18 fellow lawyers, three of which were under pre-trial detention for different charges at the beginning of the trial *de quo* and were recently released before the Hearing of 8th November, namely: Avni Güçlü Sevimli, Şerafettin Can Atalay, Sinan Zincir, Sezin Uçar (previously detained), Ramazan Demir, Onur Şahinkaya, Neziha Eken, Naciye Demir (previously detained), Mustafa Rüzgar, Mehmet Ümit Erdem, Banu Güveren, Baran Doğan, Diren Yeşil, Ebru Timtik (previously detained), Ercan Kanar, Gökmen Yeşil, Güray Dağ, Hüseyin Boğatekin.

The defendants are indicted with two different criminal charges:

i. Art. 7, paragraph 2, Anti-Terrorism Law no. 3713 of 1991: Terrorist propaganda:

“Any person making propaganda for a terrorist organisation shall be punished with imprisonment from one to five years. If this crime is committed through means of mass media, the penalty shall be aggravated by one half. [...]”

The following actions and behaviours shall also be punished according to the provisions of this paragraph:

a) Covering the face in part or in whole, with the intention of concealing identities, during public meetings and demonstrations that have been turned into a propaganda for a terrorist organisation

b) As to imply being a member or follower of a terrorist organisation, carrying insignia and signs belonging to the organization, shouting slogans or making announcements using audio equipment or wearing a uniform of the terrorist organization imprinted with its insignia

If the crimes indicated under paragraph 2 were committed within the buildings, locales, offices or their annexes belonging to associations, foundations, political parties, trade unions or professional organisations or their subsidiaries, within educational institutions, students’ dormitories or their annexes, the penalty under this paragraph shall be doubled.”⁹

ii. Art. 32, Law no. 2911 of 1983: Prohibition of unpermitted demonstrations:

“In case that persons who participate in unlawful assembly or demonstrations resist despite the warning or use of force, they shall be imprisoned for a term from six months to three years. In case that those who organized the assembly or demonstration commit this crime, the penalty to be imposed under this paragraph shall be increased by half.

In the event that despite the officers' warning or use of force, law enforcement officers face a resistance through violence or threats, perpetrators shall also be sentenced due to the crime defined under Article 265 of the Turkish Penal Code dated 26/9/2004 No. 5237.

In the event that an assembly or demonstration is dispersed without the existence of circumstances defined under Article 23 and by exceeding the scope of authority and non-

⁹ Ref. supra.

compliance of the Article 24, penalties envisaged for those who committed the crimes in the paragraphs above may be reduced by up to one fourth or may be renounced.”¹⁰

The defence expressed the concern of arbitrary limitations of the right to freedom of expression, assembly and demonstration to which every human being and every lawyer is entitled, requesting the charges to be immediately dismissed.

Beside, at the first Court Hearing – held on the 10th May 2018 – procedural violations were detected and raised by the defence: (i) the prosecutor did not obtain permission from the Ministry of Justice to indict the lawyers, although this is legally required; (ii) two of the detained lawyers were heard through videoconferencing, and not in court, even if one of them firmly objected and requested to be present at the Hearings; (iii) the videoconference of one of the two detainee was connected after the beginning of the Hearing (one hour and a half later) not permitting the defendant to rightfully assist the trial; (vi) the other defendants supported her objection by refusing to give a statement until the detained defendants would be able to be present in Court as well.

The Hearing concluded with the request of the defence to adjourn the case in order to enable the presence of all defendants at the next Hearing. The request was granted and the case was postponed to the 8th November 2018.

4. Court Hearing, 8th November 2018 (2nd Hearing)

Judicial body: 36th High criminal Court, Istanbul, public hearing

The Court is composed of three judges, all present at the hearing and the same physical persons of the previous hearing. The Public prosecutor is present on the right-hand side of the Court.

All defendants are free at the moment of the hearing, but only 8 are present in the Courtroom, for other 10 of them have concomitant Court Hearings for different trials and charges. 13 lawyers are present in Courtroom for the defence.

Hearing starts at 10.20 in the morning with the following order.

- a. Introduction of the presence of four international observers (fellow lawyers from Europe).
- b. Identification of the present defendants: Şerafettin Can Atalay, Sinan Zincir, Sezin Uçar, Ramazan Demir, Nezih Eken, Baran Doğan, Ercan Kanar, Gökmen Yeşil.
- c. Reading of indictment by the President of the Court: it is noticed that the President did not read the full and comprehensive text of the accusations moved against the defendants, but only the “*most relevant parts*” as explicitly declared before reading.

¹⁰ Ministry of Justice, Law on Assemblies and Demonstrations no. 2911 of 1983, <http://www.judiciaryofTurkey.gov.tr/Law-on-Assemblies-and-Demonstrations-is-available-on-our-website>.

- d. Intervention of defendants: all eight defendants intervened in front of the Court:
- Gokmen Yesil: represented the difficulties in preparing the defence and asked for a postponement of the hearing;
 - Can Atalay: complained for the lack of personalization of crimes and criminal responsibility within the accusation file; upon explicit request of the Court, refused to access to the privilege of penalty suspension (*ref. sospensione condizionale*) for the unlawfulness of the trial and the investigation against him;
 - Ercan Kanar: broad and long intervention on international human rights and humanitarian law, crimes against humanity, European legislation, International Courts on Human Rights (ECHR, ICCYC), on the severe violations occurred in Cizre and on the duty and right of lawyers to promote and guarantee the State of law and on the unlawfulness of the current trial;
 - Ramazan Demir: requested more time to prepare for his defence and asked for the postponement to a new hearing reminding the Court that he will be discussing a case on the Cizre facts before the ECHR after which he will be able to duly prepare and produce evidences. Reserved to later answer on the privilege of penalty suspension;
 - Baran Dogan: underlined the lack of personalization of crimes and indictment, complained about the distort usage of criminal proceedings to persecute Kurdish minority and opposition realities. Deposited pictures of the Cizre violations to the Court and requested to be judged not as normal defendant, nor as a lawyer but only as a Kurdish. Reserved to later answer on suspension of penalty;
 - Ercan Canar: requested more time to prepare his defence and to postpone the trial to a new hearing;
 - Sezin Ucar: represented she was released on the 5th of October for different charges and the fact that lawyers are accused for being human rights defenders. Requested a postponement of the trial to better prepare the defence.
 - Neziha Ekei: Requested a postponement of the trial to better prepare the defence.
- e. Defence lawyers' interventions:
- 1st lawyer: claims the violation of the freedom of speech and opinion, as well as the right to fair trial, against what envisaged by the Turkish Constitution and human rights instruments ratified and signed by the Government.
- Reminds that according to ECHR jurisprudence freedom of speech must be considered legit when no imminent violence nor incitement to violence is used: the behaviour of the defendants was peaceful and must be protected.
- Cizre facts were a violation of art. 2 of Turkish Constitution and it is normal that lawyers call upon the respect of the rule of law.
- Reserved the right to raise a constitutionality claim at the next hearing against the interpretation of the indicted charges.
- She finally asked for immediate acquittal of all charges.

2nd lawyer: recall what stated and requested by first colleague.

3rd lawyer: recall what stated by defendants and previous lawyers' interventions.

4th lawyer: recall what stated by defendants and previous lawyers' interventions.

5th lawyer: recall what stated by defendants and previous lawyers' interventions.

6th lawyer: agrees with what represented by the previous interventions and request to provide a full defence only when all interventions and observations of the defendant will be completed. Requests for immediate acquittal of all charges and represents that some defendants and defence lawyers could not be present because of concomitant hearings.

7th lawyer; 8th lawyer; 9th lawyer; 10th lawyer: recall and agree n what stated by previous colleagues.

- f. Prosecutor's intervention: as follow:
- in favour of excusing the absence of defendants and lawyers;
 - the Court to decide whether to give a postponement to allow the preparation of defence;
 - in favour of completing the statements of absent defendants to the next hearing;
 - against the claim of immediate acquittal of all charges.

The Court decides for a fifteen minutes break to reach an interim decision.

When resuming the hearing the Court decides for the dismissal of lawyers' request of immediate acquittal of charges and to accept the request of postponement of the trial to a new hearing to be fixed on the 19th February of 2019, 9.00 a.m..

5. Final findings

A lawyer from the Istanbul Bar Association was present during the trial to monitor the development of the hearing on behalf of the Association. To the knowledge of the writer, it is a unique circumstance that never occurred to other trials before.

Following the hearing, a short debriefing was held with few defendants and defence lawyers. It emerged that the strategy of some (maybe most) of defendants is to prolongate the time of the trial in the hope of new changes towards a more guarantees-oriented attitude towards fundamental rights and freedoms in Turkey. Hence, the sentence on such trial as per the current situation is feared to possibly be severe and arbitrary. The prolongment of the trial timing could not, in any case, bring to reach the prescription period, for the time period required for such criminal offences is utterly long (ranging around 20 years).

Torino, 15th November 2018

Elena Esposito, Consiglio dell'Ordine di Torino, Giuristi Democratici

International presence at the Hearing

Evelyne BOILEAU-BRANDOMIR, Défense Sans Frontière-Avocats Solidaires, France

Christine MARTINEAU, Défense Sans Frontière-Avocats Solidaires, France

Hans JONKHOUT, Lawyers for Lawyers, The Netherlands

Disclaimer

The rules and legal provisions contained in the report are not official translations, due to the difficulty to find an updated English version of the laws.