İHOP

Human Rights, the Rule of Law, and the Protection of Human Rights Defenders

REPORT ON THE DİYARBAKIR KCK CASE

İçindekiler

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SUMMARY

Some investigations and prosecutions in Turkey include practices that violate fundamental rights enshrined in treaties to which Turkey is a State Party.

These include above all long periods of pre-trial prison detention, many practices that deny suspects and defendants the presumption of innocence, and the lack of alternative measures to prison detention pending verdict. These practices are not inevitable: they are the result of decisions taken by the relevant authorities rather than the outcome of the objective circumstances.

One can observe many such violations in ongoing investigations and trials, both the well-known and highly publicized ones and those little known. This would include the widely known cases of “Ergenekon” and “Balyoz”. Regarding the case publicly known as the “KCK trial”, many voices across the political spectrum have agreed that it possesses characteristics that mark it out as different from other cases where violations are observed.
The Human Rights Joint Platform (İHOP) has studied the KCK case to assess the extent to which universal norms framing human rights have been violated by the judiciary and the defence of human rights itself threatened since among the defendants there are leaders and members of human rights organizations.

Having examined the KCK case and prosecution on the basis of international human rights law, including the European Convention on Human Rights, associated additional protocols, and decisions adopted by the European Court of Human Rights, IHOP has reached some conclusions summarized below.

While guaranteeing the independence and impartiality of courts, the judicial system in Turkey places the prosecutor who lodges claims on behalf of the public within the executive. Therefore, whatever the final outcome of the trial may be, the indictment and events preceding it constitute the starting point of this assessment since they reflect the stance of the political authorities.

1- **Human rights defence under threat of criminal investigation:** Rights defenders are of course not immune from prosecution and penalty and their status as human rights defenders cannot be taken as the sole indicator of their innocence. Rights defenders too may be involved in offences, but the investigation and prosecution of such offences cannot be used as a way of restricting the defence of human rights.

However, examining the indictment in this specific case, it is observed that the prosecutor has viewed as an offence the activities and recorded communications of the chair and board members of the Diyarbakır Branch of Human Rights Association, which cannot be construed in any other terms but as normal associational activities, and a part of their mission as human rights defenders. This necessarily leads to the inference that defending human rights constitutes an offence and consequently that activities in the defence of human rights are threatened and termed criminal acts. This is a violation of the state's national and international obligations to human rights defenders.

2- **Humiliating treatment at the stage of interrogation:** Violations such as torture and ill-treatment were not mentioned during interviews conducted while preparing the present report. Nevertheless, lining up handcuffed suspects before security units during the first wave of detentions is considered as humiliating treatment.

3- **Length of pre-trial detention violates the presumption of innocence:** Pre-trial prison detention is a precaution not a punishment. Since it deprives persons of their liberty, this is considered as the most serious measure available and should be resorted to only if alternative measures are not available. As all the evidence in this case has already been collected the prolongation of prison detention at this stage must be considered a breach. Furthermore, the argument that there is serious breach here is further supported by the fact that some defendants in the trial charged with the same offence on the basis of the same articles of the Penal Code are at liberty.

4- **The accused cannot use their native language:** Many persons accused have stated that their own language is Kurdish and that they wish to defend themselves in that language. This request has been turned down by the court. The fact that the use of own language can be the subject of a request itself indicates that there is a breach of human rights here. The use of one's own language is essential. The court's refusal in this respect is a violation of a right.

5- **No evidence in favour of the defendants can be collected:** The right of the accused to defend themselves has been restricted in this case. Procedural regulations do not provide that bringing an expert before the court to submit evidence requires authorization. Yet, the court did not allow Professor Baskın Oran, whom defence lawyers had invited to testify before the court, to submit the opinion that legal defence in own language is provided for by international conventions to which Turkey is a State Party. This situation means the violation of the principle pertaining to collecting exculpatory evidence for the accused.

6- **Freedom of expression violated:** Examining the indictment, it is found that even peaceful expressions are made the subject of criminal prosecution, which amounts to the violation of freedom of expression.

7- **Rights granted by the state made subject to prosecution:** The right to petition the state, to peaceful assembly and demonstration, among other rights, are safeguarded by the state. However, in the KCK case the exercise of these rights is criminalized. This situation threatens the exercise of the right to demonstrate. Furthermore, many activists in the fields of women's rights and environmental rights and their activities in the civil sphere face criminal investigation regardless of the content. A right is a gain where effective exercise is as important as formal entitlement. Making the forms of exercising these rights subject to judicial examination is tantamount to cancelling out the positive recognition of these rights. Investigation and prosecution of the members of women's and environmental organizations just for their activities is considered as a violation of rights.

8- **Privacy of communication under threat:** Interviews conducted suggest that the State failed to fulfil its negative and positive obligations in relation to the interception and recording of telephone conversations and other communications.

INTRODUCTION

The criminal prosecution known today as the "KCK trial" started with an electronic mail sent to the Department of Security and attracted public attention when 53 persons were arrested in Diyarbakır on 14 April 2009. The case still holds a significant place in the agenda of Turkey. This significance derives from factors including, in addition to the overall political atmosphere in the country, the high number of people arrested and the human rights record of the region where the operation was carried out. In addition to the Diyarbakır KCK (Union of Kurdistan Communities) case which is the subject of the present report, there are also KCK cases in Adana, Erzurum, Van and İzmir. The common characteristic of all these cases is that all accused persons are supporters of the Democratic Society Party (DTP) or its successor the Peace and Democracy Party (BDP), and the allegation is that these people have ties with the PKK (Kurdistan Workers' Party).

The interest of the Human Rights Joint Platform (İHOP) in this specific case emanates from two facts. Firstly, among the defendants in the case, there are members and leaders of organizations active in the field of human rights. As a common platform for human rights, İHOP has concerns as to whether the investigation into and prosecution of human rights defenders derives from their identity as such. In other words, İHOP is following the case on the grounds of the right to defend human rights and treatment accorded to rights defenders in the context of the UN Declaration on the Protection of Human Rights Defenders.

Secondly, some of the events leading to the launch of this case involve some civil and political rights including freedom of expression and association – getting organized and being active in associations, trade unions, professional chambers and political parties—participation in government and in elections for local government as candidates, being elected, being active in local government, the right to peaceful gathering and demonstration, the right to petition etc. It is of course natural that activities based on these rights can be subject to criminal proceeding in case they violate the established rules and norms of the state. In such cases, it is also natural that the legislation in effect can be questioned in terms of its compliance with universal human rights standards (standards relating to human rights, the rule of law and democracy). In respect of the rule of law and democracy, making peaceful acts and operations subject to criminal proceedings may undermine trust in law and threaten the principles of the rule of law and democracy. In sum, this case is also evaluated here in terms of the extent to which it entails the prosecution of acts in which there is no evidence of violence and which amount to the exercise of those rights and freedoms mentioned above.

The legal process is reviewed and evaluated here on the basis of the European Convention on Human Rights (ECHR), including the right to personal freedom and safety (Article 5), right to fair trial (Article 6) and the right to the protection of private and family life (Article 8).

The executive board of İHOP decided in its meeting on 19 September 2010 to conduct a monitoring and reporting activity on this specific case.

1. INVESTIGATION STAGE

1.1. PRELIMINARY INVESTIGATION

Presently there are 151 defendants tried, 103 of whom are held in pre-trial detention. Most of them are mayors elected to local government as DTP/BDP candidates, former mayors from the DTP, local government personnel, and leaders and members of non-governmental organizations. All are residents of the region, well known for their social activities.

The inquiry first started upon a request by the security directorate to the public prosecutor's office concerning the suspect Cihan Deniz, and then continued by focusing on other persons who were alleged to be in contact with Cihan Deniz.

1.2 START OF INVESTIGATION

The Diyarbakır Directorate of Security allegedly received a telephone call on 14 February 2007 in which an unidentified person informed the directorate that a person named Cihan Deniz[1] was "appealing in the name of the PKK for everyone to rise up, organizing people in other provinces as well and trying to instigate people to join street rallies." Upon this information, the Directorate appealed to the Public Prosecutor on 16 February 2007.

In its appeal, the Directorate mentioned that the "security archives and GBT (general information) records include information about the person named Cihan Deniz as an activist of the terrorist organization named KONGRA-GEL."

In its appeal, the Diyarbakır Directorate of Security asked the Prosecutor for permission to listen and record, for a period of three months, the telephone communications of the person concerned via a number provided by the informer "*...since it is impossible to identify and seize the persons concerned and collect evidence by any other measure..*"

The Public Prosecutor transferred the appeal on the same day to the court in Diyarbakır mandated on the basis of Article 250 of Law no. 5271, the Criminal Procedures Code (CMK). Again on the same day, the Diyarbakir Criminal Court no.6 (with special authority) approved the appeal on the basis of CMK Article 135.

In appropriate circumstances and in compliance with specific rules of procedure, it is legally possible to take such a decision.

Article 135 of the CMK bears the heading "Interception of correspondence through telecommunication. Location, listening and recording of correspondence" and the article starts with the following provision:

> *"The judge or, in cases of there is a risk of delay, the public prosecutor, may decide to locate, listen to or record the correspondence through*

[1] Cihan Deniz was a 35-year-old DTP member. He died in a traffic accident during the preliminary investigation.

telecommunication or to evaluate the information about the signals of the suspect or the accused, if during an investigation or prosecution conducted in relation to a crime ***there are strong grounds of suspicion*** *indicating that the crime has been committed and there is no other possibility to obtain evidence…"*

As can be inferred from the wording of the article, application of such measures requires the existence of *strong grounds of suspicion*. For any suspicion to have an objective value there must be concrete expressions supporting the information or complaint concerned. It is accepted by all jurists that this is a precondition which must be strictly observed.

In its decisions the European Court of Human Rights (EcHR) uses the term "reasonable doubt" instead of "strong grounds for suspicion" as stated in Turkish legislation. According to established EcHR decisions, reasonable doubt is not that conceived subjectively by security forces but rather general suspicion arising in the face of concrete events emerging in the routine flow of life.

In its official communication, the Directorate of Security sufficed with stating that there was an archive and GBT records that the person concerned was involved in activities for the terrorist organization named "KONGRA-GEL" without adding any document to its formal request.

Leaving aside the statements of the security directorate, neither the public prosecutor nor the court conducted any investigation into whether there were "strong grounds for suspicion" in relation to the person concerned.

No legal assessment or justification could be found as to why the allegation should be considered as amounting to strong grounds for suspicion.

1.3 BEFORE THE -ARRESTS

Following the decision given to listen to the communication of the suspect Cihan Deniz, the Directorate of Security made various further appeals to collect evidence concerning persons in contact with Cihan Deniz and others with whom these persons were in communication.

1.3.1. Listening to telephone conversations, identification of IP addresses and electronic mails

Court decisions to listen to and record communication as well as the outcomes amount to hundreds of pages and are contained in five large files annexed to the indictment.

For both the first person mentioned above and other persons alleged to be in contact with that person, the appeals of the security directorate to permit wiretaps were immediately granted by the judiciary.

Appeals regarding other telephone numbers which were allegedly being used by suspects were instantly acceded to without investigating whether these telephone

numbers actually belonged to persons who were being investigated.

The statement of the security directorate in this regard was found sufficient. Consequently, it is not possible on our part to identify the owners of hundreds of phone numbers for which decisions to listen to and record were issued; nevertheless the judicial authority must have considered that its decisions may have implications for many persons who are not actually involved in any way in the case being investigated.

Upon the statement of the security directorate that persons were found to have exchanged e-mail addresses in their telephone conversations, the court produced numerous decisions to identify those e-mail addresses and content of communication in these mails.

It is also worth noting that these decisions were repeatedly extended in their validity since paragraphs 2 and 3 of Article 135 of the CMK read as follows:

> *(2) The correspondence of the suspect or the accused with individuals who enjoy the privilege of refraining from testimony as a witness shall not be recorded. In cases where this circumstance has been revealed after the recording has been conducted, the conducted recordings shall be destroyed immediately.*
>
> *(3) The decision that shall be rendered according to the provisions of subparagraph 1 shall include the nature of the charged crime, the identity of the individual, upon whom the measure is going to be applied, the nature of the tool of communication, the number of the telephone, or the code that makes it possible to identify the connection of the communication, the nature of the measure, its extent and its duration. The decision of the measure may be given for maximum duration of 3 months; this duration may be extended one more time. However, for crimes committed within the activities of a crime organization the judge may decide to extend the duration several times, each time for no longer than one month, if deemed necessary.*

Since the prosecutor and the judge took these decisions without investigating to whom these numbers belonged, these decisions cannot be considered as effective in preventing the interception of communications of those who have the “right to refrain from testimony as a witness” as stated in paragraph 2 above.

Meanwhile, it is evident from appeals that some telephone numbers belong to other family members. While this situation can be considered as a violation of Article 8 in the ECHR providing for the “protection of private life and family”, no attention was paid to this provision.

As mentioned above, Art. 135/3 of the CMK allows for extending the duration of a measure and makes this extension possible several times in case of organized offenses. There is no limit as to how many times the duration of a measure can be extended.

The compatibility of this provision with the relevant provisions of the ECHR and articles 20 and 22 of the Constitution is a separate point worth discussing; it must be noted here that in this particular case the number of decisions to extend the period

amounted to 40-50. This is a disturbing situation in legal terms. Given that personal rights constitute the norm while restrictions are exceptional in extraordinary cases, it is considered that the sheer number of extensions cannot be considered as justified.

1.3.2. Use of technical devices for surveillance and recording conversations

At the investigation stage, some addresses were traced and audio-visual devices were used to place locations under surveillance and to intercept and record communications.

In a communication by the Diyarbakır Security Directorate to the Public Prosecutor, it is stated that during investigative work carried out in relation to the organization and its members engaged in illegal activities some suspects were observed to have been visiting a specific address in an apartment block: "...*starting from the present stage of work conducted to identify the connections of persons concerned and to obtain illegal materials, there can be no other measure to properly identify suspects and obtain evidence as to their activities but using technical devices for audio and visual recording under Article 140 of the CMK...*"

The Public Prosecutor conveyed this appeal to the Court, which decided to approve the request and allowed for above mentioned technical surveillance, interception and recording of conversations at a location.. Upon further requests, this decision was reproduced and periods were extended many times through the same procedure for the same and different addresses.

Article 140 of the CMK indeed allows for such a practice. However, all the problematic elements observed in relation to the decisions to intercept telephone communication can also be seen in relation to the decision to intercept and record conversations at locations.

Neither the Public Prosecutor nor the Court carried out any practical and legal investigation as to whether the appeal was justified or not. At least there is no statement in the decision taken and its annexes to demonstrate that any such investigation had been conducted.

That court decisions were given on the same dates as the requests made is normal, since it is binding to take such decisions within 24 hours following such requests.

Nevertheless, this does not explain why decisions were taken without looking for any written document or oral information. The exceptional and curtailing nature of such decisions should have been considered seriously at all stages and particularly in times when extensions were repeatedly granted.

The judiciary should also consider in detail how these decisions are to be translated into practice. For example, whether a flat is to be kept under surveillance through devices placed indoors or outdoors makes a difference in terms of respecting the rights of persons other than those who are to be kept under observation for 24 hours a day.

Adoption of these decisions suggests that the meticulousness mentioned above was not shown.

It was also found that the Diyarbakır Security Directorate and the Public Prosecutor also requested permission to use technical devices to listen to and record conversations at the Diyarbakır premises of the Democratic Society Party (DTP) on the grounds that some suspects would attend a meeting to be held by that party which is legal and has MPs in the Turkish Grand National Assembly. It was further observed that the appeal to the Public Prosecutor to this end contained a rather detailed justification and assessment. (We could obtain no information on whether this decision relating to a legal political party was actually taken and thus we refrain making any comment on the issue.)

2. DETENTION AND ARREST

The first wave of detentions took place on April 14, 2009, about two years and two months after the start of the inquiry. This wave was followed by others detentions on June 17, September 11, and finally December 24, 2009.

Homes and offices of persons detained were searched and no firearms were found either on the person of in the office of any detainee.

However, many notebook computers, CDs, hard disks, videos, telephones etc. as well as some documents, bills and cash belonging to suspects were seized.

During interviews conducted for the İHOP report, all interviewees stressed that the rights of the accused were grossly violated.

Detainees interviewed stated that they were not informed about what they were being accused of, that their right to legal representative was restricted, that their contact and communication with lawyers were blocked and that other legal conveniences and time periods were denied.

Among the accused remanded to detention pending trial was Seracettin Irmak, a lawyer who was detained as a suspect on a request of the police to the prosecutor following a dispute that occurred while he attempted to extend legal services to his client.

2.1 Searches and Seizures

Article 130 of the CMK includes the following provision:

> *Attorneys' offices shall only be searched on a court decision and in connection with the matter indicated in the decision and under the supervision of the public prosecutor. The President of the Bar or an attorney representing him shall be present at the time of the search.*

Article 58 of the Law on Lawyers reads as follows: *"... Offices and residences of lawyers can be searched only upon court decision and in the context of the motive mentioned in that decision, under the supervision of the public prosecutor and in the presence of a representative from the Bar Association. Unless there are cases of flagrante delicto in a criminal offence, lawyers cannot be searched for their personal*

belongings. …". This compelling provision is stated to have been violated. Leaving aside the presence of any representative from the Bar Association, in this case the search was conducted exclusively by the security directorate without even the presence of a public prosecutor.

There were frequent complaints that searches were not conducted in compliance with relevant legislation and it was observed that these complaints largely reflected the fact.

In criminal processes, search and seizure constitute a single issue. Acts of search and seizure start with a decision that can be taken by a judicial authority, prosecutor or a court on duty.

The legal validity of the decision itself is an issue that must be addressed in this context. It is also mandatory that a search be conducted in a manner in compliance with relevant national and international norms.

The request for a decision to search based on a reasonable suspicion is evaluated by the court which grants such a decision when it is deemed necessary, and this decision is executed in accordance with rules established in law. After temporary seizure of evidence and documents in the process, they can be held only with a court guarantee and kept for purposes of informing the related court verdict.

Decisions for search have to state the purpose and conditions under which the search is to be conducted. Decisions must be accompanied by a justification. These decisions must also be clear as to the scope of the search, what is actually looked for and the reasons for applying measures to persons concerned.

The decisions to grant searches in this case relied on repeating the text of the legislation concerned or on previously stated formulations. The justification for decisions included statements such as *"for being the member of the illegal terror organization PKK", "for being the leader of the illegal terror organization PKK"* and *"for violating the law against terrorism"*.

It is the provision of paragraph 3 of Article 120 of the CMK that the presence of the lawyer during any search cannot be prevented; yet this provision was not observed in some searches.

Along with detaining suspects, the security directorate seized computers, computer hardware, hard disks, memory cards and CDs of suspects.

While these actions were executed after a court decision, it cannot be said that such details as computer searching and copying were fully in compliance with the relevant legislation.

> *Article 134*
> *"…*
> *(2) if computers, computer programs and computer records are inaccessible, as the passwords are not known, or if the hidden information is unreachable, then the computer and equipment that are deemed necessary may be provisionally seized in order to retrieve and to make the necessary copies.*

Seized devices shall be returned without delay in cases where the password has been solved and the necessary copies are produced.

(3) While enforcing the seizure of computers or computer records, all data included in the system shall be copied.

(4) In cases where the suspect or his representative makes a request, a copy of this copied data shall be produced and given to him or to his representative and this exchange shall be recorded and signed."

While it is fundamental under CMK article 122 that the procedure is carried out by the public prosecutor or judge, in this case the signature of the prosecutor was absent in many records of searches and seizures.

In the court decision granting searches in this case, there was neither any justification for grounds of suspicion nor any statement on what was to be searched for.

It is also fundamental that copies of digital materials are taken in situ as they are and recorded as such. In many cases, this rule was not observed. Therefore, suspicions can always be raised as to whether documents returned later are exactly the same documents as those obtained from suspects.

In search and copying operations on computers, in many cases contradicting legal provisions were observed.

2.2. Secrecy orders

Judges may in law grant a secrecy order on an investigation so that potentially incriminating evidence and accusations are not disclosed to suspects in detention. Because in this case, secrecy orders were granted, lawyers could not examine relevant documents and reach sufficient information about the evidence that formed the basis of the allegations against their clients. It must be noted here that in investigations of political cases in Turkey, such decisions of secrecy are often given. It is clear that this practice is not in compliance with the decisions of the EcHR.

The provision regarding secrecy orders during the investigation stage can be found in CMK Article 153. The first three paragraphs of the article are as follows:

" The defence counsel may review the full contents of the file related to the investigation phase and may take a copy of his choice of documents, and is not obliged to pay any fees for such.

The power of the defence counsel may be restricted, upon motion of the public prosecutor, by decision of the Justice of the Peace, if a review into the contents of the file, or copies taken, hinder the aim of the ongoing investigation.

The records of the submissions provided by the individual or by a suspect who was arrested without a warrant, as well as the written expert opinions and the records of other judicial proceedings, during

which the above mentioned individuals who are entitled to be present, are exempted from provisions of the second paragraph."

It is possible for a judge to rule for secrecy under this article. However, the same article cannot be accepted as an instrument for practices which would totally remove the right to defence. It is the norm that the suspect who is prosecuted and whose freedom is restricted is provided with the means to defend himself. It is clear in paragraph 3 that the decision for secrecy cannot cover some documents and it is widely known that the EcHR attaches special importance to the observance of the *"principle of equality of arms".*

This is provided for in Article 6 of the ECHR which is deemed as domestic law under article 90 of the Constitution.

> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> - (b) to have adequate time and the facilities for the preparation of his defence;
> - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> - (d) 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;
> - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The article concerned envisages the interrogation of witnesses of the claimant and ensuring that defence witnesses are called in and listened to under the same conditions as witnesses of the prosecutor.

In its various decisions, the EcHR considers this paragraph as a special arrangement of the principle of "equality of arms" in the context of "fair trial" according to the Convention and attaches special importance to the equality of parties in practice. It is appropriate here to touch upon the EcHR decision on Öcalan dated 12 March 2003.

The court ruled that Articles 6/3-b and c in the context of fair trial were violated in the case of Öcalan since he could receive no legal assistance while being interrogated, could not speak with his lawyers in settings where third persons could not hear the conversation, and since he could reach the case file only at a late stage of the process.

In the KCK case, in spite of the lawyers' many appeals against the secrecy order, all were refused. Meanwhile, police attempted in some cases to search premises not belonging to the suspects for whom a search warrant had been granted.

Lawyer Muharrem Erbey is the head of the Diyarbakır Branch of the Human Rights Association. Since he was also among the suspects, a decision was taken to search the office of the civil society organization of which he was the head.

Those who were present at the office at that time raised objections on the grounds that the office to be searched was not a space personally owned or inhabited by Muharrem Erbey. Following this objection, the court granted permission to search the office of the association.

It is considered that the decision of secrecy in this case is a violation of right to a defence because it fails to observe the principle of equality of arms and Article 6 of the ECHR.

According to interviews conducted for the preparation of this İHOP Report, no act of torture or ill-treatment happened during detentions and afterwards. No claim of torture or ill-treatment was raised.

Nevertheless, striking were the photographs taken during the transfer of the accused to court and which subsequently appeared in the printed and visual media. In these photographs all suspects walk in a line handcuffed. Using handcuffs is an exceptional measure to be resorted to when there is likelihood of escape or harming oneself or another person. While the use of this measure is at the discretion of the authority concerned, it should still be considered that presenting images of handcuffed mayors, lawyers, NGO heads to the public is humiliating.

Suspects were kept in detention for the longest period of time legally allowed and after the end of the fourth day they were brought to the court with a request that they be remanded to prison pending trial. When questioned by both the public prosecutor and the judge, the very few questions they were asked focused on whether they had any affiliation with an (illegal) organization and their positions in that organization.

Hence, suspects and their lawyers could only form an indirect and partial understanding of the charges they faced.

Yet the provisions relating to testifying and interrogation of paragraph 1 in CMK Article 147 are as follows:

> *Article 147*
>
> *"…*
>
> *b) The crime he [the suspect] is suspected of shall be explained.*
>
> *c) He shall be notified of his right to appoint a defence counsel, and that he may utilize his legal help, and that the defence counsel shall be permitted to be present during the interview or interrogation. If he is not able to retain a*

defence counsel and he requests a defence counsel, a defence counsel shall be appointed on his behalf by the Bar Association.

d) An individual who has been apprehended shall have the relatives he chooses immediately notified of his apprehension, unless Article 95 provides otherwise.

e) He shall be informed that he has the legal right not to make any statement about the crime he is suspected of .

f) He shall be reminded that he may request the collection of exculpatory evidence and shall be given the opportunity to counter the existing grounds of suspicion against him and to put forward issues in his favour...
"

In respect of all accused, provisions in (b) and (f) above were not observed during interrogations before the public prosecutor and the judge. The continuance of the decision for secrecy at this stage made the fulfilment of these provisions virtually impossible.

A suspect or his lawyer not informed of the charges and inculpatory evidence cannot possibly ask for concrete evidence and put forward exculpatory evidence to clear himself of a charge, and this situation bars any effective defence.

Not observed is the second paragraph of Article 5 in the European Convention on Human Rights which reads: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him."

A person has a right to be informed in detail about the reasons of his arrest *(ECHR Fox, Campbell and Hartley v. United Kingdom).*

Paragraph (d) of ECHR Article 6 which provides for fair trial was also violated:

> *''(d) 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;"*

This principle known as "equality of arms" was not observed at the stage when suspects were remanding to prison pending trial.

Meanwhile decisions to place suspects in pre-trial detention were taken without checking whether there was "strong grounds for suspicion" or "*reasonable grounds for suspicion*", influenced by the fact that the offences in question are among those referred to as "catalogue offences" under CMK Article 100. Indeed, it is observed that inculpatory evidence against many arrested persons was obtained in ways that did not comply with legal norms or was presented to the court accompanied by prejudicial commentary added by the security directorate.

At this stage, 104 out of 151 suspects were remanded to prison pending trial. Some were released pending trial for health reasons.

It is also observed that some of those imprisoned and some released pending trial face the same charges and their inculpatory evidence is more or less the same.

During interviews conducted while preparing the İHOP report, information collected suggested that this situation can be explained by the fact that interrogations were conducted by different judges. However this may well indicate that there exists no positive and established understanding and practice in regard to determining the balance between upholding personal freedom and security.

Following decisions to remand to prison, the accused submitted many objections through their lawyers, none of which was accepted. The collection of evidence against the accused continued at this stage as well. Since the decision of secrecy on the file continued, lawyers could not raise objections to inculpatory evidence and could find no opportunity to collect exculpatory evidence.

2.3. Secret Witnesses

Four persons testified as secret witnesses during interrogations. These witnesses were given the code names “Daisy”, “Lens”, “Witness X” and “Daylight.”

Secret witnesses constitute a new institution in the Turkish legal system which entails serious ambiguities in practice and is debated as such.
At present jurists are preoccupied with such issues as how to exercise the right to question a secret witness against the accused as their identities are kept secret, how to verify information provided by witnesses regarding an offence, whether their statements are sound or not, and whether keeping their identities secret can be justified or not.

The issue is covered in paragraphs 2 and 3 of CMK Article 58.

> *“…*
> *(2) If there is a fear of gravely endangering the witness or his relatives if the witness’s identity is revealed, necessary precautions shall be taken in order to keep the identity a secret. The witness, whose identity shall not be revealed, is obliged to explain the grounds and occasion for obtaining knowledge of the facts about which he is going to testify. The personal data about the witness shall be kept with the public prosecutor, judge or the court, in order to keep his identity as a secret.*
>
> *(3) If there is a probable grave danger for the witness in being heard in the presence of others, and if there are no other means of preventing this danger, or other measures would endanger the aim of revealing the factual truth, the judge is empowered to hear the witness in the absence of others who have the right to be present. During the hearing of the witness, voice and image shall be transmitted. The right to ask questions to the witness is reserved.*

As can be seen in the text of the article, the identity of the witness is disclosed only to the judge and prosecutor and kept secret from the accused and his lawyers only in cases where the witness would face a grave danger through disclosing how he learnt about an incident and having his identity revealed.

If the judge deems necessary, he can listen to these witnesses personally, there can be audio and visual presentations and the parties can forward questions.

The issue of secret witnesses is arranged with a view to having such witnesses testify before a judge. Nevertheless, since in practice it has not been possible to ensure a coherent practice on this, it is commonly accepted that the value of such persons as witnesses is not on a par with normal witnesses. The decisions of the Court of Appeal also support this. Statements by secret witnesses can be of value only when supported by other concrete facts.

At the investigation stage of the KCK case, secret witnesses testified and their code names, concealing their real identities, were incorporated into the annexes of the indictment.

It is legally unacceptable that, in spite of the clear provisions of the legislation as mentioned above, the security directorate or the prosecution could summon secret witnesses to testify. Even more alarming is the fact that such witnesses play a rather important role in an investigation and become a factor that may influence the trajectory of the case and in decisions to place suspects in pre-trial detention pending trial. This situation is indicative of how the position of the defence in proceedings can be weakened unfairly and contrary to legal provisions.

In fact, secret witnesses should not be taken account of at this stage. At the stage of trial, any error can at least be partly remedied by properly listening to witnesses; yet, it is a grave judicial error that statements of secret witnesses are accepted as evidence while drawing up charges against suspects in the indictment and its annexes.

At the investigation stage there was an effort to comply with the procedure at least formally in some cases. In this context, for example, a court decision was deemed necessary even for the examination of some pieces of paper alleged to be torn up and thrown out by the accused; but at the same time all suspects and their lawyers were denied access to evidence until the acceptance of the indictment.

3. INDICTMENT

The Diyarbakır KCK case was opened upon the completion of the indictment on 9 June 2010. Assuming that inquiry too ended at this date, this means an inquiry extending over a period of forty months.

The indictment is 7,587 pages long and it has annexes consisting of 366 folders. This indictment was accepted after a period of 10 days as envisaged by CMK 175, at which point the prosecution stage began. .

Since the first wave of arrests in April 2009, a period of 16-17 months had elapsed before the trial began. This is an extremely long period of time which cannot be justified according to legal norms.

1. Paragraph 3 of article 5 in EHRC says the following in regard to persons deprived of their freedom: *"Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly*

before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The period of time until the suspect is brought before a judge should be no longer than the period of time necessary for completing the procedures relating to the suspect (*Brogan v. United Kingdom).*

The judge should be authorized to order the suspect's release. The authority to propose release is not sufficient (*Ireland v. United Kingdom*).

This is a right guaranteed under the ECHR. Suspects who had to wait so long for the trial to commence are entitled to the right to compensation. In fact, this right is practically recognized through arrangements introduced by ECHR Article 5, paragraph 5 and CMK Article 141.

An indictment appearing after a rather long and secret inquiry and bearing the imprint of the security directorate is also interesting in the sense that it contains accusations based on subjective inferences, but nothing, no evidence or statement that might favour the accused. As such, it is considered that the indictment is not in compliance with CMK Article 170.

4. PROSECUTION

The on-going KCK trial was launched with the indictment dated 9 June 2010, following the inquiry (file no. 2007/996 Hz) carried out by the Public Prosecutor's Office in Diyarbakır. The trial is referred to as case number 2010/1109 E of Diyarbakır 6th Criminal Court, specially authorized under CMK Article 250.

There is no "concrete" evidence to doubt the impartiality and independence of this court. Nevertheless, given that some other courts in the area have allowed defendants to conduct their defence in their own language (in Kurdish rather than in Turkish), the persistently negative approach adopted by Criminal Court no. 6 in this regard makes the position of the court disputable and gives rise to concerns about the court's approach to the right of the accused to defend themselves.

There is no decision for closed sessions; sessions are held publicly and can be followed by visitors as far as court space allows for it. It is nevertheless observed that many observers both from Turkey and abroad face difficulties in attending sessions and the number of seats is kept limited for a courtroom which is apparently reserved for such cases. While seats are reasonable for 154 accused persons including those under arrest, initially there were only 83 seats for observers, later increased to 90-95.

Lawyers for the accused have not submitted complaints concerning the physical conditions of the courtroom. During the session held on 13 January 2011, lawyers stated that spaces where the accused were held before the start of the hearing and during the breaks were cold enough to make the accused ill; that their appeal to the Public Prosecution to improve the situation was not considered; and that the situation should be assessed by an assigned judge in order to keep the trial running in a better and healthier environment.

The court, however, refused this appeal on the grounds that the authority to arrange for conditions out of the court room rests with the public prosecutor and the public prosecutor had already been informed about the problem. As an interlocutory solution, the court decided to have the accused remain in the court room during breaks.

Although no defence lawyer was denied participation in the proceedings, Muharrem Erbey, one of the defence lawyers was himself arrested and sent to prison in the course of the investigation. Erbey is still in confinement.

Under the indictment, the accused are charged with offenses under the Turkish Penal Code (no. 5237), under the Law on Demonstrations and Public Assemblies (no. 2911), and under the Law on Combatting Terrorism (no. 3713).

At the first session in the court, speaking on behalf of all the accused, Mehmet Hatip Dicle declared that they could all speak Turkish, without any objection by any of the accused. Dicle then went on to say that their mother tongue was Kurdish and that they preferred to use that language in the court. Thus it cannot be claimed that the accused were presented with the charges against them in a language unknown to them.

As of the date of this report, no problem existed in terms of the defence lawyers' access to the case file during the prosecution. However, as of 25 January 2011, the records of the trial hearings had not been given to the lawyers and these records were not in the case file. At the session held on 13 January 2011, the court gave no positive response to the lawyers' criticisms and requests on this matter.

The court denied the accused the right to defend themselves in their own language. When the accused started speaking in Kurdish, they were stopped by the court on the grounds that they were "speaking in a language that is presumed to be Kurdish". The court considered that the stage where the accused made their first defence against charges had passed. However, in spite of this assumption that the court has taken the first defence, as of the date of the present İHOP report, there has been no interim ruling by the court to collect evidence in favour of the accused. Considering the possible consequences of the disappearance of evidence favouring the accused, criminal courts are expected to collect exculpatory evidence starting from the receipt of the case file. In this regard, the court has so far taken no decision to collect evidence favouring the accused.

After a summary of the 7,578-page indictment was read out, lawyers declared and requested that the accused would speak in their own language, which was rejected by the court. Upon this, it was requested that the court should take a decision to listen to an "expert view", publicly known as "expert witness", namely Professor Baskın Oran, to see whether court defence in own language is allowed in domestic legislation and international treaties to which Turkey is a State Party. This request too was turned down by the court, stating that there was no need for an expert opinion on this matter. Considering that the expert requested by the parties would also underline evidence in favour of the accused, this decision of the court can be considered as a failure of the court to collect exculpatory evidence.

In interviews with lawyers, there was no complaint regarding any negative attitude of the court towards lawyers during the hearings. There was no restriction imposed on

lawyers in regard to the content and length of their oral presentations. In the handling of the hearings, there was no act on the part of the court running counter to what has been said above.

The decisions of the court rejecting requests for the release of the accused during the trial stage consist of stereotypical justifications without any detail. It is therefore rather difficult to conclude that the court has approached the requests of the accused party with a fully objective evaluation.

Sessions are recorded by cameras located in the courtroom. These records are deciphered afterwards. Given this audio and visual recording, it does not seem likely that the appeals and statements of the defence lawyers would not be included in the record of the hearing. In fact, no such concern has so far been expressed by the defence lawyers. Nevertheless, as stated above, there is the provision in the CMK envisaging that such records should be immediately deciphered and given to the accused or to their lawyers. In spite of this provision, even written records of the first session three months earlier had not at the time of writing been provided to the lawyers. The defence lawyers consider that this situation restricts their right to defence. Given that such records document the course of events in trials and that counsels prepare their defences according to what exists in these documents, it can be concluded that the present practice does restrict the right to defence.

Interim rulings by the court contain only formal (rather than substantive) reasoning. This evaluation, however, could be made on the basis of sentences uttered by the presiding judge while declaring interim rulings. It is uncertain how these articulations will appear in the records of the hearings. Still, when the essence of orally stated justifications for orally declared rulings is examined, it appears that the same routine response is given to all requests. Hence the rule put by the CMK that interim rulings have to include an explanation is satisfied only in form, not in substance. Of course, the similarity or in some cases identical nature of rulings concerning the same file cannot alone make these rulings devoid of justification. However, rulings refusing lawyers' requests to release different suspects for whom different penalties are sought and who have been charged on the basis of different articles have all been refused using the same reasoning, which makes it inevitable to consider that interim rulings by the court are not actually based on close examination of these requests. For example, Siracettin Irmak, accused no. 35, is charged with affiliation with a terrorist organization, under articles 53/1, 58/9, 63/1 and 314/2 of the Turkish Penal Code no. 5237, and Article 5 of the Law on Combating Terrorism. His request for release was turned down. Yet the accused no. 36, Servet Özen, who is charged with all aforementioned breaches plus violating Article 28/1 of the Law on Demonstrations and Public Assemblies was not remanded to prison pending trial.

It is of course true that the criteria of the court used in issuing decisions to place in pre-trial detention may vary even when articles alleged to be violated are the same. However, as can be inferred from the example, concerns that the court does not observe a standard, makes the reasoning contained in its interim rulings even more important. In this regard, it is observed that interim rulings by the court are not clear enough to satisfy the accused and their lawyers and do not provide the opportunity to put forward any counter-argument.

4.1 Main issues raised by this trial

4.1.1. Pre-trial detention

While the report was being prepared, there was no further material evidence that the Prosecutor wanted to be obtained. This situation suggests that there remains no more evidence that may support the charges and that risks being contaminated or spoiled. Consequently, the most important justification given by the CMK for keeping the accused detained is no longer valid in this case. Even if upper limits on the length of detention in law are not exceeded in the present case, decisions to prolong the detention of the accused run counter to relevant human rights standards.

4.1.2. Torture or Humiliating Treatment

With the exception of transportation to and from the courtroom, physical conditions in the cells in the courthouse and some forms of treatment, no evidence of torture or humiliating treatment has been observed.

4.1.3. Right to privacy and private communication

There was no finding suggesting that standards such as private life and communication were violated during the trial.

4.1.4. Right to defence in own language and to furnish evidence freely

The most salient feature of the case which also aroused public interest is the rejection by the court of the request of the accused to defend themselves in their own language. This report addresses that issue in the context of fair trial.

Before the court had conducted the check on the identities of the defendants, the accused Mehmet Hatip Dicle, declaring he was speaking on behalf of all accused, stressed all could speak Turkish well, had no problem in this regard, but that they wanted to defend themselves in Kurdish as their own language, also conveying to the court legislative articles and international treaties that entitle them to do so. The court gave no ruling on this matter at that time. During the identity check, names and last names of accused persons were read out one by one and the accused replied to the court “present” or similar in Kurdish. After his name was read out, one of the accused stated in Kurdish that there was something incorrect in his identity information and a correction was made after this statement.

Following the identity checks it was decided to read out the indictment in summary. After the prosecutor read out the indictment, the defence lawyers informed the court that their clients wanted to defend themselves in Kurdish as their own language. The court turned down this request. The lawyers asserted that delivering a defence in Kurdish was a legitimate request under national and international legislation in effect and asked to have Professor Baskın Oran testify as an expert on this issue. This request was turned down by the court.

According to CMK articles 178 and 179, in case the court rejects a request for an expert to testify before the court, the accused or their lawyers have the right to bring such an expert in person to testify to the court. The court has no discretion over the exercise of this right and, moreover, in case statements made by the expert are found to be valuable in disclosing the truth, it becomes an obligation to cover the expenses of the expert from the public budget. Lawyers exercised this right and

ensured the physical presence of Baskın Oran in the courtroom. However, the court declined to have Oran testify. This is considered as a ruling which restricts the right to freely bring evidence before a court.

It is known that the very same court has adopted different approaches in other cases and that the accused can defend themselves in Kurdish in other courts in the country. For instance, Selahattin Korkmaz, one of the lawyers, stated that he was tried by the same court in 2010, that he had made his defence in Kurdish and that the court had asked for an interpreter from Dicle University.

Also, other courts in the same jurisdiction have been observed to permit a defence to be conducted in Kurdish.

The refusal by the Court of the request of the accused to defend themselves in Kurdish on the grounds that they could speak Turkish is not consistent given that the very same Court had ruled differently in some earlier cases. Furthermore, on previous occasions the panel of judges of the court had faced no enquiry over their acceptance of defence testimonies in Kurdish. Both the accused and their lawyers maintained that oral court defence in own language is a right granted to all citizens of Turkey by Article 39/5 of the Lausanne Treaty and wanted it to be put into effect. The article is as follows:

> *"Notwithstanding the existence of the official language, adequate facilities shall be given to Turkish nationals of non-Turkish speech for the oral use of their own language before the Courts."*

Here, the qualification "Turkish nationals of non-Turkish speech" as well as reference to "oral use" and "own language" is noteworthy and clarified in the written statement submitted to the court by Baskın Oran.

The court hearing in which the accused were to present their defence took place on 13 January 2011. During this session the accused were asked one by one to give their oral defence. When the accused started to speak in Kurdish, the chief judge actively stopped them and stated "it is understood that the accused speaks in a language presumed to be Kurdish". Considering that the right to defence had been exercised, the Court gave the floor to the defence lawyers to state whether they had anything to say about their clients' defence. The lawyers stated that, since their clients had not provided statements defending themselves, it was impossible to add anything to a non-existent defence. Further, taking their turn after each accused spoke in Kurdish, the lawyers translated the statements of their clients into Turkish and stated that their clients had been ready to deliver a defence in Kurdish and wanted to speak in Kurdish but had been, interrupted by the Court. The defence lawyers sought to get this stated in the recorded record of the court hearing.

In the present case, the Court turned down the request of the accused to defend themselves in Kurdish on the grounds that they were fluent enough in Turkish to express themselves clearly. This means a restriction on the right to defence. The fact that the accused could speak Turkish does not mean there is no restriction on the exercise of the right to a defence.

There is no provision or rule in international conventions that Turkey is a State Party to as well as in legislative arrangements and practices that prohibits court defence in Kurdish, which is the language of the defendants. Even if CMK Article 2002 specifies situations in which a translator is required, this rule defines a right granted to an accused person to express himself. To interpret a norm that defines a right in a way to prevent the exercise of another runs counter to both the rationale for that norm and principles of legal interpretation. Furthermore, the law grants no discretion to the court to determine in which language an accused person can express himself better. Hence, it should be considered sufficient to have an accused person inform the court about the language in which he thinks he can express himself better. Practices observed in courts where defence in own language is accepted do not make the exercise of this right conditional to not being able to testify better in Turkish. In sum, while court decisions not allowing the accused to defend themselves in their own language do not contradict the wording of CMK Article 202, they still violate universal human rights standards.

During the session held on 1 February 2011, the defence lawyers invited judges to withdraw from the case and submitted a petition for the removal of the judges from the case in the event that they refused to withdraw. The judges did not withdraw from the case and sent on the request for their removal to another court which would deliberate on the lawyers' petition. At the same hearing, the lawyers' request for the release of their clients was refused. The court ruling for the continuation of their imprisonment is recorded as follows:

> *"1.Since there are facts suggesting strong grounds of suspicion and the possibility that the accused may run away; remove, hide or alter evidence and exert pressure on witnesses or others, and since there is strong suspicion that the accused may have committed one of the crimes listed in Article 100/3-a of the CMK no. 5271, it is DECIDED TO KEEP THE ACCUSED IN CONFINEMENT…"*

The problem here is the use of too generalized statements, routine repetition of legal provisions, stereotypical expressions and absence of any individual level discussion of the ongoing detention and any specific justification referring to individuals detained and why it should be maintained. It is clear that such collective accusations, assessments and rulings are not in compliance with the universal principle of criminal law that states the personal nature of both the crime and punishment. This principle is also cited in Article 38 of the Turkish Constitution entitled "Principles Relating to Offences and Penalties" as "criminal responsibility shall be personal". Since court rulings on the continuation of the state of confinement are devoid of justification, they can be considered as breaching Article 141 of the Constitution titled "open hearings and reasoned verdicts" which states that "the decisions of all courts shall be made in writing with a statement of justification." Further, CMK Article 34 states that "all decisions taken by courts and judges shall be written up with a justification and including any opposing vote."

5.HUMAN RIGHTS DEFENDERS IN PRISON

5.1.ROZA ERDEDE

Roza Erdede is a board member of the Diyarbakır Branch of Human Rights Association (İHD), and the ninetieth defendant in the indictment. In part 64 of the indictment, in pages 96 to 100 and 1 to 16 it is claimed that Roza Erdede is involved in organizational activities within the GABB (Union of South-eastern Anatolia

Municipalities) together with evidence and statements presumed to support this claim. In part 64, page 96, it is stated that a secret witness code named “Daisy” has provided statements concerning Roza Erdede and it is also mentioned that there is a document demonstrating that Erdede was involved in training activities. The indictment gives the following as evidence supporting the charge against Erdede: music files in a computer; telephone conversations with İHD branch chair Muharrem Erbey; telephone conversation between Reyhan Yalçındağ, the former President of İHD, and Lawyer Muharrem Erbey about the detention of Roza Erdede, and other records of telephone conversations.

Roza Erdede refutes these allegations and has emphasized that her tasks in İHD and GABB have been project design and implementation of approved projects, including development a project on “preventing domestic violence” for Kibele, which was supported by the Embassy of the Netherlands and is now completed; presentation of a project for preventing child abuse to the European Union, which passed the preliminary test for proposals; and completion of a project to transfer information and documents in the archives of İHD-Diyarbakır to an electronic form, again with the support of the Embassy of the Netherlands.

In her defence presented to the court under the title “My Defence”, Erdede says,”*What I was trying to do was to develop and implement social projects on low socioeconomic status and disadvantaged groups (the disabled, elderly and children). In this way, I was trying to be an individual contributing to their society.”*

5.2. ARSLAN ÖZDEMİR

Arslan Özdemir too is a board member of the Diyarbakır Branch of the Human Rights Association (İHD), and eighty-seventh defendant in the indictment. In part 63 of the indictment, in pages 94 to 100 and in part 65 (pages 1-16) it is claimed that Arslan Özdemir works in the GABB as a training expert as assigned by the illegal organization and uses this post to sustain organizational relations and contacts. Evidence supporting this allegation includes the following: statements by two secret witnesses code named “Daisy” and “Lens”; participation in protest marches and press conferences; Kurdish music, videos and training notes found, all presumed to support the charges brought against Özdemir.

Arslan Özdemir rejects all these allegations, stating that he is a human rights defender acting as a board member of İHD Diyarbakır Branch. He says he is an educationist, having served as teacher and education expert in various educational institutions; working in the GABB Training Centre as a sociologist and education expert and conducting legitimate and legal education activities; as İHD board member and observer he took part in various outdoor meetings with his identity tag as can be seen clearly in photographs taken during these events.

Arslan Özdemir says he is called “Aslan Hoca” since “Hoca” is a term frequently used for teachers. He asserts that no inculpatory document or material was found when his residence was searched and it was no offence to keep some music cassettes as well as various writings and publications.

5.3. MUHARREM ERBEY

Muharrem Erbey is the Vice President of İHD and chair of the Association's Diyarbakır Branch, appearing as the 132nd suspect in the indictment. Charges relating to Erbey can be found on pages 74-100 in part 74 and pages 1-26 in part 75 of the indictment. According to these charges, Muharrem Erbey raised project funds from an EU member country only to channel these funds to the illegal organization; delivered speeches in parliamentary groups of such countries as Sweden, Belgium and Britain which denigrated Turkey; took part in constitution drafting work within the Democratic Society Congress; was in frequent contact with Diyarbakır Mayor Osman Baydemir as his lawyer; served as unpaid lawyer to defendants in trials concerning the organization; made statements on Roj TV; took part in various demonstrations and rallies to build up motivation and instigate people while demeaning the security forces and other official authorities, etc.

All these charges are based on the statements made by secret witnesses, on wire-taps and documents stated as having been obtained during searches conducted in the İHD office, and Erbey's home and office.

Erbey refuted all allegations regarding his organizational affiliation and stated that without committing any offence, he had always worked as a lawyer and human rights defender. In relation to Erbey, there was first a search in his room in the Diyarbakır Branch of the Human Rights Association (İHD) and a court decision for a search of other rooms at the association was instantly produced. Computers, CDs and cassettes and many documents found in the office were seized.

In interviews made with the leaders of the İHD for preparing the present report, it was stated that the seized materials had not been returned to the İHD since December 2009. Following this search, there was no criminal investigation concerning the Diyarbakır Branch of the Association.

The İHD was not informed about any legal implication of the search conducted.

The UN Declaration on the Protection of Human Rights Defenders was adopted by the UN General Assembly on 9 December 1998. Article 1 of the declaration states that it is the right of each and every person to protect and exercise human rights. Article 5 is about the right to organize meetings at national or international level and to have contacts with various associations and persons, governmental or non-governmental organizations for protecting human rights. Article 12 underlines the obligation of States to protect human rights defenders. The articles are as follows:

> ***Article 1****: Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.*
>
> ***Article 5:*** *For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:*
>
> *(a) To meet or assemble peacefully;*

(b) To form, join and participate in non-governmental organizations, associations or groups;

(c) To communicate with non-governmental or intergovernmental organizations.

***Article 12**: 1. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.*

2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.

In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

The United Nations, European Council and European Union have adopted various resolutions to protect human rights defenders, established human rights mechanisms within and issued publications and directives.

In the Fact Sheet no.29 titled "Human Rights Defenders: Protecting the Right to Defend Human Rights it is stated that:

> "Human rights defender" is a term used to describe people who, individually or with others, act to promote or protect human rights."

The UN Secretary-General designated a Special Representative for the Protection of Human Rights Defenders. Special Representative Hina Jilani visited Turkey in September 2004 and prepared a report. The Council of the European Union adopted and declared the Guiding Principles in protecting human rights defenders on 14 June 2004. The European Union draws attention to the special position of human rights defenders in its progress reports concerning individual countries. The 2010 Progress Report for Turkey, for example, points to legal prosecution which human rights defenders are subjected to.

In its circular no. 139 (2004) titled "Guide for Human Rights Defenders", the Turkish Ministry of Interior too states that it attaches specific importance to the issue.

In these instruments shortly mentioned above, States declare that they recognize human rights defenders, respect their role in the protection and promotion of human rights and facilitate the work of human rights defenders.

Having the activities of human rights defenders subject to criminal prosecution as the activities of illegal organizations is simply unacceptable under the national human rights instruments briefly mentioned above. Keeping human rights defenders under judicial pressure is one of the methods employed by authoritarian systems.

6. CONCLUSION

In Turkey and in other parts of the world, human rights organizations defend human rights and freedoms. Law requires predictability and openness. Safeguarding of law is a precondition for the rule of law. In this respect and in the context of the ongoing KCK case, consideration that working in legal organizations – i.e. municipalities, trade unions, associations and political parties – constitutes an "offence", and designating legal and peaceful press conferences, workshops and demonstrations as offences committed upon the instructions of illegal organizations, runs counter to the principle of the rule of law.

Moreover, designating as crimes fully legal and peaceful activities may pose a threat to freedoms of expression, association, peaceful gathering and demonstration which are all enshrined in international human rights documents. In the present case, there are aspects that may be problematic in the context of Article 11 in the European Convention on Human Rights. Criminalization of peaceful indoor or outdoor gatherings, prosecution of a specific political party and its local units and the arrest of many politically active figures are all points of deep concern in the context of freedom of association. It is worth noting that all these developments take place in the period leading to general elections scheduled for 12 June 2011. Criminalization of activities resulting from the exercise of rights and freedoms enshrined in international human rights instruments is an obstacle to the establishment and promotion of human rights and democratic standards.

It is a safeguard for people that procedural rules are observed in legal inquiries. And truth can be reached only by complying with these rules. Article 5 of the European Convention on Human Rights that provides for individual freedom and safety is to be respected by all authorities and organs. Freedom and safety of persons can be ensured only this way.

All law enforcement authorities should in the first place comply with the principles of protection of private and family life and privacy of communication as envisaged by Article 8 of the European Convention on Human Rights.

The principle of the rule of law is expressed as follows by the European Court of Human Rights (EcHR) in its judgement on the case of Silver and others v United Kingdom (25 March 1983): *"One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control."*
It is the independent and impartial judiciary that is supposed to translate the principle of the rule of law into practice. The fact that personal communication and environments are placed under surveillance and conversations recorded for a period of three years suggests that interventions in personal liberty are not subject to any effective legal scrutiny and nobody is safe in this sense. Yet, procedural laws and legal scrutiny are crucial and legal safeguarding of liberties can be ensured only through an effective legal scrutiny.

With respect to rights and freedoms mentioned above, in the Diyarbakir KCK case there have been serious breaches of law by the investigating authorities and the judiciary. There are serious breaches, for example, in respect to the continuing confinement of defendants. A common feature of collective trials (with a large number of defendants) is the practice of arresting and remanding to prison suspects en masse. While there is need to assess the situation on the basis of each person concerned, there may be court rulings to keep all the accused in confinement on the basis of generalized and abstract reasons. Unfortunately, Turkey has yet to overcome this problem. Respect for human liberty unequivocally requires sound justification for the continuance of any state of confinement. In this respect, there is a need to fully observe the provisions of Article 5 of the European Convention.

It is absolutely unacceptable for human rights defenders to be subjected to criminal prosecution on allegations that their human rights activities have been carried out under instructions given by an illegal organization.

Human rights abuses are not a matter to be regarded as a country's domestic issue. Thus, human rights defenders stand up against human rights violations in all parts of the world.

Given this, human rights defenders cannot be accused of informing foreigners about human rights problems in their country. Such accusations cannot be accepted. Human rights defenders are persons campaigning for the rights and freedoms of others and undertaking risks for that. Forcing human right defenders to work under the pressure of the police and judiciary runs counter to the UN Declaration on the Protection of Human Rights Defenders and the European Union Guiding Principles.