

Fact-finding mission on CHD's trials

*Breach of Fair Trial, Independence of the Judiciary and Principles
on the Role of Lawyers*

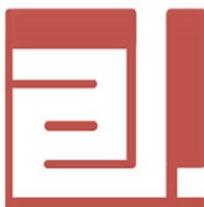
October 2019, Istanbul



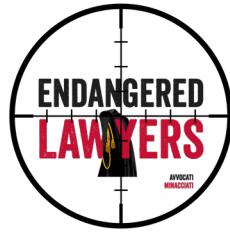
International Association of Lawyers
Union Internationale des Avocats
Unión Internacional de Abogados



CNR Consiglio
Nazionale
Forense



AVOCATS EUROPÉENS DEMOCRATES
ABOKATU DEMOKRATA EUROPARRAK
AVRUPALI DEMOKRAT AVUKATLAR
EUROPÄISCHE DEMOKRATISCHE RECHTSANWÄLTE
AVOCATS EUROPEUS DEMOCRATES
ABOGADOS EUROPEOS DEMOCRATAS
ΕΥΡΩΠΑΙΟΙ ΔΗΜΟΚΡΑΤΕΣ ΔΙΚΗΓΟΡΟΙ
AVVOCATI EUROPEI DEMOCRATICI
EUROPESE DEMOKRATISCHE ADVOCATEN
EUROPEAN DEMOCRATIC LAWYERS



KEEP YOUR HANDS
OFF THE LAWYERS



Criminal commission of the International Associations of Lawyers (UIA)

June 2020

Table of contents

PART I - About the fact-finding mission.....	4
1. Objective of the fact-finding mission.....	4
2. General observations.....	5
3. Experts Interview.....	5
PART II - Observation of the two mass trials against Progressive Lawyers Association (ÇHD).....	7
1. Mass trials pending against progressive lawyers.....	7
2. Accusations in both trials.....	7
3. Evidence and material elements in CHD II proceeding.....	9
4. Detention in CHD II trial.....	9
5. Hearings of CHD II trial.....	10
5.1. First hearings (10 th - 14 th of September 2018).....	10
5.2. Second hearings (3 th – 5 th of December 2018).....	11
5.3. Third hearings (18 th – 21 th of March 2019).....	12
6. Judgment of the CHD II trial.....	13
7. Appeal of CHD proceeding before the Istanbul Regional Court of Appeal.....	15
8. Matters of concern during the observations of CHD II trial.....	16
PART III - Analysis in light of the fair trial standards (article 6 of the European Convention on Human Rights).....	17
1. Right to an independent and impartial tribunal (article 6§1).....	17
2. Right to participate effectively in the proceedings (article 6§1).....	18
3. Equality of arms and limitation of the rights of the defense (article 6 § 1).....	19
4. Right not to be tried or punished twice (article 4 of Protocol No. 7).....	21
5. Right to have adequate time and facilities to prepare oneself defense (article 6 § 3 (b)).....	21
6. Right to publicity of the debate (article 6§1).....	22
7. Right to examine and to obtain attendance of the witnesses (article 6 § 3 (d)).....	23
8. Right to be defended by a legal assistance of his own choosing (article 6§3(c)).....	26
8. Right to be informed promptly informed of the nature and cause of the accusation (article 6 § 3).27	

10. Right to cross-examines the validity of a proof and present proofs (article 6 § 1 and 6 § 3).....	27
PART IV - Analysis in the light of the Basic Principles on the Role of Lawyers (Havana, 1990).....	30
Principle 1 : assistance of a lawyer of their choice.....	30
Principle 4 : assisting the poor and disadvantaged persons.....	30
Principle 8 : time and facilities to consult with a lawyer in detention.....	30
Principle 9 : ensuring appropriate education and training.....	31
Principle 10 : no political discrimination to continue the practice.....	31
Principle 13 : duties of the lawyer.....	31
Principle 14 : act freely in the protection of the client's interests and in the upholding of human rights	31
Principle 16 (a) : interdiction of intimidation, hindrance, harassment or improper interference.....	32
Principle 16 (c) : interdiction to sanction the lawyers for their professional actions.....	32
Principle 18 : no identification with their clients.....	32
Principle 19 : right to appear before a court for his/her client.....	32
Principle 21 : time and facilities to prepare the clients' defence.....	33
Principle 23 : freedom of expression and association.....	33
PART V - Analysis as regards to the independence of judiciary and the Rule of Law principles.....	34
1. Overview of the general situation.....	34
2. UN Principles on the Independence of the Judiciary and UN Guideline on the Role of Prosecutors	35
3. Specific observations of European lawyers.....	37
CONCLUSIONS AND DEMANDS.....	39
LIST OF THE ASSOCIATIONS REPRESENTED DURING THE FACT-FINDING MISSION.....	40
LIST OF THE ANNEXES.....	41

PART I - About the fact-finding mission

A group of 15 lawyers from 7 European countries met in Istanbul from 13 till 15 October 2019 for a fact-finding mission to clarify the legal circumstances that led to the conviction of the following 18 Turkish lawyers by the 37th High Criminal Court of Istanbul in March 2019:

- **For "founding and leading a terrorist organization"** - Barkin TIMTIK: 18 years and 9 months **For "membership of a terrorist organization"** - Ebru TIMTIK and Özgür YILMAZ: 13 years and 6 months - Behiç ASÇI and Sükriye ERDEN: 12 years - Selçuk KOZAGACLI (President of the ÇHD) : 11 years and 3 months - Engin GÖKOGLU, Aytac ÜNSAL and Süleyman GÖKTEN : 10 years and 6 months - Aycan ÇIÇEK and Naciye DEMIR: 9 years - Ezgi CAKIR: 8 years
- **For "willfully and knowingly aiding a terrorist organization"** - Aysegül CAGATAY, Yagmur EREREN, Didem Baydar ÜNSAL and Yaprak TÜRKMEN: 3 years 9 months - Zehra ÖZDEMİR and Ahmet MANDACI: 3 years, 1 month and 15 days (sentence reduced because of their presence at the hearing on 20 March 2019, unlike the other defendants).

The European lawyers of the monitoring team came from Austria, Belgium, Catalonia/Spain, Greece, Germany, France, and Italy. They represented, among others, two international associations of lawyers, two European lawyers' organizations, the European umbrella association of bar associations, various national and regional bar associations and lawyers' organizations.

Most of the European lawyers who participated in the fact-finding mission have already participated as observers of the mass trials of lawyers in Turkey and other politically motivated proceedings. Their main focus was on the question of whether Turkish and European law was violated in the proceedings. The results of these observations were recorded in various reports.

1. Objective of the fact-finding mission

The participants of the fact-finding mission examined the following questions, taking into account the reasons of the judgment:

- the extent to which the independence and impartiality of the Court was respected in the proceedings
- whether the principles of a fair trial applicable under Turkish and European law have been respected, including:
 - whether the principle that no one should be tried twice for the same offense has been respected (*ne bis in idem*)
 - whether the evidence satisfied the legal requirements

2. General observations

The observations of the two CHD trials, as well as numerous other politically motivated trials in Turkey, raised serious concerns about the respect of the rights of the accused and the defense lawyers. This was particularly the case with the 37th High Criminal Court of Istanbul, presided over by the judge, Akin Gürlek.

Among other cases, he was in charge of the proceedings against Selahattin Demirtaş (one of the two HDP presidents), Canan Kaftancıoglu (the Istanbul CHP president), Ahmet Altan (writer and journalist), Şebnem Korur Fincancı (the president of the Human Rights Foundation of Turkey and one of the academies for peace), İhsan Eliaçık (theologian and author).

3. Experts Interview

During their stay in Istanbul, the European lawyers held discussions:

- with the following **four lawyers who are imprisoned in Silivri**:
 - Selçuk Kocağaçlı (the chairman of the Turkish lawyers' organization CHD),
 - Ebru Timtik,
 - Behiç Aşçı and
 - Barkın Timtik
- with the **defense lawyers** who are on the defense team and who participated in the meeting at the Bar Associations hall:
 - Hasan Fehmi Demir
 - Fikret İlkiz
 - Derviş Aydın
 - Ciğdem Akbulut
- with the following **defense lawyers** from other politically motivated trials before the 37th High Criminal Court (see above), who are also in the group of registered defense lawyers representing our colleagues in CHD's trials:
 - Tora Pekin (lawyer in the Cumhuriyet Newspaper trial)
 - Melike Polat Bursalı (Lawyer of some Academics for Peace and lawyer in Ahmet Altan and Mehmet Altan trials)
 - Fırat Öpözdemir and Pınar Bayram (Lawyers of Selahattin Demirtaş and Sırri Süreyya Önder)
- with a **member of the Turkish Parliament**:

- Sera Kadıgil (CHP)
- with the **President of the Istanbul Bar Association:**
 - Av. Mehmet Durakoğlu.

PART II - Observation of the two mass trials against Progressive Lawyers Association (ÇHD)

1. Mass trials pending against progressive lawyers

There are currently two mass trials in Turkey against members of the Turkish lawyers' organization ÇHD Çağdaş Hukukçular Derneği (Progressive Lawyers Association).

The first trial (**ÇHD I trial**) opened in 2013, prosecuting 22 lawyers (*Selçuk Kozağaçlı*, Taylan Tanay, *Barkin Timtik*, *Ebru Timtik*, *Naciye Demir*, *Şükriye Erden*, *Günay Dağ*, Nazan Betül Vangölü Kozağaçlı, Avni Güçlü Sevimli, Güray Dağ, Gürvin Aydın, Efkan Bolaç, Serhan Arıkanoğlu, Zeki Rüzgar, Mümin Özgür Gider, Metin Narin, Sevgi Sönmez Özer, Alper Tunga Saral, Rahim Yılmaz, Selda Yılmaz Kaya, *Oya Aslan* and *Özgür Yılmaz*). The case has been pending at the trial court since 2013.

The accusations are:

- Support, membership, leadership of a terrorist organization (DHKP/C)
- One is accused of attempting premeditated murder and of abolishing constitutional order

The second ÇHD trial (**ÇHD II trial**) opened in autumn 2018, prosecuting 20 lawyers of which 8 are also prosecuted in ÇHD I trial (Ahmet Mandacı, Aycan Çiçek, Aysegül Çağatay, Aytaç Ünsal, *Barkin Timtik*, Behiç Aşçı, Didem Baydar Ünsal, *Ebru Timtik*, Engin Gökoğlu, Ezgi Çakır, *Naciye Demir*, *Özgür Yılmaz*, *Selçuk Kozağaçlı*, Süleyman Gökten, *Şükriye Erden*, Yağmur Ereren Evin, Yaprak Türkmen, Zehra Özdemir). Two other lawyers (*Günay Dağ* and *Oya Aslan*) were also defendants in this trial, but, due to their absence, the Court separated their case, which is still pending in the trial court – (**ÇHD II bis proceeding**).

On 20 March 2019, these 18 lawyers were convicted by the 37th High Criminal Court of Istanbul. On 8 October 2019, the Istanbul Regional Court of Appeal upheld the judgment, without an oral hearing. The case is currently pending before the Supreme Court.

The accusations are identical in both trials, i.e., being a (leading) member or a supporter of a terrorist group (DHKP/C).

On 22 November 2016, the ÇHD was dissolved by governmental decree.

2. Accusations in both trials

The convicted lawyers in the ÇHD II trial are members of the Progressive Lawyers Association (ÇHD) and of the People's Law Office (HHB, Halkın Hukuk Bürosu). In both trials, they are accused of issuing propaganda for, or membership or administration of a terrorist organization (DHKP/C), through their law office.

In the ÇHD II trial, the accusations are grounded on the specific provisions of the Turkish Penal Code against an armed organization acting with political aim:

- Article 314/1 of the Turkish Penal Code¹ which provides for a sentence of 10 to 15 years of imprisonment for forming and directing an armed organization (Barkin Timtik and Özgür Yilmaz)
- Article 314/2 of the Turkish Penal Code which provides for a sentence of 5 to 10 years of imprisonment for membership to an armed organization (all the other lawyers).

According to Article 3 and Article 5 of the Law on Fight against Terrorism in Turkey, n°3713, these offenses are of a terrorist nature and therefore are increased respectively to 20 to 22.5 years of imprisonment and 7.5 to 20 years of imprisonment².

The scope of the material facts included in these provisions is specified in article 7 and follows the Law on Fight against Terrorism in Turkey: establishing, leading or being a member of a terrorist organization, organizing activities of the organization, issuing propaganda, ...

In the CHD I trial, in addition to the accusations under articles 314/1 (Selçuk Koazagacli and Taylan Tanay) and 314/2 (all the other lawyers) of the Turkish Penal Code, two other accusations are made:

- Ebru Timtik is accused of attempting premeditated murder and of abolishing constitutional order under Articles 82 and 309/1 of the Turkish Penal Code;
- Taylan Tanay, Barkin Timtik, Ebru Timtik and Günay Dag, are also accused of preventing the Prosecutor from performing his duty, under Article 265/1-3 of the Turkish Penal Code.

In both cases, the lawyers concerned are accused of acting in union or communicating with a qualified terrorist organization, via the law firm HHB and the association ÇHD. In the ÇHD I trial, it is alleged that the accused lawyers were active in ÇHD. In the ÇHD II trial, it is alleged that there is a relationship between the activities of accused lawyers as members of a terrorist organization and the activities of ÇHD.

Among other things, the lawyers are accused of passing messages between detained DHKP-C members and non-detained DHKP-C members. In support of this charge, the Prosecutor identified the lawyers with their clients and considered the following material facts which are activities connected with their professional functions: participation in anti-torture demonstrations or in human rights protests, attending the funerals of clients, inviting their

1 - The Turkish Penal Code is available here :

https://www.legislationonline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf

2 - The Law on Fight against Terrorism in Turkey is available here :

https://www.legislationonline.org/download/id/3727/file/Turkey_anti_terr_1991_am2010_en.pdf

clients to exercise their right to silence, or representing numerous clients accused of being members of DHKP-C, etc.

The accused deny membership of the DHKP-C in both proceedings.

3. Evidences and material elements in CHD II proceeding

The conviction in the CHD II trial and the indictment in the CHD I trial are based on almost identical evidence.

In the CHD II trial, **three types of evidence**, leading to numerous instances of circumstantial evidence, were presented by the Prosecutor: witnesses, digital documents allegedly seized during a search in a musical studio, and printed documents that are allegedly a copy of digital documents taken by Turkish police from Belgian and Dutch authorities in those countries, respectively.

During the fact-finding mission, defense lawyers detailed the reasons why they considered the evidence on which the conviction was based to be unreliable.

Of the **witnesses**, 7 of 8 were anonymous, all repentant. Three of these anonymous witnesses were not heard during the trial, but in its final decision the 37th High Criminal Court of Istanbul relied on their previous testimonies, which were taken during the investigation period. The testimonies of the witnesses were particularly problematic, regarding the circumstances surrounding these testimonies (obvious psychological problems of some witnesses, hundreds of pages of testimonies with hundreds of names, used in numerous trials, inconsistent periods, etc.)

Defense lawyers argued that the alleged printed version of the **digital documents from Belgium and Dutch authorities**, were tampered with: conversations and reports of the illegal organization's activities were placed in the file and used to convict the accused. As a matter of fact, the authenticity of the documents could not be confirmed by the experts, since the originals of these digital documents were not communicated. The experts were therefore unable to check whether any information had been modified during the extraction of the digital files. Some of these computer files were shared with the Turkish authorities by Belgium and the Netherlands in 1998 and 2003. They circulated in 2006 in Turkey and began to be used in trials from 2013 onward.

The originals of the **digital documents which were allegedly seized in a musical center** were not available to the defense lawyers either. No digital material or printed versions of them were submitted in the case file. These documents would have been submitted by police officers to the witness, Berk Ercan, during his testimony, in order for him to confirm the content of those documents. The minutes of Berk Ercan's testimony is therefore the only trace, in the file, of these documents.

4. Detention in CHD II trial

Arrest warrants were issued against 20 ÇHD lawyers at the end of 2017, on 12 and 21 September, on 13 November and on 20 December.

Two of these lawyers had their files separated (Günay DAĞ and Oya ASLAN) and two of them were provisionally released (Ezgi ÇAKIR and Ahmet MANDACI).

The first arrests took place the day before the trial of teachers Nuriye GÜLMEN and Semih ÖZAKÇA, represented by lawyers from ÇHD.

Seventeen of the lawyers were detained, dispersed among different prisons, some in isolation, until their trial began on 10 September 2018.

On 14 September 2019, after the first week of hearings, the Court released all seventeen lawyers.

However, the Prosecutor appealed within 24 hours. The appeal chambers of the Court, with an unusual composition of seats, issued "re-arrest warrants", the legality of which is uncertain.

Six lawyers were re-arrested, and six others were wanted. Lawyer Selçuk KOZAĞAÇLI went to court on his own initiative.

5. Hearings of CHD II trial

5.1. First hearings (10 - 14 September 2018)

The purpose of these hearings was to take the statements and determine the preventive detention of the accused lawyers. Lawyers had to struggle to appear in person and not through the SEGBIS videoconferencing system.

The following observations were made on the first day:

- the presence of gendarmes was excessive, all around the accused, which did not allow defense lawyers and accused lawyers to interact during the hearing;
- a lawyer was threatened with torture by one of the anti-terrorist police officers while she was pleading for them to leave the courtroom, as they had tortured some of the accused lawyers;
- during a break, the gendarmes beat the lawyers because the lawyers were trying to communicate with each other;

The hearing was moved, on the last day, to the courtrooms adjoining Silivri prison.

On 14 September 2018, at the end of the first week of hearing, the 37th High Criminal Court of Istanbul ordered the release of all the detained lawyers and postponed the case to the hearing of 19-20 February 2019. After the renewed arrest of the lawyers, the next hearing date was scheduled for an earlier date, from 3-5 December 2018, because the February 2019 date would have exceeded the lawful reasonable detention period.

5.2. Second hearings (3 – 5 December 2018)

The purpose of the hearings from 3 to 5 December 2018 was to hear the witnesses.

The Prosecutor and the composition of the Court have changed since the September hearings. The hearings are conducted by the President, Akın GÜRLEK.

Most of the witnesses were anonymous and repentant. They testified via the SEGBIS video-conferencing system, following very lengthy written statements, which had often been written from the prisons where they are incarcerated, sometimes even after consulting some elements of the Prosecutor's case.

The facts reported by the witnesses were, for example, that a lawyer had advised his client on his attitude to adopt in a court of law, that a lawyer had invited his client to remain silent, that a lawyer had a code name in the organization, that a lawyer had attended a legal conference, that a lawyer had confirmed to his client that there was nothing in the file and that he would be released, or simply that a lawyer was defending a person. Many of the testimonies were hearsay.

The facts of transmitting messages or participating in DHKP-C activities never seemed to be corroborated by evidence other than witness statements.

In general, the credibility of these witnesses was lacking:

- they often did not know for which trial they were appearing (since they testify in very many trials);
- their statements were ostensibly directed by the judge;
- one of the witnesses even confirmed that he knew a lawyer, whose name had just been invented by a defense lawyer on cross-examination;
- they were often asked if they confirmed their statements, even though they were often unable to summarize the contents;
- it was difficult to verify that the testimony via the videoconferencing system was voluntary, particularly when one of the witnesses whose name is known was able to testify with his face blurred at his request...

These hearings were marked by numerous incidents. We observed the following events:

- the President of the Bar of Izmir was beaten in the face before the public entered the courtroom on the first day;
- the request to challenge the three judges was dismissed after a short break, and the President continued the hearing, despite the fact that the lawyers had indicated their intention to appeal;
- police officers who have no jurisdiction in Silivri entered the courtroom disguised as journalists (with a press badge); they departed as soon as the defense discovered them;
- the presiding judge was particularly aggressive with the defense lawyers, yelling at them, interrupting them, never listening to the opinions of the other two judges, issuing them warnings, using familiar language;
- on the first day, the President suddenly decided to apply a limitation of the number of defense lawyers per accused;
- the President excluded from the courtroom the accused lawyers - who had expressed their disapproval following the President's decision to exclude two defense lawyers from the courtroom after cross-examining a witness, Bahattin Özdemir and Kemal Aytaç... - and the public who expressed their support for the accused lawyers by applauding. The defense lawyers wished not to continue the hearing and their defense work without the presence of their clients and the public. The President therefore proceeded to hear a witness in an empty room (with the exception of the two international observers);
- without any request from the Prosecutor, the President decided on his own will not to hear three witnesses, the testimonies of whom defense lawyers later learned were manipulated by the police and that the witnesses testified under duress;
- the President refused to hear the witnesses for the defense, even though two of them were in the courthouse, ready to testify.

5.3. Third hearings (18 – 21 of March 2019)

The purpose of these hearings was to present requests for additional duties, hear the closing arguments and plead. They were taking place in a context where defense lawyers had been on a hunger strike for dozens of days.

The defense lawyers made various requests, all of which were rejected after a 15-minute break (recusal of the judges on the basis of their partiality, hearing of defense's witnesses, additional investigations, additional time to prepare the pleadings, gathering additional evidence, etc.).

The defense lawyers were regularly interrupted. In this trial, the prosecutor had submitted his final consideration before the hearing, it was communicated to the defense before the hearing and it was not read during the hearing.

The defense lawyers did not have the opportunity to prepare their defense (see below). Only the non-detained lawyers who participated at the hearing pleaded for themselves, in the absence of their defense lawyers.

We observed the following incidents in particular:

- a hostile attitude of the President towards defense lawyers (see above);
- an excessive presence of gendarmes (more than 50 gendarmes for 5 detainees);
- on 19 March 2019, the President again excluded the accused lawyers, the public and the defense lawyers from the courtroom; the defense lawyers tried to reach the defense benches but were prevented from doing so by the gendarmes guarding the courtroom door; a mob followed; neither the detained accused lawyers nor the defense lawyers were informed by the President that they would be allowed to re-enter the court the next day to present their final statement and have a last word ;
- a one-hour deliberation to impose sentences of 3 to 18 years' imprisonment for 18 lawyers;
- the public, observers and defense lawyers were pushed out of the courthouse by the gendarmes after the reading of the judgment;

6. Judgment of the CHD II trial

The sentences of the judgment of the 37th High Criminal Court of Istanbul are as follows:

- Ahmet MANDAÇI and Zehra ÖZDEMİR (appearing voluntarily): 2 years, 13 months and 15 days in prison, lifting of judicial review, as they appeared throughout the proceedings;
- Didem BAYDAR ÜNSAL, Aysegül ÇAGATAY, Yagmur EREREN EVİN, Yaprak TÜRKMEN (all refusing to appear): 3 years and 9 months in prison. Their detention had been lifted in September, but they did not appear on the last day of the hearing.
- Ezgi ÇAKIR (absent): 7 years and 12 months in prison, under house arrest subject to electronic surveillance, since she is a single mother of a young daughter, in the absence of her husband, also imprisoned.
- Aycan ÇIÇEK (prisoner) and Naciye DEMİR (absent): 9 years in prison.
- Engin GÖKOGLU (absent), Aytaç ÜNSAL (prisoner), Süleyman GÖKTEN (absent), 10 years and 6 months in prison.
- Selçuk KOZAGAÇLI (prisoner): 10 years and 15 months in prison.
- Behiç ASÇI (prisoner) and Sükriye ERDEN (absent): 12 years in prison.
- Özgür YILMAZ (absent) and Ebru TIMTIK (absent): 13 years and 6 months in prison.
- Barkin TIMTIK (prisoner): 18 years and 9 months in prison, considered to be the leader of the organization.

This judgment relies on questionable circumstantial evidence: repeatedly, minor events are included in the grounds of the judgment as evidence of membership in a terrorist organization or of the connection of the People's Law Office with the DHKP-C, such as:

- the possession of various books of left-wing authors
- the possession of a book noting the “recommended style of conduct of members of the DHKP-C”
- Photos of the founder of DHKP-C

- A paper with the names of lawyers and phone numbers of the HHB lawyers found in the pocket of the person who killed a prosecutor
- The organization of a funeral in Turkey for the deceased alleged leader of DHKP-C in the Netherlands
- The criminal defense of alleged members of DHKP-C before the tribunal
- Visiting imprisoned, alleged members of DHKP-C
- Instructions given to clients to remain silent and not to give any statements
- Participation at the “Fête de l’Humanité” in Paris, a huge cultural event which is organized every year by the communist party in France

For example, the circumstantial evidence for the conviction of Selçuk KOZAGACLI was:

- Division of labor among the lawyers of the People's Law Office
- He was head of the People's Law Office
- Provided criminal defense for alleged members of the DHKP-C
- He informed detained alleged members of the DHKP-C about their rights as defendants and prisoners
- He appeared at a symposium, where he explained the activities of the DHKP-C
- He became active in Soma after the mining accident to advise and represent the families of the victims as a lawyer
- He attended funerals of deceased alleged members of the DHKP-C
- On the website which is related to DHKP-C, his arrest was announced
- He was quoted in a left-wing magazine for the families of prisoners
- He spoke at a memorial service for deceased who were allegedly members of the DHKP-C
- He spoke at many national and international events
- He is President of the ÇHD and speaks on behalf of the ÇHD

7. Appeal of CHD proceeding before the Istanbul Regional Court of Appeal

The appeal was rejected on 14 October 2019 by the Istanbul Regional Court of Appeal on the following basis:

"Considering the defense of the defendants and the trial in place, the evidence collected and shown in the judgment venue, the opinions and the estimations of the court which was formed in accordance with the results of the investigation and the contents of the reviewed file, it is decided that the verdict of the court does not contradict with the law in terms of the merits and the procedures, that there were no deficiencies in the evidence and the proceedings, that the assessment was appropriate in terms of the proof and that the penalty was applied within a legal context." (Translation made by our Turkish colleagues)

8. Matters of concern during the observations of CHD II trial

The initiation of a second criminal proceeding with the same accusations and with 8 identical defendants generates the impression that influence was exerted on an ongoing proceeding and that the independence and impartiality of the judiciary was no longer guaranteed.

In particular, we raise our concern about the following matters:

- The re-arrest of the lawyers, on 17 September 2018, after their release from pretrial detention on 14 September 2018, was without legal basis.
- The chairman and members of the 37th High Criminal Court were exchanged during the proceedings. The new chairman was Judge Akin Gürlek.
- The conviction on 20 March 2019 was handed down in the absence of the defendants and their defense lawyers and without taking into account the defense's requests for additional evidence and their demand for comments, allegedly because they were too late, although there is no legal deadline for comments and requests for evidence under Turkish criminal law.
- The defense's request to add all witness statements to the trial file was rejected.
- There is no convincing evidence that the lawyers were members of DHKP-C. For example, the accusation that Selcuk Kozagacli was an ambassador for the DHKP-C with the code name ODTÜLÜ is disputed. Also the claim that he had the authority for intra-organizational communication is disputed.
- The hearing of the witness Baris Önal was rejected by the court without justification.
- The press statements were peaceful statements that did not have the character of organizational statements.
- The meetings where he participated were public.

- The international symposiums and conferences where he participated were not related to the indictment. As chairman of ÇHD, he was invited to many international conferences.
- There is no justification for accusing him of being the chairman of the DHKP-C.

PART III - Analysis in light of the fair trial standards (article 6 of the European Convention on Human Rights)

During the ÇHD II trial, European lawyers have observed and reported facts detailed in the above summary and attachments. Without being exhaustive, this chapter will list the violations of guarantees in criminal procedures protected by Article 6 of the Convention, leading to the conclusion that, as a whole, the ÇHD proceeding was unfair.

1. Right to an independent and impartial tribunal (article 6§1)

« I have been a lawyer for 25 years and I would have never thought that what has happened during the hearing yesterday could be real. I have never seen a judge who shares his sentence in an intermediate decision. The judge is even lacking the courage to act up as a judge in this trial. »
 (Selcuk KOZAGACLI, 19 March 2019)

According to article 6 of the Convention, all accused have the right to appear before an independent and impartial tribunal. The impartiality of the Tribunal is assessed on the basis of an objective approach and a subjective approach³.

Regarding both the objective and the subjective approach, the facts leading to a conclusion of partiality of the presiding judge Akin Gürlek are, among others, the following : use of familiar form of address towards defense lawyers instead of the polite form, interrupting the accused and defense lawyers during their speeches and switching off their microphones, rejection of all requests without taking an appropriate time to examine them and to confer with the two other judges, reputation of presiding over all political trials with harshness and extreme severity, the

3 - Kyprianou v. Cyprus, 15 December 2005, § 118

presiding judge Akin Gürlek has convicted one of the repentant witnesses of the Prosecutor, change of the composition of the tribunal between the first hearings and the second hearings.

On Tuesday 4 December 2018, the defense submitted a request to challenge the composition of the 37th High Criminal Court, according to article 24 of the Turkish Criminal Procedure Code, on the following grounds:

- constant lack of respect of the defense lawyers, in disregard of the principle of equality of arms, the defense being constantly interrupted by the President who sued many warnings in order to intimidate the lawyers;
- refusal of the presiding judge Akin Gürlek to transcribe in the minutes of the hearing some objections from the defense lawyers;
- violation of the publicity of the hearing, following the removal of the public from the courtroom.

Following this request, the presiding judge Akin Gürlek issued a warning to the lawyers, noting that the challenge request would be contempt of Court. The presiding judge then rejected the request, refusing to suspend the hearings in order for the appeal to be examined.

As a whole, the breach of many other guarantees set out in article 6 of the Convention under the 37th High Criminal Court of Istanbul, in the CHD II proceeding, leads to the conclusion that the accused lawyers were not presented in front of an independent and impartial tribunal.

Finally, the change in the composition of the 37th High Criminal Court between the hearings conducted in September 2018, leading to the release of the accused lawyers, and the hearings in December 2018, presided over by Akin Gürlek, also raises a serious concern about the independence of the Tribunal. Regarding the independence of the judicial system in Turkey, see *below* (part III).

2. Right to participate effectively in the proceedings (article 6§1)

According to the Guide on Article 6 of the Convention⁴, “Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial⁵. In general, this includes, *inter alia*, not only his or her right to be present, but also to hear and follow the proceedings. (...) Accordingly, poor acoustics in the courtroom and hearing difficulties could give rise to an issue under Article 6⁶. (...) Given the importance attached to the rights of the defense, any measures restricting the defendant’s participation in the proceedings or imposing limitations on his or her

4 - The Guide is accessible here: https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

5 - ECtHR, Murtazaliyeva v. Russia [GC], no. 36658/05, § 91, 18 December 2018 1

relations with lawyers should only be imposed to the extent necessary, and should be proportionate to the risks in a specific case⁷."

In the ÇHD II trial, European lawyers have observed at the 37th High Criminal Court of Istanbul:

- courtrooms were not equipped with enough microphones and screens, preventing the defense and the public to properly listen to testimony, argument and pleadings;
- heavy presence of police forces and gendarmes inside the courtrooms, close to the defense, and also on the benches, preventing the accused lawyers from communicating with their defense lawyers ;
- the President of the Court was at the origin of several incidents and, without any legal reason, ordered numerous suspensions and prohibited the families, the accused lawyers and the defense lawyers from entering the courtrooms;
- lawyers' numerous requests (challenge the Court, present additional evidence, hearing the defense witnesses,) were immediately and systematically rejected;
- all of the above mentioned led to tangible and palpable tension;

3. Equality of arms and limitation of the rights of the defense (article 6 § 1)

The equality of arms principle supposes that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent"⁸. The limitation of the rights of the defense may therefore be an issue in regard of the principle of equality of arms⁹.

In this regards, several restrictions of the right of the defense have been observed:

- *Regarding the removal of the accused lawyers and the public from the courtrooms in December 2018*

6 - ibid Stanford, § 26

7 - ECtHR, Yaroslav Belousov v. Russia, nos. 2653/13 and 60980/14, §§ 151, 153 and 154, 4 October 2016,

8 - ECtHR, Öcalan v. Turkey [GC], no. 46221/99, § 140, ECHR 2005-IV

9 - ECtHR, Eftimov v. the former Yugoslav Republic of Macedonia, no. 59974/08, §§ 38-40, 2 July 2015

During the hearings of cross-examination of the witnesses, one of the defense lawyers demonstrated that a witness was lying, after asking him to confirm that a lawyer with an invented name was also part of the organization. As retaliation, the presiding judge cut off the defense lawyer's microphone and prevented this defense lawyer from continuing his cross-examination. Following the protest of the accused lawyers who were deprived of their defense by this lawyer, the presiding judge decided to remove the accused lawyers from the courtroom. Following the protest (applauses) of the public against this decision, the presiding judge decided to remove the public from the courtroom. The defense lawyer left the courtroom, being unable to defend his client without the client's presence.

- *Regarding the sudden limitation of the number of lawyers for each accused in December 2019*

Around 200 defense lawyers composed the defense team of the mass trial against ÇHD lawyers. During the hearing in December, the presiding judge suddenly decided to limit to three the number of defense lawyers per accused lawyers. The accused lawyers were denied representation by their chosen defense lawyers.

- *Regarding the removal of the accused lawyers, the public and the defense lawyers from the courtroom in March 2019*

On 19 March 2020, the accused lawyers, one by one, orally challenged the Court's authority on the basis that the Court was not impartial. After Selçuk Kozagacı's speech, the public applauded him and, thereafter, the presiding judge Akin Gürlek decided to remove the accused lawyers from the courtroom. As a consequence, the public applauded in protest and then they were also removed from the courtroom. The defense lawyers decided to leave the courtroom since there were no clients and no public allowed to attend the hearing.

After a break, the presiding judge refused entrance to the courtroom by the defense lawyers. After a door of the courtroom opened, the defense lawyers tried to reach the benches but were prevented by the police to do so. A defense lawyer, Bahattin Özdemir, who reached the bench, was taken outside the courtroom by the police and forbidden from representing his client.

The accused lawyers and defense lawyers were never informed that they would be allowed to re-enter the courtroom the next day and that the judge would hear the final statements then before handing down the judgment. Therefore, the accused lawyers weren't present on their last days to give their final words and the defense lawyers couldn't prepare their defense on such a short notice, their request for postponing the last hearing having been denied.

- *Regarding the sanction upon Bahattin Özdemir prevented to represent his client*

The defense lawyer Bahattin Özdemir has been threatened with prosecution for having tried to reach the bench of the defense, during the events of the 19th of March 2020. He was forbidden to defend his clients, including Zehra Özdemir.

- *Regarding the right to the last word*

Article 216 of the Turkish Criminal Procedure Code provides that the accused who is present shall be granted to have the very last word before the judgment. However, this right was denied to the accused lawyers.

On 20 March 2020, the accused lawyers couldn't reach the courtroom, weakened by their hunger strike and the tension during the hearing of the previous day. Moreover, they weren't informed that they would be allowed back into the courthouse on 20 March 2020 and that it would be the last day of the trial when they could present their final word.

The defense lawyers were, under such circumstances, unable to prepare a defense, given such short notice of the hearing on 20 March. Moreover, they were not informed that they would be allowed back into the courthouse on March 20, or that 20 March would be the last day of the hearings. Only Ahmet Mandaci and Zehra Özdemir appeared to present their last words, expressing their inability to present their defense in these conditions.

In these very particular circumstances, the equality of arms, in the meaning of the right to have the last word, was also breached.

4. Right not to be tried or punished twice (article 4 of Protocol No. 7)

The *ne bis in idem* principle is set by article 4 of the Protocol No. 7 to the ECHR, as well as in article 38 of the Turkish Constitution. Eight lawyers are defendants in both the CHD I and the CHD II (and II bis) trials : Selçuk Kozağaçlı, Barkın Timtik, Ebru Timtik, Naciye Demir, Şükriye Erden, Günay Dağ, Oya Aslan and Özgür Yılmaz.

Both proceedings rely on substantially identical evidence (same witnesses and same digital documents from Belgium and the Netherlands). Both proceedings are grounded on articles 314/1 and 314/2 of the Turkish Penal Code. Both proceedings are related to the accusation of the lawyers as alleged members of DHKP-C, as a continuous offense.

These eight lawyers have been tried simultaneously twice for the same offense. The 18th High Criminal Court of Istanbul, in charge of the CHD I proceeding, postponed its decision on this matter until the Supreme Court's decision on the CHD II trial.

5. Right to have adequate time and facilities to prepare oneself defense (article 6 § 3 (b))

Article 6 § 3, (b) of the Convention provides for the right to have adequate time and facilities for the preparation of one's defense. The European lawyers have observed the following events demonstrating that this right has been violated many times:

- *Regarding access to the file*

Selçuk Kozagacli argued he was denied the right to access his file, which he needed to prepare his defense.

- *Advancement of the date of the hearings*

At the end of the hearing in September 2018, the continuation of the hearing had been announced for 19 and 20 February 2019. It was only late in November, fifteen days before the actual hearing date that the parties were notified of the advancement of the date from February 2019 to December 2018.

- *Denial of time to prepare the defense*

During the hearings in March, the defense lawyers did not expect that all their requests for complementary investigation, challenge to the Court's lack of impartiality, additional evidence, etc. would be rejected so quickly and without *bona fide* consideration. They expected an additional set of hearings at which to plead and asked for it, but their request was, again, rejected. Zehra Özdemir expressly stated, on 20 March 2020 that she was not ready to defend herself. Moreover, they weren't even informed that they could enter the courtroom on 20 March 2020 (since they were excluded the previous day) and that it would be the final hearing where the defense statements and the last words of the accused would be heard.

- *Denial of time to prepare the hearing of a witness*

On 4 December 2018, an unscheduled witness was called by the President. The lawyers were denied time to prepare the cross-examination of this witness.

6. Right to publicity of the debate (article 6§1)

The right to the publicity of the debate is set out in article 6§1 of the Convention. The public and the accused can be excluded from the courtroom only for the interests of morals, public order or national security, protection of juveniles, protection of private life, or in the interests of justice in exceptional circumstances and where the limitation is strictly necessary.

Articles 182 and 184 of the Turkish Criminal Code provides similar guarantees regarding the publicity of the debate.

However, the European lawyers observed on many occasions restrictions on the publicity of the debate, not only with respect to the public but also with respect to the defense and the accused lawyers.

On 3 December 2018, the presiding judge first excluded two defense lawyers from the courtroom because they were successfully cross-examining a witness, then excluded the accused lawyers protesting against the decision to deprive them of their lawyers, and finally excluded the public protesting against the removal of all lawyers from the courtroom. The presiding judge of the 37th High Criminal Court of Istanbul then interrogated a witness in a courtroom empty except for two European lawyers observers and the police.

On 19 March 2020, the presiding judge of the 37th High Criminal Court of Istanbul even forbade all the defense lawyers to enter the courtroom, leading to threats of prosecution of those lawyers who sought to enter the courtroom and , and in particular, against Bahattin Özdemir who reached the bench.

Each time, the restrictions on the publicity of the debate appear to have been motivated by retaliation towards the defense and not in the interests of justice. The exclusion from the courtroom of the public and of the accused lawyers because of their protest by applauding is also disproportionate.

7. Right to examine and to obtain attendance of the witnesses (article 6 § 3 (d))

Article 6 § 3, (d) sets that every accused has the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

Several guarantees have been breached during the trial, with respect to the right to examine and to obtain the attendance of witnesses.

- *Equal treatment between the witnesses of the prosecution and the defense*

Witnesses for the prosecution and the defense must be treated equally¹⁰. However, the presiding judge refused to hear three witnesses of the Prosecutor (see below), all witnesses from the defense, and showed more respect for the witness (polite form of address) than towards the lawyers (familiar form of address). On 4 December 2018, while the public and the lawyers entered the courtroom, a witness was already visible on the screen and it is impossible to know what he heard before he testified. .

- *Refusal to hear witnesses admitting to be put under pressure by the police*

Refusal to hear any witnesses or examine evidence for the defense but examining the witnesses and evidence for the prosecution may raise an issue from the perspective of equality of arms¹¹. Only good reasons can justify the absence of a witness, provided that the Tribunal tasks all efforts to secure their presence¹².

On 5 December 2018, the presiding judge of the 37th High Criminal Court of Istanbul refused to hear three last witnesses of the prosecution, without asking the lawyers. He rejected the oral requests from the defense for the attendance and testimony of these three witnesses. After a short break during the hearing, the lawyers asked for additional time to draft a written request, on the basis of the minutes of the hearing that they had not yet received, with respect to the attendance and examination of the three last witnesses. This request was denied, and the three last witnesses were never required to attend and be subject to examination during the trial. The defense lawyers claimed that these witnesses admitted, in another trial, that their testimony was manipulated by the police and that they were put under pressure.

As the testimony of the witnesses was crucial to demonstrate the total lack of credibility of the witnesses, no good reason was given for their absence and no efforts were made to secure their presence. It appears from the basis of the judgment of 18 March 2019 that the judges assessed the credibility of the witnesses, only taking into account the declaration of seven of them, even if two of them couldn't be crossed-examined by the defense lawyers. Therefore, article 6§3 was breached.

10 - ECtHR, Bönisch v. Austria, 6 May 1985, §§ 31 and 32, Series A no. 92

11 - ECtHR, Borisova v. Bulgaria, no. 56891/00, , §§ 47-48, 21 December 2006; Topić v. Croatia, no. 51355/10, §§ 45, 48 and 49, 10 October 2013; Abdullayev v. Azerbaijan, no. 6005/08, §§ 59-60 7 March 2019

12 - ECtHR, Schatschaschwili v. Germany, [GC], no. 9154/10, §§ 119-122., ECHR 2015,;

Moreover, the judge constantly interrupted the lawyers while they were cross-examining the witnesses, thus encouraging them not to respond properly to the relevant questions of the defense lawyers. By this attitude, the judge also prevented the full hearing of the witnesses.

- *Refusal to hear any witness from the defense list*

The 37th High Criminal Court rejected the request to hear any witness from the defense list, which was submitted in a written request, even when two of these witnesses were present in the courtroom, ready to testify.

The defense was thus deprived of its right to submit evidence and witnesses, which is also an essential element of the principle of equality of arms. The defense was denied its right to disprove the claims and impeach the testimonies of anonymous and repentant witnesses and the other claims by the Prosecutor.

- *Anonymous and repentant witnesses*

Five of the witnesses were anonymous witnesses and several guarantees of fairness in such circumstances were also breached. Firstly, the defense lawyers were constantly interrupted by the judge during the cross-examination, preventing the full hearing of these witnesses, which led some of them to refuse to respond to the questions of the defense lawyers (see above)¹³.

Secondly, the reasons for the anonymity of witnesses is also questionable¹⁴, especially as evidenced by two incidents: one of the anonymous witnesses had his real name revealed by the presiding judge; at his demand, one of the known witnesses (Berk Ercan) was blurred on the screen by the presiding judge.

Thirdly, the combination of the anonymous status and the repentant status of the witnesses raises concerns about the reliability of their testimonies. According to the ECtHR, “The Court reiterates that the use of statements given by witnesses in return for immunity or other advantages may cast doubt on the fairness of the proceedings against the accused and can raise difficult issues to the extent that, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge. The risk that a person might be accused and tried on the basis of unverified allegations that are not necessarily disinterested must not, therefore, be underestimated”¹⁵. All the witnesses were imprisoned during their testimonies, and refused to

13 - ECtHR, Craxi v. Italy (no. 1), no. 34896/97, §88, 5 December 2002

14 - ECtHR, Doorson v. The Netherlands, 26 March 1996, §§ 69 – 70, Reports of Judgments and Decisions 1996-II

15 - ECtHR, Habran and Dalem v. Belgium, , nos. 43000/11 and 49380/11, § 100, 17 January 2017

respond to the questions of the defense lawyers regarding the advantage they obtained with their testimonies.

The lack of reliability of these testimonies also comes from the fact that several witnesses admitted that they had testified in many trials and couldn't recollect in which case they were presently testifying or the names of the accused lawyers in the trial.

- *Contradiction between the declaration of the witnesses and unfairness of the collection of their statement*

If article 6§3 (d) does not specify which declaration prevails, when there are contradictions between the testimonies during the pretrial and trial stages or when the witness declares he no longer has recollection of the facts, the jurisprudence of the ECtHR requires an assessment of the circumstances under which evidence was taken¹⁶.

The Turkish Criminal Code provides several guarantees with respect to the assessment of witness testimonies. For instance, article 209 and 210 of the Code requires a reading of the full declaration of witnesses, especially if they claim not to recall the facts about which they testified.

However, the declarations of the witnesses during the pretrial phase were not fully read by the Tribunal. The witnesses were constantly led by the presiding judge with respect to their answers. Some of them admitted not recalling the entire declaration they had made about the accused. .

During the fact-finding mission as well as during the observation of the hearing in December 2019, the European lawyers observed that all the witnesses were repentant and were generally refusing to identify what benefit they received in return for testifying.

One of the witnesses, Berk Ercan, was also given access to the digital material allegedly seized during the investigation before his written statement during the pretrial phase. The probity of this witness is also challenged by the fact that he suffered psychological problems and, before his second written statement, wrote to the authorities to express how the detention was problematic regarding his psychological problems. Finally, it is to be noted that this witness was convicted, in his own case, by the presiding judge of the 37th High Criminal Court of Istanbul, Akin Gürlek.

16 - ECtHR, Vidgen v. The Netherlands, , no. 68328/17, §§38-41, 8 January 2019

One of the witness, Ismet Özdemir, (alleged to be a member of both DHKP-C and FETÖ) was also convicted for false testimony in a trial in 2013. The defense lawyers request for a copy of the evidential documents relating to this previous conviction was denied.

Another witness confirmed having drug issues.

8. Right to be defended by legal representation of his own choosing (article 6§3(c))

On 3 December 2019, the presiding judge of the 37th High Criminal Court suddenly decided to limit to three the number of defense lawyers per accused. However, at the beginning of the trial, there were about 200 defense lawyers defending all 20 accused lawyers. The presiding judge of the 37th High Criminal Court suddenly decided to enforce Article 149 of Code of Criminal Procedures, after its amendments in 2016 and 2018, which states that a maximum of three lawyers can represent each defendant who is being tried for organized crimes.

Moreover, several times, the presiding judge prevented lawyers from defending their clients, as mentioned above (see publicity of the debate).

8. Right to be informed promptly informed of the nature and cause of the accusation (article 6 § 3)

The Article 6§3 ECHR provides that '*Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*'.

On 14 September 2018, the Istanbul 37th Heavy Penal Court ordered the release of the accused lawyers from pre-trial detention. A few hours later, on 17 September 2018, the same lawyers were arrested a second time, without legal basis.

The accused lawyers, released and re-arrested, have not been promptly informed of the alleged new charges against them, preventing them from drafting defensive petitions.

10. Right to cross-examine the validity of a proof and present proofs (article 6 § 1 and 6 § 3)

According to the Guide on Article 6 ECHR, "unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents, are important guarantees of a fair trial. The failure to afford such access has weighed in favour of finding that the principle of equality of arms had been breached¹⁷. The

17 - Beraru v. Romania, no. 40107/04, §§ 70 and 71; 18 March 2014,

right to an adversarial hearing means the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed by the other party with a view to influencing the court's decision¹⁸.

Since the beginning of the CHD trial, the original documents have never been available, despite numerous submissions to obtain them made by the defence lawyers.

According to ECtHR, "Respect for the rights of the defence requires that limitations on access by an accused or his lawyer to the court file must not prevent the evidence from being made available to the accused before the trial and the accused from being given an opportunity to comment on it through his lawyer in oral submissions"¹⁹.

According to the Guide on Article 6, "It must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. The quality of the evidence must be taken into consideration, as the circumstances in which it was obtained, whether these circumstances cast doubt on its reliability or accuracy, whether the evidence was or was not decisive for the outcome of the criminal proceedings²⁰, the use of evidence obtained through exertion of pressure on a co-accused²¹, unfair use of other incriminating witness and material evidence against an accused²², and use of expert evidence in the proceedings²³".

In this trial, substantial evidence was not accessible to the defence, who was then unable to challenge the authenticity and reliability of that evidence.

In particular, the **digital material allegedly seized during a search of a musical centre** was never presented to the defence. No printed copy of these documents were submitted in the case file. The defense lawyers only had an idea of the alleged content of these documents, based on the testimony of Berk Ercan, who had access to these documents during his statements made in the pretrial phase. No details are provided about the conditions under which the USB key, on which the alleged documents were copied, was found. It was always the same expert who processed the digital materials and raises questions about the reliability of this expert. One can

18 - Brandstetter v. Austria, 28 August 1991, § 67, Series A no. 211

19 - Öcalan v. Turkey [GC], no. 46221/99, § 140, ECHR 2005-IV

20 - Gäfgen v. Germany [GC], no. 22978/05, § 164, ECHR 2010

21 - Erkapić v. Croatia, no. 51198/08, 25 April 2013; Dominka v. Slovakia, no. [14630/12](#), 3 April 2018

22 - İlgar Mammadov v. Azerbaijan (no. 2), no. 919/15, 16 November 2017

23 - Erduran and Em Export Dış Tic A.Ş. v. Turkey, nos. 25707/05 and 28614/06, §§ 107-112, 20 November 2018; see also Avagyan v. Armenia, no. 1837/10, § 41, 22 November 2018.

question the reliability of this expert. Digital evidence was never communicated to the defence which was not able to analyse it and subject it to counter-expertise.

For instance, the claim that Selçuk KOZAĞAÇLI used the code name ODTÜLÜ (FROM METU) is based only Berk Ercan's indirect statements. Likewise, there is no substantial evidence that KOZAĞAÇLI had authority to conduct secret intra-organizational communication; the court derived this conclusion from Berk Ercan's indirect statement.

Also, the defence lawyers could not test the authenticity of the **printed version of the documents from the Belgium and the Dutch authorities** because the original digital documents were never accessible to the defence lawyers.

The defence lawyers made several submissions to challenge the source of the data and to gain access to the data used as evidence against the accused lawyers in the current case were made by the defense lawyers. They also challenged the role of the expert in assessing how the data was stored. These submissions were all rejected after a one minute-discussion by an oral decision from the Court.

By denying access to the documents presented by the Prosecutor as evidence, and by denying all requests related to the cross-examination of these documents, as well as the hearing of all the witnesses from the defense list, the 37th High Criminal Court of Istanbul violated Article 6 § 1 and 6 § 3 ECHR.

PART IV - Analysis in the light of the Basic Principles on the Role of Lawyers (Havana, 1990)

The Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, Cuba, on the 27th of August to the 7th of September 1990, provides principles “to assist Member States in their task of promoting and ensuring the proper role of lawyers” and “should be respected and taken into account by Governments (...) and be brought to attention of (...) judges, prosecutors, (...).”

In light of the numerous observed flaws in the prosecution and trial, with respect both to the accused lawyers and the defence lawyers, the European lawyers/observers find that the Basic Principles were ignored.

Principle 1: assistance of a lawyer of their choice

“All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.”

As regard the accused lawyers, they were deprived on several occasions of this right, particularly when the defense lawyers were excluded from the courtroom. As regards the accused lawyers, it must be noted that their arrest and the prosecution against them started a few days before the trial of their clients (Nuriye Gülmən and Semi Özakça) in a political case.

Principle 4: assisting the poor and disadvantaged persons

“Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.”

With respect to the accused lawyers, their association (CHD) was well-known for defending the poor, the oppressed and disadvantage persons, such as victims of the collapse of the Soma mine, victims of the Cizre bombing, victims of expropriation, workers of the construction of the new airport, victims of torture, etc. By targeting the CHD association, the Turkish authorities impair this work of defending the poor and disadvantaged persons.

Principle 8: time and facilities to consult with a lawyer in detention

“All arrested, detained or imprisoned persons shall 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. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

The imprisonment of the accused lawyers in different jails in different cities was one of the many obstacles to defence lawyers having sufficient time and facilities to prepare and consult with their clients. Moreover, the fact that some of the accused lawyers were placed in a high security prison (type F – Silivri), increased the difficulties of the consultation between the accused

lawyers and the defense lawyers, because of the difficulties of access to the detained (many security checks, long waiting times, etc.).

Principle 9: ensuring appropriate education and training

"Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law."

The prosecution of the accused lawyers relied on their attendance at legal conferences, both national and international. The CHD is also well-known for training lawyers in human rights. By targeting these lawyers, presumably on the basis of their attendance at attending human rights conference and trainings, it properly infringes on the very conduct required by this Principle 9.

Principle 10: no political discrimination to continue the practice

"Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory."

The CHD lawyers were prosecuted because of their opinions and their political beliefs based on the progressive practice of lawyering.

Principle 13: duties of the lawyer

"The duties of lawyers towards their clients shall include:

- (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;*
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;*
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate."*

The CHD lawyers have been accused of being members of a terrorist organization on the ground that they fully respected their duties towards their clients, such as informing them of their legal right (to remain silent, for example); informing them of the lack of merit of a prosecution file in their cases; assisting them in every appropriate way, such as via press conferences; and defending them in Court.

Principle 14: act freely in the protection of the client's interests and in the upholding of human rights

"Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession."

The CHD lawyers were prosecuted in order to impeach them to defend freely their clients' human rights.

Principle 16 (a): interdiction of intimidation, hindrance, harassment or improper interference

"Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;"

The massive prosecution of the CHD lawyers, both, in the CHD I trial and the CHD II trial, simultaneously, for the same facts, because of their defense of human rights, was obviously an attempt to intimidate them, to create obstacles and interference in their work, and to harass them.

Moreover, it has been observed, during the CHD II proceeding, that the defense lawyers were also intimidated (e.g., threats of torture by anti-terror police on the first day, and they faced many obstacles and interference in the defense of their colleagues.

Principle 16 (c): interdiction to sanction the lawyers for their professional actions

"Governments shall ensure that lawyers (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."

The CHD lawyers have been prosecuted because they were defending – with respect to their professional duties, standards and ethics -- persons accused of being members of a terrorist group. Moreover, their defense lawyers were many times threatened with sanctions even while pleading during the CHD II trial.

Principle 18: no identification with their clients

"Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

The CHD I and CHD II trials are based on the fact that the lawyers, because they are defending persons accused of being members of DHKP-C, are therefore themselves members of DHKP-C.

Principle 19: right to appear before a court for his/her client

"No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles."

The CHD II proceeding started a few days before the opening of a political trial in which the accused lawyers were presenting their clients (Semih Ozakça and Nuriye Gülmen). On several occasions, in the CHD II trial, defense lawyers were excluded from entering the courtroom to represent their clients.

Principle 21: time and facilities to prepare the clients' defense

"It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time."

On several occasions, the defense lawyers were denied the time to prepare the defense (by sudden advancing of the schedule, denying requests for additional time to prepare the cross-examining of an unexpected witness, additional time to prepare the pleadings, etc)

Principle 23: freedom of expression and association

"Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have 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 and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession."

The CHD association was dissolved by governmental decree on 22 November 2016. During the CHD II trial, the prosecution largely relied on the participation of the lawyers in public debate with respect to the interdiction of torture, human rights, etc.

PART V - Analysis as regards the independence of judiciary and the Rule of Law principles

1. Overview of the general situation

The independence of justice in Turkey is challenged by several factors.

Since 2010, several reforms have contributed to impair the independence of the judiciary, increasing the control of the government over the judiciary²⁴:

- dependence of the Council of the Judges and Prosecutors under the Ministry of Justice and direct nomination of 4/22 members of the Council directly by the president (2010);
- control by the Ministry of Justice of the composition of the chambers of the Council of the Judges and Prosecutors, responsible for recruitment, promotion, appointment and transfers of judges and prosecutors (2014 – subsequently canceled by the Constitutional Court and condemned by the Venice Commission);

After the failed coup d'Etat on the 15th of July 2016, the State of Emergency was declared in Turkey on the 21st of July 2016, and more than 4,000 judges and prosecutors were dismissed from their positions during the two following years, for their presumed membership in the Gülenist organization²⁵.

On 23 January 2017, the Inquiry Commission for State of Emergency measures was created, in order to control the measures taken under the emergency decree laws, such as revocation and dismissal of organizations²⁶. However, this Commission has been severely criticized for its lack of

24 - See Bar Human Rights Committee of England and Wales, Human Rights Institute of International Bar Association and the Law Society of England and Wales, "Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches concerning the Independence of Legal Profession in Turkey, 18 September 2018, p. 6, available here : <https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article> [consulted the 10/06/20]

25 - Human Rights Joint Platform (IHOP), Updated Situation Report -State of Emergency in Turkey (21 July 2016 -20 March 2018), published on 17 April 2018 (hereinafter "IHOP Report"), available at https://ihop.org.tr/wp-content/uploads/2018/04/SoE_17042018.pdf [consulted the 10/06/2020]; International Commission of Jurists (ICJ), "Justice suspended : access to justice and the State of Emergency on Turkey", available at <https://www.icj.org/wp-content/uploads/2018/12/Turkey-Access-to-justice-Publications-Reports-2018-ENG.pdf> [consulted the 10/06/20]

26 - See Bar Human Rights Committee of England and Wales, Human Rights Institute of International Bar Association and the Law Society of England and Wales, "Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches concerning the Independence of Legal Profession in Turkey, 18 September 2018, p. 6, available here : <https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article>

independence, as the majority of its members are appointed by the executive, and its inquisitorial proceedings have led to a lack of guarantee of fair trial or effective remedies²⁷, despite the position of the ECtHR confirming the necessity to exhaust remedies at the national level before applying for relief to the EctHR²⁸.

In April 2017, a referendum increased the power of President Erdogan over the judiciary, leading to a decrease of the independence of the judiciary (reducing the number of Constitutional judges and appointment of 12/15 by the President, reducing the members of the Council of the Judges and the Prosecutors and appointment of 6/13 by the President)²⁹.

While the State of Emergency ended in 2018, an anti-terrorism bill was adopted to allow authorities to continue to suspend judges suspected of being members of the Gülen organization³⁰.

2. UN Principles on the Independence of the Judiciary and UN Guidelines on the Role of Prosecutors

It is essential, in regard to the Rule of Law, to guarantee the independence of Justice. Following the Basic Principles on the Independence of the Judiciary³¹, several guarantees are a matter of concern with respect to the judiciary in Turkey, especially:

[risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article](https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article)

27 - See Bar Human Rights Committee of England and Wales, Human Rights Institute of International Bar Association and the Law Society of England and Wales, "Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches concerning the Independence of Legal Profession in Turkey, 18 September 2018, p. 6, available here : <https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article>

28 - ECtHR (decision) - ÇATAL c. TURQUIE, No 2873/17, 7 March 2017 available only in French <http://hudoc.echr.coe.int/eng?i=001-172247>).

29 - See Bar Human Rights Committee of England and Wales, Human Rights Institute of International Bar Association and the Law Society of England and Wales, "Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches concerning the Independence of Legal Profession in Turkey, 18 September 2018, p. 6, available here : <https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article>

30 - See Bar Human Rights Committee of England and Wales, Human Rights Institute of International Bar Association and the Law Society of England and Wales, "Joint Submission to the Special Rapporteur on the Independence of Judges and Lawyers concerning International Law Breaches concerning the Independence of Legal Profession in Turkey, 18 September 2018, p. 6, available here : <https://communities.lawsociety.org.uk/lawyers-at-risk/un-submission-on-turkey-international-law-breaches-regarding-the-independence-of-the-legal-profession/5065977.article>

- **Principle 1:** The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary
- **Principle 2:** The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- **Principle 4:** There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
- **Principle 8:** In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
- **Principle 18:** Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
- **Principle 20:** Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Similarly, the Guidelines on the Role of Prosecutors³² is a matter of concern regarding:

- **Principle 2 (a) :** States shall ensure that: (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
- **Principle 4:** States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

31 - The Basic Principle on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

32 - Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

- **Principle 8:** Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have 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 and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
- **Principle 21:** Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
- **Principle 22:** Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

3. Specific observations of European lawyers

The European lawyers have observed the CHD I proceeding and the CHD II proceeding and have participated in a fact-finding mission in October 2019.

During the fact-finding mission, the Dean of the Istanbul Bar Association, Mehmet Durakoğlu, confirmed the impression of the European Lawyers that changes are necessary to guarantee the independence of the judiciary. : *"The problem is that the Council of Judges and Prosecutors has 13 members, 6 are appointed by the President, 7 by the Parliament, where AKP also has the majority. And the President of AKP is the president. The Council of Judges and Prosecutors is presided by the Minister of Justice. The chair of the council is appointed by the President. So it is impossible to have an independence of the judiciary without amending this. The evaluation of justice should be made by a commission of the national assembly. But the problem is not restricted to this. The President has expressed that the separation of powers hampers him. He considers it his right to put pressure on the judiciary."*

The European Lawyers believe that the lack of independence of the Judiciary in Turkey has significantly impacted the above mentioned mass trials against lawyers.

Firstly, the change in the composition of the 37th High Criminal Court between the first hearings conducted in September 2018 and the second hearings in December 2018 would appear to be coincidental. As a matter of fact, this change occurred after the first presiding judge decided to end the pretrial detention of the accused lawyers (who were subsequently re-detained, after a legally questionable appeal of the Prosecutor). The second presiding judge, Akin Gürlek, is famous for being in charge of political trials, such as: Selahattin Demirtaş (one of the two HDP presidents), Canan Kaftancıoglu (the Istanbul CHP president), Ahmet Altan (writer and

journalist), Şebnem Korur Fincancı (the president of the Human Rights Foundation of Turkey and one of the academies for peace), İhsan Eliaçık (theologian and author).

Secondly, as we conducted interviews with the defense lawyers in these political trials, we found that a specific pattern applies in the conduct of the trial (harassment of the defense lawyers, fanciful evidences and witnesses, denial of all requests made by the defense, denial of sufficient time to prepare the defense, etc.).

Similarly, the appeal brought to the Regional Court of Appeal was rejected on the basis of the substance of one paragraph, without oral hearing, which creates doubt about the independence of this Court.

CONCLUSIONS AND DEMANDS

The associations represented during this investigation therefore demand of Turkish authorities:

- the immediate release of the lawyers accused in both the CHD I and the CHD II proceedings;
- the application of the principle *ne bis in idem* in the CHD I proceeding;
- the cancellation of the judgement of the 37th High Criminal Court of Istanbul of the 18th of March 2019, as confirmed by the Regional Court of Appeal, for its non-compliance with article 6 ECHR and article 4 of Protocol 7 to the ECHR ;
- the full respect of the Basic Principles on the Role of Lawyers, and, in particular, the immediate cessation of the harassment of human rights lawyers, the immediate cessation of identifying lawyers with their clients' cause, and the immediate cessation of attempts to bar lawyers to act freely for the defence of their clients;
- the full respect of the Principles of the Independence of the Judiciary and, in particular, to abstain from conducting political trials by interfering in the composition of the Tribunals;
- the full respect of the Guidelines on the Role of Prosecutors;

LIST OF THE ASSOCIATIONS REPRESENTED DURING THE FACT-FINDING MISSION

The lawyers of the monitoring team represented the following organizations:

- ELDH - European Association of Lawyers for Democracy and World Human Rights
- AED-EDL - European Democratic Lawyers
- The foundation The Day of the Endangered Lawyer
- IADL - International Association of Democratic Lawyers
- Progress Lawyers Network
- Giuristi Democratici
- CCBE The Council of Bars and Law Societies of Europe
- CNB - French National Bar Council (Conseil national des barreaux)
- OIAD - Observatoire International des Avocats en Danger (The International Observatory of Endangered Lawyers)
- UCPI - Unione delle Camere Penali Italiane
- Consiglio Nazionale Forense (Italian National Bar Association)
- DSF AS - Défense Sans frontière - Avocats Solidaires
- UIA International Association of Lawyers
- OBFG/Avocats.be (Association of French speaking Bars of Belgium)
- Paris Bar Association
- Athens Bar Association
- Barcelona Bar Association
- Berlin Bar Association
- Brussels (French-speaking) Bar Association
- Brussels (Dutch-speaking) Bar Association (NOAB)
- Liège Bar Association
- Vienna Bar Association

LIST OF THE ANNEXES

1. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Rapport de Mission : Turquie – Audience Istanbul du 23 mai 2018, dossier CHD, 18ème chambre, FR, 23/05/18*
2. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Mission Report : Istanbul – CHD Trial – Hearing before the 37th High Criminal Chamber (High Criminal Court) of the Bakirköy Court of Istanbul, September 10, 2018, EN, 05/10/18*
3. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Rapport de Mission : Istanbul 24 octobre 2018 – Procès CHD – audience devant la 18ème chambre criminelle, D-FR, 30/10/18*
4. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Mission Report : Istanbul – CHD Trial – Hearing before the 37th Criminal Chamber of the High Criminal Court of Silivri, December 3rd to 5th 2018, EN, 14/02/2018*
5. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Rapport de Mission : Procès dit "CHD 1", Audience du 6 mars 2019 devant la 18ème chambre de la Cour de CAGLAYAN, Istanbul, FR, 12/03/19*
6. Joint Statement of the International Observers of the trial against CHD Lawyers, Silivri, 20/03/19
7. Défense Sans Frontières – Avocats Solidaires (DSF-AS), *Mission Report : Istanbul, CHD 2 Trial, Hearing before the 37th Criminal Chamber of the High Criminal Court of Bakirköy in Istanbul, March 18-20, 2019, EN, 08/04/2019*
8. Joint letter to UN Special Rapporteur on the independence of judges and lawyer, to UN Special Rapporteur on the situation of human rights defenders, to the UN Special Rapporteur on the promotion and protection of the rights to freedom of opinion and expression and to the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, 20/05/19
9. Belgian Observers representing several Bar associations and organizations, *Rapport synthétique du procès des avocats "CHD 2", 04/07/19*
10. Press release, *European Fact-Finding mission to clarify the circumstances leading to the conviction of 18 Turkish lawyers, 15/10/19*