

## ICTUR TRIAL MONITORING REPORT: ISTANBUL, 6 FEBRUARY 2015

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### **A. Background**

1. Over the past decades, more often than not, Turkish authorities have banned annual May Day celebrations at Istanbul’s Taksim Square. This is despite the fact that Turkey is a member of the International Labour Organisation (“ILO”) which has consistently held that the “right to organise public meetings and processions, particularly on the occasion of May Day, constitutes an important aspect of trade union rights”.<sup>1</sup> It is also despite the fact that Turkey has ratified the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), both with protect the right to freedom of assembly, and that Article 34 of the Turkish Constitution protects the right to peaceably hold meetings and demonstrations. Nevertheless, the Law on Demonstrations and Public Meetings (Law No. 2911) has routinely been used to prohibit celebrations and to prosecute those who organise or participate in gatherings.

2. Five leaders of trade unions that represent a wide range of unionized workers from teachers to doctors, to architects and engineers were summoned to appear on Friday, 6 February, 2015 at the Istanbul Criminal Court of First Instance No. 28 in connection with events at Taksim Square on 1 May 2014. DISK and KESK, two trade unions whose leaders were named in the Indictment, requested that International Centre for Trade Union Rights (“ICTUR”) provide a legal observer (“Observer”) for the hearing.<sup>2</sup> The Observer was given two tasks: (i) to provide the international

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<sup>1</sup> See *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fourth (revised) edition, 1996 (“1996 Digest”), para. 134; 300<sup>th</sup> Report, Case No. 1791, para. 339; 302<sup>nd</sup> Report, Case No. 1840, para. 350; 311<sup>th</sup> Report, Case No. 1851/1922, para. 478; 335<sup>th</sup> Report, Case No. 2270, para. 1393; and 337<sup>th</sup> Report, Case No. 2323, para. 1039.

<sup>2</sup> The Observer, Lori Ann Wanlin, is a Member of the Law Society of Upper Canada and currently works as an Associate Legal Officer for the UN International Criminal Tribunal for the former Yugoslavia. She is not employed by

human rights community with a clear and independent assessment of how the day unfolded; and (ii) to be seen to be present by the local lawyers and others attending the hearing. The following trial monitoring report (“Report”) has been prepared in fulfilment of the former. With respect to the latter, in addition to attending the hearing, the Observer was asked to give a few comments at the press conference held on the courthouse steps before the hearing. A copy of the brief address given to the crowd and media gathered is included in Annex A to the Report.

## **B. Relevant Domestic Law**

3. The following recitation of relevant domestic legal provisions is not a complete overview of all the laws at play in the present case. Rather, it is meant to help give the reader a general understanding of three legal instruments that are referred to in the Report: Turkish Constitution; the Law on Demonstrations and Public Meetings (Law No. 2911); and the Turkish Penal Procedure Code.

4. Article 34 of the Turkish Constitution provides:

“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

...

The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”

5. Article 27 of the Law on Demonstrations and Public Meetings (Law No. 2911) criminalises “inciting the public to illegally assemble and demonstrate”. The sanctions for violating the law range from 6 months to 5 years. Individuals who use violence against law enforcement officials, who resist attempts to disperse, and who are found to have organised the gatherings are subject to sentences at the higher end of the scale. For example, Article 32 in relevant part reads:

“1. Unarmed persons taking part in an unlawful meeting or procession who, instead of dispersing of their own motion after having been warned or ordered to do so and who thus have to be forcefully dispersed by government forces, are liable to be sentenced to a term of imprisonment of between one and three years.

...

2. Unless their action breaches another criminal law provision which stipulates a more severe punishment, persons who resort to violence or making threats while being dispersed, or who resist the attempts to disperse them, are liable to be sentenced to a term of imprisonment of between three and five years.

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ICTRU or any trade union or affiliate. She attended the hearing in her personal capacity and not as a representative of the Tribunal, or of the United Nations in general. Similarly, the views expressed herein are those of the Observer in her personal capacity and do not necessarily represent the views of the Tribunal, or of the United Nations in general.

Notably, organisers as a committee can face collective responsibility – which may include both civil and criminal liability.<sup>3</sup>

6. Article 172 (1) of the Turkish Penal Procedure Code provides:

In cases where at the end of the investigation phase there is no evidence with sufficient gravity to justify the suspicion which is required to open a public claim, or there is no legal possibility of prosecution, then the public prosecutor shall render a “decision on no ground for prosecution”. This decision shall be notified to the and to the suspect who has been priorly interviewed or interrogated. The decision shall contain the right to oppose, time limit and authority of possible opposition.

### **C. The Indictment**

7. The six page Indictment was issued on 15 October 2014 by the Terrorism and Organized Crime Bureau of the Office of the Prosecutor. It alleges that Mrs. Arzu Çerkezoğlu, General Secretary of DISK; Mr. Lami Özgen, Co-President of the national trade union federation KESK; Mr. Mehmet Soğancı, President of the engineers and architect’s union, TMMOB; Mr. Ahmet Özdemir Aktan, Chair of the Headquarters Council for the doctor's union TTB; and Mr. Kani Beko, President of the national trade union centre DISK, violated Article 27 of the Law on Demonstrations and Public Meetings (Law No. 2911) by “inciting the public to illegally assemble and demonstrate” in relation to events at Istanbul’s Taksim Square on 1 May 2014. It enumerates 55 incidents that occurred in 15 locations that are alleged to have been perpetrated by protestors who had gathered to mark the day. The majority of incidents listed of damage to property—an ATM, a pizza restaurant, a police station - but also refers to police officers who were hit by stones.

### **D. The Hearing<sup>4</sup>**

8. The hearing was heard in a packed courtroom in the Istanbul Criminal Court of First Instance No. 28 on the afternoon of Friday 6 February 2015. Access to the proceedings was restricted as the courtroom selected for the hearing was quite small—despite the availability of larger venues. Many of those who were able to get past the security officers charged with managing the crowd were unable to find a place to sit and stood for the duration of the proceedings. Despite the large number of people, security in the courtroom itself was minimal and the atmosphere was

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<sup>3</sup> See Regional Study: The right to freedom of assembly in the Euro-Mediterranean region Part I: Legislation Review, November 2013, Turkey, p. 144 <<http://www.euromedrights.org/eng/2013/11/27/the-right-to-freedom-of-assembly-in-the-euro%E2%80%91mediterranean-region/>> retrieved on 2015-03-23.

<sup>4</sup> The trial observer does not speak Turkish. She is grateful for the interpretation from Turkish to English and insight into the legal system was provided by an attorney and Phd Candidate on Human Rights at Koc University of Istanbul. Any errors contained within this report are wholly my own.

relatively relaxed. This may have been in part due to the fact that none of the Accused had been in pre-trial detention.

9. The single Judge who presided over the proceedings began by confirming the identities of each of the five leaders who appeared before her by verifying each leader's occupation and income. Mr. Lami Özgen, Mr. Kani Beko, Mrs. Arzu Çerkezoğlu, Mr. Mehmet Soğanci, and Mr. Ahmet Özdemir Aktan ("Five Leaders") all confirmed the information. She then read the Indictment.

#### 1. Declarations by Five Leaders

10. The Five Leaders, who sat on a bench directly in front of the Judge, each stood up and took about 15 to 20 minutes to present their case. The declarations were not legal arguments, nor were they attempts to deny responsibility. In line with the strategy announced at the press conference held before the hearing on the courthouse steps— the Five Leaders went on the offensive against the government in an effort to put the attitudes of the government on trial.

11. The Judge was told key events in the history of May Day in Turkey including of the deaths in 1977 when gunmen opened fire on those gathered in the square killing 36 people. She was told of the bans imposed on celebrating May Day, the violence faced by those who gathered, and the impunity of those responsible for the violence. She also told of the dangers that pepper spray has on the health of those who ingest it. She heard that Government-proposed alternate locations to mark May Day could not be accepted as Taksim Square possesses a special significance not unlike London's Trafalgar Square or Berlin's Alexanderplatz. She was reminded that not only was this a restriction on the freedom of assembly but also a restriction on the freedom of expression guaranteed by both the Turkish Constitution and the ECHR. She was told that on 1 May 2014 the streets surrounding Taksim Square were closed at 4:00 a.m. All transport to and from Taksim Square was blocked. There were no cars, no trains, and no boats.

12. After each of the Five Leaders made their declarations, the Judge summarized the main points which were taken down by the stenographer. She was also given a copy of the submission in hard copy. In some cases she asked follow up questions—in other cases she didn't. When she did the questions were asked directly to the Five Leaders who answered them directly—without seeking the guidance of counsel who were sitting in a panel on the right hand side of the courtroom.

13. For example, referring to a video included on a CD that was attached to the Indictment, the Judge noted that Mr. Kani Beko was shown speaking to security forces. She asked whether he succeeded in going to Taksim Square. Mr. Beko responded that he discussed going with security forces but was denied access. Everything was blocked—even the handful of people who wished to

lay flowers to commemorate those who died in 1977 were blocked. He concluded that it was effectively a state of emergency.

14. Mr. Ahmet Özdemir Aktan, who represented the doctor's union, was asked what prompted the police to use the pepper spray. "Tradition", he responded. In response to the Judge's question as to whether the pepper spray was used all of a sudden, she was told that it was released without any prior notification – at a forbidden angle and at a forbidden distance.

15. After the declarations, the Judge then asked each of the Five Leaders to enter a plea. They were each offered a five year suspended sentence, provided they violate any other laws, and they each rejected the offer and plead not guilty.

16. On several occasions the Judge referred to a video that contained footage of the events of 1 May 2014. After the hearing resumed following a short break, the Judge played the video. Everyone in the courtroom focussed their attention to the small screen sitting on the bench beside the Judge. Three of the Five Leaders—Mr. Kani Beko, Mr. Lami Özgen and Mrs. Arzu Çerkezoğlu—could clearly be seen on the video. The footage also showed tear gas being released though it was unclear what prompted the authorities to do so as it seemed to have been fired quite suddenly. Once again the Judge asked about Mr. Kani Beko about his discussion with the security forces and the attempts to lay flowers to commemorate those who died in 1977. She queried whether he was going with the group he was with or whether he was waiting for other to join the group before proceeding. "Just a small group", he responded. "Union leaders".

## 2. Submissions by the Five Leaders' Defence Counsel

17. The Judge then invited the submissions of the Defence. The first of several defence counsel who would make submissions rose and informed the court that the video had been sent by the police. It was asserted that some parts of the footage had been cut from the video and that the missing segments could be found on social media. The Defence went on to present photographic evidence demonstrating the severity of the gas attack as well as copies of newspapers with stories covering the events in question. This submission was followed by extensive legal and factual arguments.

18. Several references were made to the November 2012 decision of the European Court of Human Rights ("ECtHR").<sup>5</sup> In this case that concerned the banning of a 2008 May Day rally, and was brought before the ECtHR by KESK and DISK, the court held that Turkey had violated Article

11 of the ECHR. Article 11 of the ECHR guarantees the right to freedom of peaceful assembly and to freedom of association with others. It includes the right to form and to join trade unions for the protection of ones interests. It provides that “[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” Although the decision focused more on policing than on the banning of the rally, it is nevertheless an important precedent especially with respect to the chilling effect on the actions of the Turkish authorities have on the exercise of Article 11 rights.

19. It was emphasised that when one enjoys a right – one should not be prosecuted for the exercise of that right. Further, citing the fact that the authorities permitted gatherings at Taksim Square for religious holidays but placed restrictions on May Day celebrations, it was alleged that the government had failed in its duty to ensure equality before the law.

20. The Defence also contended that the Indictment was prepared by the police and that it contained allegations that were untrue – such as those that gathered failed to disperse when asked. The Observer notes that those who refused to disperse face a higher sentence. They further alleged that, rather than review and revise the document as it is incumbent upon a prosecutor to do, the prosecutor simply signed it. Referring to Turkish Criminal Procedure Code, they argued that allegations contained within the Indictment lacked sufficient gravity to proceed with the prosecution.

### 3. Submissions by Interveners

21. After the Defence counsel representing the Five Leaders finished their submissions, additional arguments were put forward by “interveners”. The three rows behind the Five Leaders were filled with over 45 members of the Turkish bar. The procedure seems to grant these individuals, who registered before the hearing, leave to make submissions. Those who did represented similarly placed individuals, namely other unions, but it was explained to the Observer that this was not a requirement.

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<sup>5</sup> *Disk and Kesik v. Turkey*, no. 38676/08, (27 November 2012).

#### 4. Absence of Submissions by Prosecutor or Government

22. Notably absent were submissions from the Prosecutor or the Government. Neither the Prosecutor nor a representative was present. Three lawyers who were acting on behalf of the Government were present, and could have addressed the court, made no submissions.

#### 5. Hearing Adjourned

23. Although the attention of those in the gallery waned as the extensive and detailed legal arguments advanced by the defence counsel, they seemed to have held the Judge's attention more than the more political submissions given by the Five Leaders. At the end of the afternoon, there was much anticipation in the courtroom that the Judge would render a verdict. Instead, noting the comprehensive written submissions presented to her, the Judge indicated that she would take the time to read them before rendering a judgement. It was unclear whether the case is "closed", that no further submissions will be allowed, and that the Judge will simply render her decision on 24 March 2015, or whether after reviewing the written arguments she will seek additional submissions.

#### **E. Conclusion**

24. The fair trial rights of the Five Leaders appear to have been respected both before and during the hearing. First, although the courtroom selected for the hearing could have had more seating in the gallery to accommodate all the members of the public who wanted to attend, the hearing was nevertheless public. Second, the hearing was held before a Judge of the Criminal Court of First Instance No. 28, and although the judgment has yet to be rendered, neither the Judge's comments nor her behaviour raise questions about her independence and impartiality. Third, the hearing was held within a reasonable time, less than four months after the Indictment was issued on 15 October 2014. Considering the case presented at the hearing, it is unclear why it took several months to issue the Indictment following the events in question however the delay does not appear to have negatively impacted the Five Leaders. In this regard it is important to note that none of the Five Leaders were detained pending the hearing. Fourth, the Five Leaders were given adequate time and facilities to prepare their defence and were all represented by counsel. No witnesses were called during the case but that seems to have been the choice of the parties. The Five Leaders are all fluent in the language used by the Court and therefore not in need of the assistance of an interpreter.

25. The troubling aspect of the case against lies not with the procedural guarantees afforded to the Five Leaders – but rather with the decision to proceed, the charges laid, and ultimately the sentence sought.

26. Where there is “no evidence with sufficient gravity to justify the suspicion which is required to open a public claim, or there is no legal possibility of prosecution” the Prosecutor shall, pursuant to Article 172 (1) of the Turkish Penal Procedure Code, render a “decision on no ground for prosecution”. Given the evidence presented at the hearing it is unclear to the Observer on what basis the Prosecutor could have concluded that it had evidence of sufficient gravity to pursue the case.

27. The Observer notes that as a result of the Prosecutor’s decision not to make submissions many questions about the claims in the Indictment were left unanswered. Most notably, how the Five Leaders – who had called for a peaceful gathering and sought to lay flowers to commemorate those who died in 1977– were to be held responsible for 55 incidents of property damage and injuries sustained by police officers who were hit by stones. Although it is understood that under the Law on Demonstrations and Public Meetings Notably organisers as a committee can face collective responsibility, which may include both civil and criminal liability, to apply such a provision in the present case amounts to prosecutorial overreach.

28. The five-year sentence offered to the Five Leaders is yet another example of prosecutorial overreach. As noted earlier, the sanctions for violating the Law on Demonstrations and Public Meetings range from 6 months to 5 years. Based on the facts of the case, to offer a suspended sentence equivalent to the maximum available sanction is excessive.

29. Ultimately, it is difficult to explain why the Prosecutor would choose to proceed with charges against the Five Leaders with such a dearth of evidence supporting the allegations in the Indictment– unless the goal was to send a message to discourage those who hope to exercise their right to freedom of peaceful assembly. In this regard, the Observer draws the attention to the frequently cited ILO principle that allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities.<sup>6</sup>

30. The Observer holds out hope that the Judge will dismiss the case. The fact that the Judge indicated prior to adjourning the hearing that she would review the written submission gives the Observer hope that she will give appropriate consideration to numerous domestic and international legal instruments and precedents that support a dismissal.

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<sup>6</sup> See the 1996 *Digest*, para. 43; 305<sup>th</sup> Report, Case No. 1773, para. 365; 306<sup>th</sup> Report, Case No. 1884, para. 700; and 327<sup>th</sup> Report, Case No. 2018, para 117.



**F. Annex A – Observer’s Brief Address before hearing**

Dear Colleagues and Friends,

It is inspiring to be surrounded by so many people who have dedicated their lives to the fight for the respect of human rights.

The International Centre for Trade Union Rights sends lawyers like myself to act as legal observers to promote the rule of law, the right to a fair hearing, equality of arms, and compliance with the law. I would like to emphasise that each of the individuals on trial today have a panoply of rights protected by both international and domestic law: the right to be presumed innocent until proven guilty, the right to be informed of the charges brought against them; the right to a prompt trial by an independent judicial authority. These are but a few of the rights guaranteed.

My role today is to observe the proceedings and to report on them. In my report I will endeavour to report on whether the process is consistent with Turkey’s legal obligations – including those set out in the ILO Conventions and the European Convention of Human Rights, among others.

Thank you.