

# TURKEY: KESK TRIAL OBSERVATION REPORT<sup>1</sup>

## EXECUTIVE SUMMARY

1. Turkey is a member of the UN, the International Labour Organization (“ILO”), the Council of Europe and has ambitions of joining the European Union. As such it has ratified the core international treaties relating to trade union rights, including ILO Conventions 87 and 98, and the European Convention on Human Rights (ECHR), the most relevant Articles being 6 (right to a fair hearing) and 11 (right to association). Although Turkey has not accepted Articles 5 or 6 (trade union rights) of the European Social Charter, the European Court of Human Rights (ECtHR) embedded into article 11 (the right to association) the ILO jurisprudence and the European Social Charter, effectively saying that they should be applied anyway<sup>2</sup>.
2. Workers in Turkey continue to struggle to realise their rights. National legislation does not fully conform to international standards<sup>3</sup> and what laws are in place are often not effectively enforced. In the past two years there has been judicial harassment of trade unions, severe limitations on the right to strike, obstruction of collective bargaining, and discrimination and violence used against union members<sup>4</sup>.
3. More broadly, trade union rights remained insufficiently protected in national law. Despite government statements indicating that legal amendments aimed at bringing national law into conformity with international standards on trade union rights could be brought before Parliament, little progress has been made.
4. In June 2010, the ILO Commission on the Application of Standards reviewed implementation of ILO Convention 87 by Turkey. Noting the important restrictions placed on freedom of speech and of assembly of trade unionists in Turkey, the ILO urged the Government to take all necessary measures to ensure a climate free from violence, pressure or threats of any kind so that workers could fully and freely exercise their rights under the Convention.
5. In September 2010, the UN Human Rights Council issued recommendations requesting the Turkish Government to ensure the independence and impartiality of the judiciary and to make the necessary legal amendments to guarantee freedom of association in accordance with article 22 of the International Covenant on Civil and Political Rights (ICCPR).

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<sup>1</sup> The trial observer, Michael Newman, is a practicing Solicitor of the Supreme Court of England and Wales. He is not employed by ICTUR or any other trade union or affiliate. He was assisted by an interpreter. He is extremely grateful for Sarah Hemingway’s previous report for ICTUR, which formed the basis of this report. This observation was undertaken with thanks to the Lipman-Miliband Trust for travel expenses.

<sup>2</sup> *Demir and Baykara v Turkey* [2009] IRLR 766 in the Grand Chamber.

<sup>3</sup> In its 2009 October Progress Report, the European Commission reported that "the current legal framework is not in line with EU Standards and ILO Conventions, in particular as regards the right to organise, the right to strike and the right to bargain collectively, for both the private and public sectors".

<sup>4</sup> See the ITUC Annual Survey of Turkey 2009 at appendix 3

6. In 2011, the ILO Committee of Experts noted that it had issued a series of recommendations to the Turkish authorities to bring legislation into line with ILO standards in the previous two years. In particular the Committee stressed the right to organize as an area where national law failed to uphold ILO standards to which Turkey is party.
7. The findings of the observation mission are that freedom of association in Turkey is being severely undermined by three things: the use of restricted indictments (meaning the defendants do not know the charges against them); charges without specified evidence (making defence of any charges impossible or unreasonably difficult); and, an unduly long prosecution (acting as a deterrent to the exercise of freedom to expression, regardless of whether the prosecutions results in acquittal or conviction).
8. The recommendations are both specific (for acquittal of the defendants should the prosecution fail to specify the case against the defendants in relation to the phone-tapping evidence) and general (that Turkey should not use anti-terror legislation as an impediment to the exercise of freedom of association).

## **KEY FACTS**

9. In June 2009, the following 30 trade unionists were arrested and charged with the offence of being a member of a terrorist organisation:
  - (1) Lami Özgen, president of KESK;
  - (2) Songül Morsümbül, former woman secretary of KESK;
  - (3) Sakine Esen Yılmaz, woman secretary of Eğitim Sen;
  - (4) Gülçin İsbert, former woman secretary of Eğitim Sen;
  - (5) Abdurrahman Daşdemir, former general secretary of KESK;
  - (6) Elif Akgül Ateş, former member of Eğitim Sen Executive Committee;
  - (7) Haydar Deniz, former member of Eğitim Sen Supervisory Board;
  - (8) Hasan Soysal, former general secretary of KESK affiliated union BTS;
  - (9) Nihat Keni, the member of Eğitim Sen İzmir Branch No.6;
  - (10) Mustafa Beyazbal, the former president of Eğitim Sen İzmir Branch No.2;
  - (11) Mehmet Hanifi Kuruş, Mine Çetinkaya, Aziz Akikol, Hasan Umar, Harun Gündeş, Aydın Güngörmez, Süeda Demir, Şermin Güneş, Şeyhmus Belek, Erkan Deniz, İsmail Demir, Mahir Engin Çelik, Selçuk Haspolat, Kemal Karakoyun, Murat Meriç, Faysal Ceylan (all members of Eğitim Sen);
  - (12) Abdulcelil Demir, member of DİSK;
  - (13) Meryem Çağ, member of KESK affiliated union BES;
  - (14) Ahmet Demiroğlu, a retired teacher;
  - (15) Yüksel Mutlu, former member of Eğitim Sen.
10. KESK (Kamu Emekçileri Sendikaları Konfederasyonu) stands for Confederation of Public Employees Trade Unions. Eğitim Sen (Education and Science Worker's Union) is an affiliated union for teachers.
11. The charges were brought under the following legislation:

- (1) article 314/2 of the Turkish Penal Code; and,
- (2) article 3713/5 of the Anti Terrorism Law.

12. The Anti-Terrorism law defines terrorism in article 1:

“Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat. An organization for the purposes of this Law is constituted by two or more persons coming together for a common purpose. The term "organization" also includes formations, associations, armed associations, gangs or armed gangs as described in the Turkish Penal Code and in the provisions of special laws.”

13. Article 2 goes on to make an offence for any organisation that is founded to attain terrorist aims. Article 7 provides that punishment for a terrorist offence is:

“imprisonment of between 5 and 10 years and with a fine of between 200 million and 500 million Turkish liras; those who join [terrorist] organizations shall be punished with imprisonment of between 3 and 5 years and with a fine of between 100 million and 300 million Turkish liras. Those who assist members of organizations constituted in the manner described above or make propaganda in connection with such organizations shall be punished with imprisonment of between 1 and 5 years and with a fine of between 50 million and 100 million Turkish liras, even if their offence constitutes a separate crime. Where assistance is provided to such organisations in the form of buildings, premises, offices or extensions of associations, foundations, political parties, professional or workers' institutions or their affiliates, or in educational institutions or students' dormitories or their extensions the punishments mentioned in paragraph 2 shall be doubled. In addition, activities of associations, foundations, trade unions and similar institutions found to have supported terrorism shall be banned and the institutions may be closed down by a court's decision. Assets of these institutions will be confiscated.”

14. Article 3 defines certain offences in the Penal Code as terrorist offences, and article 5 allows for the penalties for those offences to be increased by one half.

15. Article 312 of the Penal Code concerns conspiracy, stating:

- “(1) If two or more persons make a deal to commit any one of the offenses listed in fourth and fifth sections of this chapter by using suitable means, the offenders are sentenced to imprisonment from three years up to twelve years, depending on the quality of offense.
- (2) No punishment is imposed on the persons who break up the alliance before commission of the offense or commencement of investigation.”

16. On 28 May 2009, the Jandarma, Turkey's military police force, raided and searched KESK's offices, along with the houses and workplaces of some of the trade unionists. After the arrests, 22 of the trade unionists were imprisoned, and the indictments against them restricted, meaning that they did not have access to the details of the charges against them. The detention was in Turkey's infamous "F-Type" prisons, with reportedly deplorable conditions.<sup>5</sup> When details of the charges were eventually made known to the trade unionists, the allegations included membership of an illegal armed group, creating an unlawful network within KESK, and participating in unauthorised meetings.
17. Concerns were raised that the evidence contained within the indictment regarded KESK's support for Kurdish language rights and other legitimate union activities, rather than demonstrating the participation or advocacy of violence.<sup>6</sup>
18. The first hearing was in 19 - 20 November 2009, with a delegation of representatives from international and European trade unions and Global Union Federations in attendance, and a legal observer from ICTUR.
19. Before the submission of the indictment, on 31 July 2009, the defence lawyers had not had access to their defendants' files. The accusations were all written up after police had tapped the phones of 36 KESK members and leaders. The only evidence against the KESK members stemmed from their recorded telephone conversations and their e-mail exchanges. During the trial itself, the rights of the defence were constantly violated, with the president of the court himself conducting the interrogations, the defence lawyers being prevented from speaking to the defendants, and only one female guard being present although ten women were standing trial.<sup>7</sup>
20. The court ruled that all the detainees should be freed, but must reappear in court in March 2010.<sup>8</sup> Other hearings took place on the following dates: 22<sup>nd</sup> June 2010, 22<sup>nd</sup> October 2010, and 29<sup>th</sup> April 2011.

## HEARING ON 21 OCTOBER 2011

21. The case was scheduled for 10.00am in the Criminal Court in Izmir.
22. Around 500 trade union members demonstrated outside the court demanding basic labour rights. A short statement was made by Lami Özgen, president of KESK, proclaiming KESK's right to freedom of association as fundamental.

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<sup>5</sup> Immigration and Refugee Board of Canada, *Turkey: Prison conditions and the treatment of prisoners in civilian and F-type prisons, including the prevalence of torture and the state response to it (2006-2007)*, 7 June 2007, TUR102517.E, available at:

<http://www.unhcr.org/refworld/docid/47d6547e23.html> [accessed 28 October 2011]

<sup>6</sup> See Amnesty International report, "Concerns in Turkey – July to December 2009", AI Index EUR 44/004/2010

<sup>7</sup> See statement by International Trade Union Confederation's (ITUC) Annual Survey of Violations of Trade Union Rights, entitled "Turkely (2010) – Public Sector Union KESK on trial"

<sup>8</sup> See "Teachers on Trial" article, by Daniel Blackburn, Director of ICTUR

23. At the hearing itself, the public gallery was packed, with people sitting on the steps. Several factors about the procedure would strike an observer as being at odds with recognised elements of a fair trial. The prosecutor sat alongside the three judges, and at no stage uttered a word to the court, although could occasionally be seen talking to a judge. Not only does this offend against the principle that the prosecution be independent of the court, but it made it difficult to ascertain what case the defence was being asked to meet. It meant that the defendants were effectively being asked to prove their innocence, rather than defend any defined allegations.
24. The court transcriber only recorded the judge's summary of the witness' evidence and the lawyers' submissions; any inaccuracies were corrected by either the lawyers, or on some occasions by the public, by shouting out. There is a clear risk that any subtleties in evidence or submissions will be erased by this process, as well as the possibility of evidence being changed through being recorded (the very mischief that verbatim transcription is meant to eradicate). A screen in front of the lead judge means that he could see what the transcriber is recording; for example, when defendants were repeating their pleas, he asked the transcriber to "cut and paste" a previous entry.
25. Although the judges had a bundle of papers, it was clear that the lawyers for the defendants did not have these documents in front of them. For example, towards the end of the hearing, the judge referred to 16 folders of phone tapping evidence, although it is unclear how much of this has been seen by the defendants and their lawyers. Without access to the evidence that forms the prosecution case, any defence will be at best misdirected, and at worst completely ineffectual.
26. Proceedings opened by the judge confirming the presence and identity of the defendants and their representatives. The lead lawyer then announced that a general defence would be given on behalf of all the defendants, with the aim of allowing proceedings to be concluded within the allotted time. This meant that 4 of the defendants gave evidence (Lami Özgen , Sakine Esen Yılmaz, Mehmet Hanifi Kuruş and Ahmet Demiroğlu), of between 10 – 15 minutes each. All of the defendants then repeated that they demanded their release. (As an aside, the judge remarked that he would probably be criticised by the European Court of Human Rights for "cutting and pasting" parts of the court record, an indication in any event that the judge was aware of the international observers present.)
27. The defendants all spoke of the evidence against them being based on their union activities, including organising educational events and evening meetings, conducting internal elections, and holding meetings in public. Many said that they believed the trial to be "political" rather than "legal".
28. The lawyers then made their submissions; three gave defences on behalf of all the defendants, and each lawyer then adopted those submissions, as well as making any short remarks relevant to their individual client. Written defences were handed to the judge, so that he did not have to take notes.
29. The general defences criticised the manner of the prosecution: both the perceived aim of the prosecution in treating an organised labour movement as a terrorist

organisation, and the use of secret video evidence and telephone tapping. One lawyer stated that national law prohibited a prosecution being brought on phone tapping evidence alone, as has happened in this case. Another criticism was that the prosecutor had simply adopted the evidence given to them by the police, they had not sought to build a case by categorising this evidence under particular charges, or stating which parts they were placing reliance upon. One lawyer said that the prosecution needed to specify which parts of the phone tapping evidence they were relying upon.

30. The paucity of evidence was also frequently commented on; many of the meetings that were the subject of the charges were held in public, and there was no evidence throughout of any connection between KESK and the PKK (the Partiya Karkerên Kurdistan or Kurdistan's Workers Party, listed as a terrorist organisation by NATO and the EU). It was commented upon that the prosecution did not distinguish between violence and trade union activities. For example, people travelling a long distance to come to Izmir for a meeting was cited as evidence of terrorism, when it could equally be explained as attending a trade union meeting.
31. One lawyer stated that her client was alleged to have a forbidden book in her home, but this was a mistake, as the ban on this particular book had been lifted many years ago.
32. Around 5pm, at the conclusion of the defence, the judge stated that the defence had formally concluded. He remarked that if he were to start giving judgment now, it would take a very long time, and so he would give judgment at another hearing. He went on to comment that he wanted to go over the content of the phone tapping evidence again, of which there were 16 files. It should be noted that these reasons are inconsistent: either the judge is ready to give judgment, or he needs to review the evidence again, but both situations cannot be accurate at the same time.
33. The defendants' lawyers commented that the defendants were arrested in June 2009, and that the trial had been ongoing since then. Although the defendants were no longer imprisoned, they were banned from leaving the country, and this should be lifted if there were to be any further delays.
34. The judge refused to lift this ban, and said that he would give judgment on 28<sup>th</sup> November 2011. The defendants then had their last word, where each of them repeated that there was no evidence against them and they believed they should be acquitted.
35. The public reaction to the adjournment was broadly positive, as the judge had not decided that the defendants were guilty, and the delay was short until the next hearing.

## EVALUATION OF THE HEARINGS/TRIAL PROCESS (extent complied with international standards)

### *Legal framework*<sup>9</sup>

36. The main international standards relevant for the purposes of this report are set out in ILO Conventions 87 and 98, along with ECHR Articles 11 and 6, all of which have been ratified by Turkey.
37. In the case of *Demir and Baykara v Turkey*,<sup>10</sup> the Grand Chamber unanimously held that Article 11 of the ECHR should now be interpreted in line with the jurisprudence of ILO committees (as well as the standards and principles enshrined in the European Social Charter). The ECtHR, in defining the meaning of the ECHR, can and must take into account elements of international law other than the Convention. The consensus emerging from specialised international instruments (such as ILO conventions) and from the practice of contracting states may constitute a relevant consideration for the Court when it interprets the provisions of the EHRC.<sup>11</sup>
38. The ECtHR also held that article 11(2) of the EHRC indicates that states are bound to respect freedom of assembly and association, subject to the possible imposition of “lawful restrictions” on the exercise by members of its armed forces, police or administration of the rights protected in article 11. The restrictions imposed on the three groups mentioned in Article 11(2) are to be construed strictly and should therefore be confined to the “exercise” of the rights in question. These restrictions must not impair the very essence of the right to organise.<sup>12</sup>
39. The ILO Committee on Freedom of Association note the following relevant principles in their “Digest of Decisions”, under the heading on Civil Liberties:
- “41. Allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities.  
[...]  
The detention of trade union leaders or members for trade union activities or membership is contrary to the principles of freedom of association.  
[...]
62. The arrest, even if only briefly, of trade union leaders and trade unionists, and of the leaders of employers’ organizations, for exercising legitimate activities in relation with their right of association constitutes a violation of the principles of freedom of association.  
[...]
64. The detention of trade unionists for reasons connected with their activities in defence of the interests of workers constitutes a serious

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<sup>9</sup> This section relies heavily on Sarah Hemingway’s observation report for ICTUR in the Sinter Metal trial.

<sup>10</sup> [2009] IRLR 766

<sup>11</sup> *ibid*, at [85]

<sup>12</sup> *ibid*, at [96] – [98], in the context of the right of civil servants to organise and form trade unions

interference with civil liberties in general and with trade union rights in particular.

[...]

66. The detention of trade unionists on the grounds of trade union activities constitutes a serious obstacle to the exercise of trade union rights and an infringement of freedom of association.

67. The arrest of trade unionists and leaders of employers' organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities.

68. The apprehension and systematic or arbitrary interrogation by the police of trade union leaders and unionists involves a danger of abuse and could constitute a serious attack on trade union rights.

69. The arrest and detention of trade unionists without any charges being laid or court warrants being issued constitutes a serious violation of trade union rights.

70. The arrest of trade unionists against whom no charge is brought involves restrictions on freedom of association, and governments should adopt measures for issuing appropriate instructions to prevent the danger involved for trade union activities by such arrests.

[...]

72. While persons engaged in trade union activities or holding trade union office cannot claim immunity in respect of the ordinary criminal law, trade union activities should not in themselves be used by the public authorities as a pretext for the arbitrary arrest or detention of trade unionists.

[...]

75. The arrest and detention of trade unionists, even for reasons of internal security, may constitute a serious interference with trade union rights unless attended by appropriate judicial safeguards.

[...]

81. The prolonged detention of persons without bringing them to trial because of the difficulty of securing evidence under the normal procedure is a practice which involves an inherent danger of abuse; for this reason it is subject to criticism.

82. Although the exercise of trade union activity or the holding of trade union office does not provide immunity as regards the application of ordinary criminal law, the continued detention of trade unionists without bringing them to trial may constitute a serious impediment to the exercise of trade union rights.

[...]

93. The arrest and sentencing of trade unionists to long periods of imprisonment on grounds of the "disturbance of public order", in view of the general nature of the charges, might make it possible to repress activities of a trade union nature.

94. In cases involving the arrest, detention or sentencing of a trade union official, the Committee, taking the view that individuals have the right to be presumed innocent until found guilty, has considered that it was incumbent upon the government to show that the measures it had taken were in no way occasioned by the trade union activities of the individual concerned.

[...]

98. It is one of the fundamental rights of the individual that a detainee be brought without delay before the appropriate judge and, in the case of trade unionists, freedom from arbitrary arrest and detention and the right to a fair and rapid trial are among the civil liberties which should



be ensured by the authorities in order to guarantee the normal exercise of trade union rights.

[...]

100. It should be the policy of every government to ensure observance of human rights and especially of the right of all detained or accused persons to receive a fair trial at the earliest possible moment.

[...]

102. Detained trade unionists, like anyone else, should benefit from normal judicial proceedings and have the right to due process, in particular, the right to be informed of the charges brought against them, the right to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing, and the right to a prompt trial by an impartial and independent judicial authority.

[...]

104. As concerns allegations that legal proceedings are overly lengthy, the Committee has recalled the importance it attaches to such proceedings being concluded expeditiously, as justice delayed is justice denied.

[...]

106. The absence of guarantees of due process of law may lead to abuses and result in trade union officials being penalized by decisions that are groundless. It may also create a climate of insecurity and fear which may affect the exercise of trade union rights.

107. The safeguards of normal judicial procedure should not only be embodied in the law, but also applied in practice.

[...]

109. The Committee has always attached great importance to the principle of prompt and fair trial by an independent and impartial judiciary in all cases, including cases in which trade unionists are charged with political or criminal offences.

110. If a government has sufficient grounds for believing that the persons arrested have been involved in subversive activity, these persons should be rapidly tried by the courts with all the safeguards of a normal judicial procedure.

111. In cases where the complainants alleged that trade union leaders or workers had been arrested for trade union activities, and the governments' replies amounted to general denials of the allegation or were simply to the effect that the arrests were made for subversive activities, for reasons of internal security or for common law crimes, the Committee has always followed the rule that the governments concerned should be requested to submit further and as precise information as possible concerning the arrests, particularly in connection with the legal or judicial proceedings instituted as a result thereof and the result of such proceedings, in order to be able to make a proper examination of the allegations.

[...]

117. Any trade unionist who is arrested should be presumed innocent until proven guilty after a public trial during which he or she has enjoyed all the guarantees necessary for his or her defence.

118. The Committee has recalled that the International Covenant on Civil and Political Rights, in Article 14, states that everyone charged with a criminal offence shall have the right to adequate time and the necessary facilities for the preparation of his defence and to communicate with counsel of his own choosing.

[...]

203. In cases in which martial law has been declared and special provisions adopted against terrorism, although the Committee is aware of the serious situation of violence which may affect a country, it has to point out that as far as possible recourse should be made to the provisions of the ordinary law rather than emergency measures which are liable, by their very nature, to involve certain restrictions on fundamental rights.”<sup>13</sup>

40. It is worth noting that Turkey’s accession to the European Union is contingent upon full trade union rights being respected in line with EU standards and the relevant ILO conventions, in particular as regards the right to organise. It is axiomatic that the possibility of future reforms is no protection for unions and workers in the present.
41. Currently, the relevant international standards and principles are reflected to a degree within the national legal framework, but they are subject to wide ranging restrictions. In particular, the application of the Anti-terrorism law has the ability to operate as a very effective disincentive to the exercise of any rights to organise.
42. The Turkish Constitution protects the rights and freedoms of association in Part Two: Article 33 allows for everyone to form or become a member of an association without prior permission; and Article 34 protects the right of everyone to hold peaceful meetings and demonstration marches without prior permission, although that right can be restricted by law on a number of grounds and “the formalities, conditions and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law”.<sup>14</sup>
43. As the ILO principles cited above show, which are an absolute baseline, rather than a recommended maximum, the freedom to associate can be undermined by the application and procedure followed in relation to other laws (in this instance, the criminal prohibition on terrorism and related activities). In particular, if the prosecution is to persist with the allegations of terrorist activity, the necessary safeguard must be that these allegations are properly particularised, as principle 111 of the ILO Digest states.
44. The delay in bringing charges, and in conducting the prosecution as a whole, further undermines the prosecution; it would be in the state’s interest to secure a conviction if the individuals were terrorists, as they are not currently detained; however, if the purpose was to discourage trade union activities, then a prolonged prosecution would fulfil this purpose.
45. The undermining of the right to organise is further shown through the procedure of restricted indictments; specific allegations should be formed from the evidence collated, and then a charge brought against the individual, rather than (as appears

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<sup>13</sup> Digest of decisions of the Committee on Freedom of Association - Fifth (revised) edition, 2006

<sup>14</sup> It is those restrictions that prohibited a demonstration taking place before the court hearing on 4 August 2010.

to have happened in this case) the charge being brought, and then the prosecutor sifting through evidence to see what allegations can be substantiated.

46. Since the full hearing was not yet been concluded, it was not possible to assess whether the court applied the substantive law in conformity with international standards and principles.
47. However, it can be said that there are significant concerns regarding the procedural aspects of the prosecution, both in terms of delay, and the failure of the prosecution to shape the evidence given to it by the police into any meaningful set of allegations or charges.
48. Justice delayed is justice denied, and for the two years that this case has been ongoing, a spectre hangs over the defendants in that they are unable to proceed about their daily lives free from the possibility of future imprisonment. There is an obvious “chilling effect” on conducting trade union activities, as such a lingering prosecution acts as a deterrent to membership or participation. From the information made available to the Observer, there does not appear to be a good reason for such a protracted process, other than allowing the prosecution additional time to form a case.
49. According to Article 6(1) of the ECHR, everyone is entitled to a fair and public hearing within a reasonable time. Where there has been undue delay, an applicant may take a case before the Court in Strasbourg (ECtHR) immediately under Article 35 of the Convention, without exhaustion of local remedies. In assessing whether the time taken is unreasonable, the Court considers six criteria: the complexity of the case; the conduct of the applicant; the conduct of the competent authorities; what is at stake for the applicant in the proceedings; and the state of those proceedings. Time periods of cases considered by the Court varied from 1 year and 11 months<sup>15</sup> to 12 years and 10 months, with the majority of delays being in a of 5-7 year range.
50. Given the volume of phone tapping material, the prosecution has had ample time to state the grounds on which it is alleging members of KESK to be members of a terrorist organisation. While it is unlikely that this case would be admitted under Article 35 to the ECtHR at this stage, any delay beyond the scheduled November hearing could be a basis on which to take the case straight to the ECtHR for a breach of Article 6.
51. All of the issues above impede access to justice for the defendants.

## **CONCLUSION**

52. Due to the hearings being adjourned, it has not been possible to comment on the extent to which the court applied, or interpreted, the law in line with international standards.

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<sup>15</sup> *Meier-Sax v. Switzerland*, 12421/86 : 1 year, 11 months and 19 days, 11/05/1988 (admissible).

53. However, it has been possible to draw conclusions about the general conduct of proceedings and the nature of the legal protection afforded to union members in Turkey.
54. Providing a right to organise is only of value if the right can be effectively organised; it follows that the right is emaciated if its exercise is penalised in practice. The use of the Penal Code and Anti-Terrorism law in against KESK means that members are placed in doubt about whether trade union activities are lawful. This doubt, whether it is in the intention of the prosecuting authorities or even the unintended consequence of their prosecution, is enough to render the right to organise potentially ineffective.

## RECOMMENDATIONS

Specific recommendations – to rectify breaches of international law:

- In accordance with the interpretation of Convention rights by the ILO Committee on Freedom of Association, the Court should:
  - Ask the prosecution to specify the parts of the phone tapping evidence that they are relying upon, and to identify which evidence supports which charge
  - To acquit the defendants in the event that the prosecution fails to specifically detail its case against the defendants
  - To lift the ban on the defendants travelling abroad while the prosecution is ongoing
  - To ensure that the prosecution is rapidly concluded, given the length of time that has already passed

General recommendations – possible reform:

- The legislature should provide for greater protection of trade union rights and freedoms in line with international standards;
- There should be effective enforcement of the rights enshrined in national labour laws (and the rights provided for in international law);
- The judiciary should ensure that prosecutions are conducted timeously;
- Pre-trial detention should be limited to cases where specific charges are brought, so that the judiciary can ensure that there is a case to answer should the detention be challenged;
- Restricted indictments should not be used unless there are exceptional circumstances justifying their use; and,
- The presumption of innocence should mean that the default position is the defendants are not deprived of their liberty or ability to travel while proceedings are ongoing, unless the prosecution can establish that the risks present in any particular case shift that presumption.

Possible actions

- In the event of further delays it is potentially open to the defendants to complain of the unreasonable delay to the court and to pursue their case before the ECtHR in Strasbourg.
- The defendants could make a complaint to the ILO Committee on Freedom of Association regarding non-compliance with the principles of freedom of association.

**Appendices (available on request from ICTUR):**

- 1. Ordre de mission**
- 2. ICTUR briefing**
- 3. ILO Conventions 87 and 98**
- 4. ITUC Annual Survey Turkey 2010**
- 5. Turkish Anti-Terror Law**
- 6. Turkish Criminal Code**