



## **DESTROYING THE RIGHT TO DEFENCE**

**THE DETENTION AND ARREST OF ABDULLAH ÖCALAN'S LAWYERS**

**MAF-DAD e. V.**

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### **Report about the detention and arrest of Abdullah Öcalan's lawyers**

#### **I) Introduction**

Since 15 February 1999, Abdullah Öcalan has been imprisoned at Imrali Island Prison. He was at first sentenced to death, but the sentence was later changed into aggravated life sentence without the possibility to parole. He has still several cases pending at the European Court of Human Rights. In another ECHR case on 12 May 2005 a Grand Chamber judgement stated that his trial had been unfair and that he should be retried.

A look at this ECHR Grand Chamber judgement shows that the basic violations were found in the limitations of the right to defence. Further violations of the right to defence and the hardships that his lawyers have been facing due to their professional activities have left their mark on the his 13 years of imprisonment.

In this report we will not try to present a comprehensive presentation of the physical repressions, threats and blackmails, insults, inquiries and punishments. Since this would require a very broad research, we will confine to the detention and arrest of Öcalan's legal team on 22 November 2011.

#### **II) Chronology of the incident**

1. Since 27 July 2011 Öcalan has not been able to meet his lawyers. Prime minister Recep Tayyip Erdogan and Minister of Justice Sadullah Ergin stated publicly that this is due to a government decision. After the implementation of this ban on consultation with lawyers Erdogan delivered a speech in which he targeted the Asrin Law Office that is shouldering Öcalan's defence. In his speech on 2 October 2011 Erdogan said:

*"There is a place called 'Asrin Law Office'. The lawyers of Imrali are connected to this office. The keep changing the lawyers. It's not only one lawyer that goes to Imrali. The lawyers that go to Imrali somehow establish contacts between Imrali and Kandil. Lately there have been no such consultations. That is the reason why there has been an interruption of communication for a few months." (Hürriyet, 2 October 2011)*

Thus Erdogan made the lawyers a target.

2. Shortly after this statement. in the morning hours of 22 November 2011, the Asrin Law Office was raided by the police on the order of a "prosecutor with special competences" from Istanbul. The office was searched until midnight, case files were read, all defence documents investigated and some of them confiscated. The lawyers were not able to watch the search. According to Turkish law, in the case of the search of a lawyer's office the prosecutor and the president or a representative of the bar association has to be present. During this search unfortunately none of them was to be seen because the police intervened harshly. The search conducted as if it was a normal house search and not a lawyers' office that was being searched, thus damaging the lawyer-client relationship. The contents of case files present in the bureau were investigated as evidence against the lawyer. It was even attempted to confiscate the licenses of some lawyers to determine whether they were real or faked. At the same time the private domiciles of the lawyers were raided as well.

But not even the lawyers whose houses had been raided were later allowed to be present during the search of their offices.

3. On the orders of the prosecutor on the same day and time about 50 houses and offices of lawyers were raided and searched in 16 different cities (Ardahan, Batman, Bursa, Denizli, Diyarbakir, Hakkari, Iğdir, Istanbul, Izmir, Kars, Mersin, Mus, Siirt, Sirnak, Urfa and Van). The lawyers were detained and those living elsewhere brought to Istanbul. In this operation, even the secretary of Asrin Law Office, its two drivers and a journalist were detained.
4. After testifying to prosecutors and judges, 36 lawyers and 1 journalist were arrested. 10 lawyers will be tried without arrest, the case of 1 lawyer was separated from the others. The two drivers will also be tried without arrest, and the secretary was at first released, but arrested later.

### III) Detention, Interrogation, Arrest

5. At the day of the detentions, the prosecutor labelled the case file "secret"; documents concerning the investigation and related documents have not been given to the arrested lawyers and their defence lawyers until the indictment was accepted by court on 18 April 2012. This secrecy, however, was only applied to the prisoners and their lawyers, because when they were just newly detained before they even knew the charges, newspapers close to the government had already to publish against the lawyers. In these biased publications they have been defamed, details from their private lives were unveiled. The press ran a disinformation and defamation campaign. With speculative and untrue articles based on made-up scenarios the presumption of innocence has been violated.
6. The searches and confiscations in this investigation have been conducted in a manner that contradicts the law. It is required that search warrants contain the purpose of the search and the terms of the search according to the purpose. Therefore search warrants have to be justified. While it is necessary to state in a satisfactory manner what and where will be searched, the reason for the search and how long it will last, none of the search warrants contained those details but only stereotypes. From a legal point of view it is also questionable that all decisions have been given by a single judge; to preserve the rights it should be taken by a court.
7. As in earlier KCK investigations the decisions about detention, searches, confiscations, secrecy and communication tapping are lacking juridical substantiations and have been implemented as template decisions.
8. Certain restrictions have been allowed for through changes in the Anti Terror Law<sup>1</sup>. While these restrictions should be used in exceptional situations, in this case as in many other recent cases they have become the norm rather than the exception. On top of this suspects and defendants are now routinely accused of leaking information to "the organisation", citing this as the reason for the restrictions. In fact, the rationale for the spirit and the doctrine of the law on possible secrecy during an investigation is to enable a proper investigation and to protect the personal rights of the suspects on the basis of the presumption of innocence. In each investigations the reasons have to be re-evaluated. In these investigations article 147/1 of the code of criminal procedure regulating the interrogation has been

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<sup>1</sup> Article 10/d of the Anti Terror Law: "*If the inspection of the file or the photocopying of documents by the defendant might endanger the purpose of the investigation, a judge may restrict the permission to do so on request of the prosecutor.*"

violated in the case of all "suspects".<sup>2</sup> Due to the secrecy, the suspects did not learn the charges and the evidence against themselves and were not able to present evidence in favour of themselves to the prosecutors or the judge. Thus article 5/2<sup>3</sup> of the European Convention of Human Rights has been violated. In the ECHR judgement *Fox, Campbell and Hartley v. The United Kingdom* and many similar judgements it has been stated that *"the person has the right to demand a detailed explanation of the reason for custody."*

9. The persons that were taken into custody are people that could have been called to make a statement at any time. There is not one among them that was preparing to get away. On the contrary, one of the lawyers now in custody was abroad when the interrogations started. He returned to Turkey immediately to make his statement and was taken into custody.
10. The investigation was started violating article 58/4 of the Lawyers Act No. 1136. According to Article 58, investigations against lawyers because of their professional activities or in relation to these activities can only be conducted with the permission of the Ministry of Justice and only by the local prosecutor of the place where the activity was located. In this case there is no such permission. The investigation started with completely political motives, as if the Prime Minister had given a direct order to the prosecutors, after the public accusations against the lawyers.
11. Another indication for the illegal character of the investigation is that it is largely a repetition for most of the lawyers. Up to the present day there has been an abundance of cases with the same accusations against Abdullah Öcalan's defence lawyers before Heavy Penal Courts with special competences. 44 of these cases ended with an acquittal, 5 cases were closed after a lapse of time occurred and 27 cases continue to date.
12. Since 1999, all consultations between Abdullah Öcalan and his lawyers at Imrali have been conducted under the complete control of both military and civilian units of the state. The consultations have been followed in every possible manner. The lawyers have been subjected to humiliating searches and were not even allowed to use their own pen and paper during the meetings. They had to use pen and paper that was given to them by the officers. The notes they took during the meeting have been checked by both the civilian and the military units. Since 1 June 2005 all consultations with the lawyers at Imrali have been tape-recorded. On top of this at all meetings an officer of the ministry of justice was present. These implementations violated article 59 of the Prison Act No. 5271 as well as article 36 of the Lawyers Act. That despite such a permanent thorough control of the consultations the lawyers would face an accusation of "transmitting orders", that they are even taken into custody because of consultations that took place under the watchful eyes of the state should be seen as an act that is contrary to law and ethics.
13. Another important proof for the fact that the investigation has been run on a political order is that the so-called "protocol for the assessment of the offences" has only been filled out on the day before the interrogation by the prosecutor, on 24 November 2011. That means the lawyers were detained for conjunctural political reasons and because the executive wants it, and there is no assessment of the offences until they are detained. Then in

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2 Code of criminal procedure (CMK) 147/1 b): *"The charges are explained [to the suspect] ... f) [the suspect] is reminded that he can request the collection of concrete evidence to clear him from the charges. He gets the opportunity to bring forward facts that are suitable to clear the reasons for the suspicions against him and that speak for him positively."*

3 ECHR Art. 5/2: *"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. "*

three days hastily a "protocol for the assessment of the offences" was produced because there had to be some justification for the custody.

14. All questions that the lawyers were asked during the interrogation were questions related to their professional activities and covered by professional secrecy. There were even questions asked about the applications to the European Court of Human Rights and the Council of Europe anti-torture Committee (CPT) which from time to time supervises Imrali Island from a human rights perspective on the basis of international conventions.

#### IV) Some information on the prison situation

15. The female lawyers in custody are held in the Istanbul Bakirköy Women's Prison, the other lawyers are in custody in the High Security F-Type Prisons No 1 and 2 in Kandıra. Based on press reports on the prison situation we can summarize:

The female lawyers were held for two days after the arrest in a room called "müşahade" (observation room) that was dirty and cold. They could not eat or clean themselves for two days. In the cells that they were brought to later they had to little warm water, the tap water was yellow and rusty. The heating did not work well so it was very cold. Visits that were supposed to last one hour were cut short to 35 minutes, books and letters were handed over late with the justification that they had been read by the prison administration. Medical treatments were not possible after noon because there was no doctor, prisoners that were brought to the hospital could not be examined because the gendarmes refused to leave during the examination.

The male lawyers in Kandıra Prison had similar complaints. Some lawyers were not brought to the hospital although they had health problems. Between the arrest and the arrival at the prison administration they have been searched 19 (!) times, several times naked and in a humiliating manner. Before consultations with their own defence lawyers they were searched thoroughly three times, and three times again after the consultation. The men had similar complaints about food, warm water and heating. Letters and faxes from outside of the prisons were confiscated. They were forbidden to use the title "lawyer" in letters, communication and applications and frequently warned about this particular issue. They had to stay on a concrete floor the whole day, the clothes, beds and blankets were unhygienic and the consultations with their lawyers were cut short.

#### V) Indictment

16. On 3 April 2012 the Istanbul Special Prosecutor prepared an indictment of 891 pages and presented it to the court. The indictment was accepted and became official on 14 April 2012. Apart from this, there are 220 folders of additional documents.
17. The indictment has the same structure and concept like former "KCK indictments". One can even say that even the outlines of the expositions are the same. Since 2009 it has been attempted to describe civilian and political activists, among them local politicians, jurists, journalists, parliamentarians and mayors, as ringleaders<sup>4</sup> or members<sup>5</sup> of KCK. The indict-

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4 Turkish Penal Code, Article 314 (1): "Any person(s) who forms an armed organisation to commit the offences listed in the fourth and fifth sections of this chapter [Section Four: crimes against state security; Section Five: crimes against the constitutional order and its functioning], and commands this group, is punished with imprisonment of 10 to 15 years."

5 Turkish Penal Code, Article 314 (2): "Members of the organization defined in the first paragraph are sentenced to im-

ment is based on the claim that the lawyers were part of the "Leadership Committee" of KCK which is said to have been founded on 17 May 2005. It should not be forgotten that Öcalan has been in prison since 15 February 1999 and that some of the lawyers that are now in custody have been defending him since that date.

18. Since February 1999 there have been hundreds of consultations between Öcalan and his lawyers. There has always been a high interest of the press and curiosity about his conditions, his health, his defence against the charges against him and his views on topics that concerned him. Therefore the lawyers could not avoid giving statements to the press. These statements and their attendance at public press conferences are turned into criminal offences in the indictment. Furthermore, it concentrates on some of the consultations that took place after 1 June 2005 and have been recorded in an unlawful manner, claims that these have been conveyed to the KCK and based on these claims demands punishment because of membership or ringleadership in an organisation. Numbers, dates, mails, addresses etc. from tapped communication is presented in frightening masses which amount to a criminalisation of the professional activities of lawyers. The rights to defence in general is endangered by this attack on Öcalan's defence rights.
19. The indictment incriminates lawyers because they worked in their profession, secretary, journalist and drivers because they did their jobs. Therefore every detail of their professional and private life becomes the topic of highly artificial, speculative discussion and analysis. For instance about the secretary it mentions: *"If the lawyers would not trust her, she would not have been employed in the bureau."* There are even tragic-comical evaluations like of the fact that as part of her job she answers the phone often: *"Because she answers the phone often in person, she organises a lot of things."*
20. Without doubt the lawyers will themselves bring forward lots of criticism, comments and corrections of the topics mentioned in this indictment. Their colleagues who will defend them in court shall do the same. From now on, despite all difficult conditions, attacks and political interventions, it will be the defence who speaks up.

## VI) Conclusion

21. After the Prime Minister targeted the lawyers publicly, prosecutors and police took action and detained in a centrally planned operation the complete defence team of Abdullah Öcalan including all lawyers that had been visiting him in the past two years. Offices and houses were searched and 36 lawyers taken into custody. If we also count the two lawyers that had been taken into custody with similar charges in 2009, 38 lawyers of Mr Öcalan are imprisoned right now.
22. This political attack has been described as the biggest operation against lawyers in the history of Turkey. As can be seen from the judgements of the European Court for Human Rights, the current legislation and jurisdiction in Turkey is far from being fair, the right to defence is limited, overlong pre-trial detentions have turned into punishments themselves. The right to defend oneself in their mother-language is not granted and—most importantly—the jurisdiction is highly politicised and has become a part of the executive. This is the background against which this historic operation against the lawyers has to be seen.
23. With this operation several conventions and treaties to which Turkey is party and their principles have been violated. Examples for this are the "General principles of professional

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*prisonment of five to 10 years. "*

standards of the European Community" and the principles stated in Council of Europe's Committee of Ministers' recommendation "Freedom of exercise of the profession of lawyer" and the "Basic Principles on the Role of Lawyers" (Havana Rules) as adopted at the United Nations (UN) in Havana/Cuba in 1990. According to these rules, the Government is responsible for ensuring that lawyers can carry out their profession without experiencing threats, interference, harassment and inappropriate intervention and that lawyers should not be associated with the interest of their clients. It is also stated as basic principles that lawyers also should not only have the right to state their opinion but also to participate in public discussions, that their participation in activities regarding legislation be secured. All the principles expressed in these supranational texts have been violated in this case.

24. The arrests also contradict the Rule of Law principle stated in article 2 of the Turkish Constitution, the right to a fair trial as protected by article 36 of the constitution<sup>6</sup> and article 6 of the European Convention of Human Rights and the presumption of innocence as protected in article 38 of the constitution<sup>7</sup> and article 6 of the Convention<sup>8</sup>.
25. The protection of the right to defence is also a duty for all jurists and human rights defenders. This case should be treated as an example case as it showcases the legal situation and the destruction of the right to defence in a state that wants to be a member of the European Union. Solidarity should be shown accordingly.
26. The trial against Öcalan's lawyers will start on 16 July 2012 at the Special Heavy Penal Court No. 16 in Istanbul. We call on jurists from Europe to observe the trial and defend the right to defence.

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6 Constitution Article 36: "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures. "

7 Constitution Article 38: "No one shall be considered guilty until proven guilty in a court of law."

8 ECHR 6 (2): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. "