

DRAFT ARTICLE
THE ISTANBUL RESOLUTION
OF THE EUROPEAN CRIMINAL BAR ASSOCIATION

“İstanbul Barosunun yanında olmak için”¹

SCOTT CROSBY²

THE RESOLUTION

The Board of the ECBA unanimously adopted a Resolution on the protection of lawyers in the exercise of their professional duties in advance of the opening of a criminal trial in Silivri against its President and Council members on 17 May 2013.

Here is the text of the Resolution:

“Whereas, on the one hand

1 By Article 3 of its Constitution the European Criminal Bar Association (ECBA) is obliged “(...) to promote the administration of justice and human rights under the rule of law within the member states of the Council of Europe and among the peoples of the world”;

2. Principle 16 of the United Nations Basic Principles on the Role of Lawyers (Basic Principles) provides that “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”;

¹ “To be near the Istanbul Bar Association”

² Advocate, Brussels, ECBA Human Rights Officer and Board Member

3. Principle 18 of the Basic Principles provides that lawyers “shall not be identified with their clients or their clients' causes as a result of discharging their functions”;

4. Principle 20 of the Basic Principles provides that lawyers “shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority”;

5. Principle 17 of the Basic Principles provides that where “the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities”;

6. The Tenth Recital of the Basic Principles declares, inter alia that “professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest”;

7. The Tenth Recital of the Basic Principles also declares that these principles “ should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general (...)”

8. The Basic Principles, being indispensable for political democracy and the rule of law fall under the protection of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in general and in particular of Recital 4 and Article 6 thereof;

9. Turkey is a signatory of the ECHR;

Whereas, on the other hand

10. It is stated at § 65 of the Report of the UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, following her mission to Turkey that the “increase in the number of cases of arrest, detention and prosecution under terrorism-related charges of lawyers defending individuals accused of terrorism-related crimes is of particular concern (...); it is far from uncommon for investigations to be initiated against lawyers on grounds of an alleged link to, or the provision of support for, their clients' alleged criminal activities”, which “(...) regrettably seems to be increasingly the case in Turkey”;

11. *The statements made by the Special Rapporteur are corroborated by reliable testimony from the European Lawyers for Democracy and World Human Rights, the International Association of Democratic Lawyers, the CCBE, the International Bar Association, the German Federal Bar and from the Istanbul Bar Association itself all of which detail the mass arrests and detention of lawyers in Turkey defending persons accused of acts of terrorism, whose clients are thereby denied a fair trial;*

12. *According Article 76 of the Law governing the profession of advocate in Turkey the duty of the Turkish bars is to defend the supremacy of law and human rights; according to Article 95 of the same law the duty of the board of every bar is to defend the profession against encroachments on the rights particular to the profession; according to Article 97 of the same law the duty of the president of every the bar is to defend the dictates of law and professional rules (...) in matters involving the honour and independence of the profession;*

13. *Defence counsel in the so-called Sledgehammer case (Balyoz Harekâti) pending before the 10th Criminal Court with special authority in Istanbul refused to appear because they were prevented by the court from discharging their duty to defend the accused and consequently the President and Board of the Istanbul Bar Association formally requested the court orally and in writing to conduct the trial according to law and fair trial principles, pursuant to Articles 76, 95 and 97 of the above law;*

14. *As a result of this intervention the President and the Board of the Istanbul Bar Association have been indicted on criminal charges of attempting to influence judges unlawfully pursuant to Article 277 of the Criminal Code;*

15. *By acting as required by the Law governing the legal profession, the President and the Council of the Istanbul Bar Association cannot have been acting unlawfully within the meaning of Article 277 of the Criminal Code;*

16. *The ECBA is gravely concerned that the trial against the President and Council of the Istanbul Bar Association is going ahead on 17 May 2013,*

17. *To demonstrate this concern the ECBA will be present during the public trial in Istanbul as European observer in terms of the rule of law and the Basic Principles.*

Now therefore the ECBA resolves urgently and respectfully to call upon Turkey:

- i) *To comply with the UN Basic Principles on the Role of Lawyers in respect of all cases tried within its jurisdiction, including cases being tried under its terrorism laws;*
- ii) *To release all lawyers detained in breach of the UN Basic Principles on the Role of Lawyers and to permit them to return to their professional duties;*
- iii) *To ensure the personal and professional safety of all lawyers including those defending persons accused of anti-state activities;*
- iv) *To desist from the prosecution of lawyers' representatives or associations who, in compliance with the UN Basic Principles on the Role of Lawyers, as required by Articles 76, 95 and 97 of the Law governing the profession of advocate and who in good faith seek to protect their members from persecution and improper restrictions and infringements;*

So resolved and entered in the records of the European Criminal Bar Association at London on 13 May 2013 and sent to the President of Turkey and the Turkish Justice Minister on 13 May 2013³.

SLEDGEHAMMER

The reasons leading to the ECBA's Resolution may be simply stated.

There were two trials against the Turkish Military, Ergenekon and Sledgehammer.

It is reported by Rodik in an article freely available on the internet⁴ that in these trials the evidence was manipulated and defence counsel were prevented from defending the accused.

According to Rodik :

“The Sledgehammer trial is particularly instructive because the problematic nature of the evidence and its disregard by prosecutors are so blatant in this case. In January 2010, the anti-military Turkish daily Taraf received several CDs and voice recordings, as well as a trunk full of documents, from an anonymous

³ Signed by Prof. RA Dr Holger Matt, President of the ECBA

⁴ Rodrik, Ergenekon and Sledgehammer: Building or Undermining the Rule of Law? Turkish Policy Quarterly, Volume 10, Number 1

informant who identified himself as a retired officer who had served under then 1st Army chief General Çetin Doğan during 2002-2003. The recordings cover the proceedings of a military planning workshop held under Doğan's command in March 2003. The workshop was designed to test the army's preparedness to deal with future threats, including a potential Islamist uprising. The deliberations revolved around a fictional scenario that assumed a severe deterioration of the situation in Iraq, a military confrontation with Greece, and an opportunistic uprising by Islamist groups. These recordings are genuine and were made under Doğan's orders at the time. Even though the antagonism of those present towards the AKP and Islamist groups perceived to be hostile to secularism comes across clearly, there are no references in the proceedings to a military coup or any other criminal activities.

But along with these voice recordings, three of the CDs delivered to Taraf contained details of an elaborate operation, code-named Sledgehammer, to destabilize the country and topple the newly elected AKP government. The plans included the bombings of two Istanbul mosques during Friday prayers and the downing of a Turkish jet, along with names of cabinet members to be installed following the coup, a detailed government program, a list of journalists to be arrested, and much else. Taraf claimed that the March 2003 workshop was a dress rehearsal for the coup, even though none of these illegal activities were mentioned during the workshop.³ This claim would be echoed by prosecutors when they produced their indictment some months later in July.

Taraf and other media outlets had a field day with these charges. But within days evidence began to surface that threw significant doubt on the authenticity of the Sledgehammer coup documents. Most importantly, it became clear that the incriminating CDs could not have been prepared in 2002-2003 as claimed. The Word files in these CDs contain verbatim extracts from a lecture first delivered in 2005, refer to an organization founded in 2006, and criticize the AKP government for activities that it did not undertake until many years later. (The documents require us to believe that the coup plans were hatched literally days after the first AKP government took office.)

Equally telling are the mistakes made in military language, strongly suggesting that the documents were produced outside the military. The documents refer to non-existent military units, and are replete with numbering and style that do not conform to military format. There are glaring mistakes and inconsistencies in the plans. For example, the head of the war academy in Istanbul is said to have

plotted to carry out operations out of bases in the central and eastern parts of the country— bases that are not actually under his chain of command. Once the indictment and the supporting files were made fully public in July 2010, the fraudulent nature of the coup plot documents became even clearer. Most strikingly, it was revealed that the documents contain dozens of anachronisms in which entities –hospitals, NGOs, companies, military units– were referred to by names they would acquire years later. For example, one of the documents on the CDs, apparently from February 2003, refers to a pharmaceutical company called Yeni Recordati İlaç. This is the name that the company acquired after being taken over by the Italian firm Recordati in 2008; it was previously called Yeni İlaç. Another document, dated also February 2003, refers to an NGO named Liberal Avrupa Derneği (Liberal Europe Association). This NGO existed under a completely different name in 2003 (Hür Demokratlar Derneği, Free Democrats Association), and changed its name to Liberal Avrupa Derneği years later, in 2006.

(...)

These conspicuous anachronisms made clear that the documents supposedly authored in 2003 by (and for) the officers on trial were in fact produced no earlier than August 2009.

As the charges in the indictment came to be increasingly questioned in public debate⁴ a second batch of digital files was uncovered at a naval base in Gölcük in December 2010. This new find was touted by the pro-government and Gülenist media as confirming the prosecutors' case. In truth the files, also supposedly from 2003, simply multiplied the anachronisms and inconsistencies. For example, they showed naval officers on duty in vessels that had not yet been commissioned or in units that did not yet exist. They contained countless documents prepared when their alleged authors were on duty abroad (or out at sea) and had no access to the computers on which they are alleged to have been produced.⁵

The prosecutors showed little interest in such discrepancies and made no attempt to account for them in their indictment. Even though conclusive evidence would surface during their own investigation indicating that the Sledgehammer documents were fakes, they overlooked this evidence completely. Instead, they sought, and succeeded eventually, to imprison more than 100 of the defendants pending trial.

In light of all the evidence regarding the questionable nature of the Sledgehammer documents,⁶ it is very difficult to make sense of the prosecutors' behavior. Their

exertions went beyond prosecutorial zeal and were sharply at variance with European legal norms.

(...)

In brief, prosecutors seem to have been following a pre-arranged script rather than trying to uncover the facts of the case”.

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- ³ For a complete transcript of the workshop, along with the scenario discussed, see <http://cdogangercekler.wordpress.com/2011/04/08/5-7-mart-2003-1nci-ordu-plan-semineri-ses-kaydi/>.
 - ⁴ Pınar Doğan and Dani Rodrik, *Balyoz: Bir Darbe Kurgusunun Belgeleri ve Gerçekler [Sledgehammer: Myths and Realities of a Coup]*, (Istanbul:Destek Yayınevi, 2010.)
 - ⁵ For documentation of all these inconsistencies, the reader is referred to our blog: <http://cdogangercekler.wordpress.com/category/celiskiler-ve-kanitlar/>.
 - ⁶ For a fuller listing of the anachronisms and inconsistencies in the case, the reader is referred to our blog cdogangercekler.wordpress.com

That then is the context in which the Istanbul Bar Association intervened before the trial court to remind it that the accused were entitled to a fair trial and that their counsel must be given every opportunity to present their clients’ defence.

OTHER TRIALS

The prosecution of the Istanbul Bar is not an isolated incident.

Another is the trial of some 45 lawyers, who represent the Kurdish leader, Abdullah Öcalan, but who, having taken on Öcalan’s defence have themselves been accused of terrorist offences. They are unable to defend their client, not least because many of them are in jail pending judgment. In a separate contribution we publish an first hand report of day five of this trial, which gives a graphic and revealing account of what the trial is about and how it is being conducted. This trial is taking place in the custom built court arena at Silivri, which can accommodate hundreds of people.

Yet another is the arrest and detention of members of the CHD or the Progressive Lawyers Association some of whose members were defending Öcalan’s lawyers. Apart from the reported mishandling of these defence lawyers, this action demonstrates that in Turkey the right of defence is being denied for certain kinds of alleged offences, notably, it seems, those in which the Government wishes a conviction for its own purposes, by the expedient of arresting, detaining and prosecution of the defence lawyers involved.

This persecution of the legal profession is compounded by the prosecution and trial some 45 of journalists also at the Silivri facility. Most of them work for Kurdish media organisations and are accused of belonging to or having links with the PKK.

There are more journalists in jail in Turkey than in Russia or China.

The freedom of expression and the right to a fair trial are thus under extreme threat in Turkey today.

GENERAL COMMENT

Turkey's record before the European Court of Human Rights is appalling. This is no secret. The Turkish Minister for Justice even confirmed this in his address to the ECBA conference in Istanbul on 27 April 2013.

Yet Turkey ratified the Treaty of London, establishing the Council of Europe, on 1 April 1950, has accepted the jurisdiction of the European Court of Human Rights since its foundation in 1953 and thus undertook to be bound by and to respect and implement the ECHR from the outset. Turkey is therefore a member of the family of European peoples who share the same trust in the rule of law as grounded in and protected by the ECHR. The Convention has accurately been described as "*as a constitutional instrument of European public order on which the democratic stability of the Continent depends*⁵".

By preventing and prohibiting defence lawyers from fulfilling their duties, by detaining them in prison for doing so and thus by denying accused persons their rights under Article 6 ECHR Turkey endangers the democratic stability of the Continent.

Also, by persecuting journalists who expose the conduct of the State, Turkey not only denies the right under Article 10 ECHR to receive and impart information without constraint but further endangers the democratic stability of the Continent.

Just as the Istanbul Bar Association felt it was obliged to remind the Courts of the absolute necessity to respect Convention rights and duties, so too had the ECBA no option but to act in defence of the Convention in general and of its Turkish colleagues in particular.

More need not be said, save, perhaps to recall that Turkish membership of the EU will depend on its fulfilling the Copenhagen Criteria which require, inter alia, that it achieve "*stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities*", conditions which Turkey must in any case comply with by virtue of its membership of the Council of Europe and thus as a member of the European family.

So long as Turkey violates these principles it betrays its people.

⁵ Foreword of the Secretary General of the Council of Europe to the European Ministerial Conference on Human Rights, held for the 50th Anniversary of the Convention at Rome, 3-4 November 2000