Case concerning the killing of Tahir Elçi and lack of effective investigation into his death

The undersigned organisations have been following recent developments in the case involving the prosecution of police officers allegedly involved in the killing of human rights lawyer Tahir Elçi in November 2015. We are concerned that the prosecution, as well as the court before which this case is being heard, fails to respect fair trial rights. We are further troubled by the Turkish authorities' continued violation of Turkey's international legal obligations to carry out a prompt, effective, impartial, and independent investigation into the death of one of its citizens and to ensure a fair trial by an impartial and independent tribunal for those accused of the killing of Tahir Elçi. The first hearing in this case, as described below, raises significant doubts that proceedings will be independent, impartial, and capable of establishing the facts and truth around the killing of Mr. Elçi and holding accountable those responsible for that killing, in accordance with international law binding on Turkey, as well as the 2016 United Nations (UN) Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol) on the Investigation of Potentially Unlawful Death.[1]

We are also concerned that the rights of the family of Tahir Elçi have not been respected during the criminal proceedings, as required by the Turkish Code of Criminal Procedure. Mr. Elçi's family members have not been assured of their right to full and effective remedies and a fair trial, as guaranteed by Turkey's international obligations, including access to justice and reparations as set out in the Minnesota Protocol.[2]

Background

Tahir Elçi was a prominent figure within the international and domestic lawyers' community. He had practiced law for around 25 years. At the time of his death, he was the President of the Diyarbakir Bar Association. He was well known for having acted for victims in a number of leading cases brought before the European Court of Human Rights (ECtHR) concerning, for example, the forced evictions of Kurdish villages, enforced disappearances, summary executions, and torture and ill-treatment by the security and/or state-affiliated forces.[3] Through his work on these cases, he contributed to the ECtHR's case-law, especially on the right to life and prohibition of torture. Throughout his personal and professional life, he fought against impunity and contributed to this struggle significantly. In addition to his work before the ECtHR, he was engaged with, and in some cases was a founding member of, several prominent non-governmental organizations (NGOs), including the Human Rights Foundation of Turkey and Amnesty International Turkey. He has received several prestigious awards nationally and internationally.

On 12 October 2015, during a TV interview, he shared his views on the Kurdish issue and the end of the peace process on a national channel, CNN Turk. Following his interview, he received numerous death threats and insults through social media and telephone. Government supporters and pro-government media appeared to start a campaign of intimidation and harassment against

[1] UN OHCHR, The Minnesota Protocol on the Investigation of Potentially Unlawful Death 2016. The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 2016, available at: https://www.un-ilibrary.org/human-rights-and-refugees/the-minnesota-protocol-on-the-investigation-of-potentially-unlawful-death-2016_0389ae17-en.
[2] Ibid, Para. 10.
[3] See http://hudoc.echr.coe.int/eng?i=001-61442; https://cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1ZqhYni2bmCMKCUoO3OYe7uDcHypWmv9EALzjBPhy4O8&font=Bitter-Raleway&lang=tr&initial_zoom=2&height=650

him. A few days later, after a request from the Bakırköy Public Prosecutor, an arrest warrant was issued against him by the Bakırköy 2nd Criminal Judgeship of Peace. He was arrested and subsequently charged with an alleged offence of "propagandising for a terrorist organisation through the press," which carries a sentence of imprisonment of up to 7.5 years. [4]

During the summer of 2015, violent clashes occurred between the Kurdistan Workers' Party (PKK) and the Turkish state forces in south-eastern Turkey. The government adopted stringent measures affecting the lives of thousands of civilians in the region and imposed 24-hour curfews in many cities, sometimes for months on end. Tahir Elçi, amongst others, commenced legal actions against the unlawful security measures of the government and its local administrative personnel. He also advocated to address the increasingly violent situation in the region. As a part of these activities, as the president of Diyarbakir Bar Association, he helped to organise a press conference to draw attention to the damage inflicted on the cultural and historic heritage in the region during the armed clashes. The press conference took place in front of a historic minaret damaged by security operations on the morning of 28 November 2015. During this conference, an armed clash took place between two armed PKK militia members and the police, during which Tahir Elçi was shot dead. His killing was publicly denounced by the international community.[5]

Despite assurances given by the Prime Minister, Mr. Ahmet Davutoğlu, that four investigators had been assigned to the case, no independent effective investigation was carried out. Notwithstanding the fact that the police officers at the scene should have been regarded as suspects, the police themselves carried out the investigations. The current prosecution did not begin until after a London based group, Forensic Architecture, published its report on the incident in February 2019. This report concluded, after a detailed forensic investigation of the video footage of the scene at the time Mr. Elçi was killed, that three police officers were engaged in active shooting at the time of the killing and that:

> "*- Tahir Elçi was killed when he was struck by a single bullet fired within the time frame of 7 seconds and 12 frames (07:12), at approximately 10:55 am on 28 November 2015.*
>
> *- Neither of the two PKK members appear to have fired the fatal shot.*
>
> *- All of the shots fired in the investigative time frame have similar sonic signatures and show no auditory evidence of a long-range weapon fired from a considerably different distance.*
>
> *- Three police officers (A, C, and D) had a direct line of fire towards Elçi, and are seen discharging their weapons multiple times. Of them, police officer C is the only officer who discharges his weapon with a clear, unobstructed view towards Elçi."* [6]

Following the publication of the Forensic Architecture report, the prosecutor was left with little choice than to indict the 3 police officers named in the report as the potential perpetrators. However, we are concerned about a number of aspects of this indictment:

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[4] https://www.hrw.org/news/2015/10/20/turkey-rights-lawyer-faces-terrorism-probe

[5] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16827&LangID=E; https://www.amnesty.org/en/latest/news/2015/11/at-the-funeral-of-tahir-elci-a-giant-in-turkeys-human-rights-movement-the-sense-of-loss-is-deafening/; https://www.hrw.org/news/2015/11/28/turkey-human-rights-lawyer-murdered; https://www.ccbe.eu/NTCdocument/HR_Letter_Turkey_Tah1_1449055818.pdf; https://lawyersforlawyers.org/en/turkey-lawyer-tahir-elci-shot-dead/; https://content.forensic-architecture.org/wp-content/uploads/2019/03/FA-TE-Report_12_English_public.pdf.

- The indictment has many serious flaws, e.g., in its determination of the events, legal classification of the acts, and sentencing request against the police officers.

- Regarding the determination of events, it is suggested in the indictment that the situation of general chaos at the time of the shooting made it impossible to identify who fired the shot which killed Tahir Elçi. The prosecutor postulates that it was possible that one of the militants could have fired the shot and prosecutes the militant for intentional homicide. This conclusion is in direct contradiction to the findings of the Forensic Architects report which found that *"none of the forty gunshots that are visible or audible during the period of the shooting (during which time multiple cameras were recording the scene) were fired by the two PKK militants. Rather, the only shots that could have been that which killed Elçi were fired by one of the three officers we identified."*[7]

- Under the Turkish Penal Code, intentional homicide requires life-time imprisonment (Article 81) while under aggravated circumstances, it can be sentenced with aggravated life-time imprisonment (Article 82), which includes additional restrictions in prison. In cases of homicide with malice these sentences are reduced to at least 20 years imprisonment for Article 81 and life-time imprisonment for Article 82 (with Article 21(2)). In the indictment, however, the prosecution charged the 3 police officers under Article 85(1) of the Penal Code instead of Article 81 or 82 and legally classified the acts committed as "negligent homicide" which provides that: "Any person who causes the death of a person by negligent conduct is punished with imprisonment from two years to six years."

- The prosecutor requested the court to apply Article 22(3) of the Penal Code which requires that: "Where an act of person creates the legal consequence defined in the laws beyond his will, this is considered as intentional negligence; in such case, the punishment imposed for the negligent act is increased from one third to one half." We are concerned that the prosecutor's classification of offense on which to prosecute the police (Article 85(1) with 22(3) of the Penal Code) does not correspond with the seriousness of the offence committed and its grave consequences.

We are also concerned that due process may not be followed forthcoming hearings of the trial of the officers and that the rights of Mr. Elçi and his family may not be respected during the proceedings. These concerns are based on several serious violations of due process that took place during the first hearing. The first hearing took place on 21 October 2020 at 10 am, before the Diyarbakir 10th Heavy Penal Court.

The lawyers representing the Elçi family argued in their submission to the court that (inter alia):

- Following the interview on CNN Turk, Tahir Elçi received several serious death threats. The State was under the obligation to protect him, but it failed to do so.

- The case file reveals that the two suspects who were affiliated with the PKK had been closely followed by the police in Diyarbakır on the day of the incident and their movements had been known to the police before the incident.

[7] https://forensic-architecture.org/investigation/the-killing-of-tahir-elci

- Neither Tahir Elçi nor other lawyers from the Diyarbakır Bar Association at the scene had been warned about a potential operation in the same area against suspects who were likely armed.
- The security forces planned and carried out the operation against the two suspects without proper regard for the safety of the public who were present nor did they take necessary measures to mitigate potential harm to civilians.
- The police officers at the scene did not use their firearms carefully and diligently. They did not take necessary measures to protect the lives of the civilians around them and they did not warn people to hide for their own safety. If the planning of the operation to catch the two suspects had been done properly, Tahir Elçi still would be alive.
- The onsite investigation was not carried out promptly as required by the Minnesota Protocol,[8] but only 110 days after the death of Tahir Elçi (between 17 and 18 March 2016). According to the prosecution, the reason for this delay was the ongoing armed clashes in the area. The crucial evidence from the scene, including the bullet that killed Tahir Elçi, disappeared during this time. This represents a significant failure of Turkish authorities to preserve evidence and to carry out an effective, transparent, and prompt investigation into the death of Tahir Elçi as required by Turkey's international legal obligations.
- Other serious defects in the investigation included that the police officers who were at the scene and fired their guns were not questioned as suspects by the prosecutor until early 2020, more than four years after the killing. In addition, several apparent inconsistencies in the statements of those investigated were not adequately followed up by the prosecution. The prosecutor also refused to hear several witnesses put forward by the lawyers of Tahir Elçi's family and did not summon the police officers who were responsible for the planning and execution of the operation and monitoring of the press conference.
- The video recordings from the security cameras around the scene and the MOBESSE (police security cameras in the area) were tampered with or not obtained. Several crucial recordings were either missing or the relevant parts covering the time of the killing have been deleted.
- The expert reports the prosecutor obtained, e.g., from the forensic medicine institute, claimed that the time of the death of Mr. Elçi could not be determined and the suspects could not be identified. However, the expert reports obtained by the Elçi family's lawyers, e.g., the report of the Forensic Architecture and a forensic medicine expert, reached a contrary conclusion on both matters.
- The 5-year delay in the proceeding and the arbitrary rejection of the requests of the lawyers representing the Elçi family indicate the authorities' failure to carry out a genuine investigation in conformity with the ECtHR's case-law on the procedural obligations of the state with respect to the right to life.

The trial has been adjourned until 3 March 2021. However, the hearing before the Diyarbakir 10th Heavy Penal Court on 21 October 2020 was highly problematic:

[8] Minnesota Protocol, supra note 1, para. 10.

1. The court, among other requests, refused the request of the Elçi family's lawyers to be heard at the beginning of the hearing. The court refused to allow Türkan Elçi, Tahir Elçi's wife, to take the floor and submit her requests as the complainant. Without hearing the complainants and their request to become formal parties to the proceedings, the complainants could not question the suspect which is a right that is granted to them clearly under the Code of Criminal Procedure.
2. The court refused to hear the accused police officers in person, instead, insisting on hearing them through SEGBIS (an official video communication system).
3. The suspects were not visible to the family of Tahir Elçi or his lawyers, because the small screen was too far away from them to be seen. There were several technical issues making it difficult to hear the statement of the suspects, and these technical issues were not resolved by the court, even upon request of the family's lawyers.
4. The court refused several times to allow the lawyers to speak and submit their requests. It threatened the lawyers and Mrs. Elçi that if they insisted on speaking, they would be expelled from the courtroom by force.

The lawyers asked the judges to recuse themselves from hearing the case based on these occurrences during the hearing. However, the court did not rule on this request. Under the rules of procedure, before moving forward with the hearing, the court should have dealt with these requests as a matter of priority.

A Call to the Turkish Authorities

This was the first hearing in what may be a protracted trial of the police officers accused of the homicide of Tahir Elçi. We call on the Turkish authorities to ensure that:

1. The case is heard by an independent, impartial, and competent court that is capable of establishing the facts and truth around the killing of Mr. Elçi;
2. All future hearings comply with international standards regarding the right to a fair trial, in which the victims' rights are also recognised;
3. The hostile attitude from the court towards the Elçi family and their lawyers and the court's persistent refusal to follow the rules of procedure and principles of both domestic and international law are not repeated in future hearings;
4. The lawyers for the Elçi family are given reasonable opportunities to be heard and to make their applications in relation to the procedure and the evidence;
5. Where submissions are refused, reasons for refusal are given in accordance with the case law of the ECtHR;
6. Following a fair judicial procedure, those who are responsible for Mr. Elçi's killing are held accountable and serve sentences appropriate to the gravity of the crime committed; and
7. Mr. Elçi's family is provided with appropriate redress for the violations they and their loved one have suffered in accordance with the international obligations of Turkey and the Minnesota Protocol.

Amsterdam Bar Association, the Netherlands

Article 19

Article 21, Italy

Bar Human Rights Committee of England and Wales, the United Kingdom

Cartoonists Rights Network International

Council of Bars and Law Societies in Europe (CCBE)

Danish PEN

The European Association of Lawyers (AEA-EAL)

European Association of Lawyers for Democracy and World Human Rights (ELDH)

The European Bars Federation (FBE) and FBE Human Rights Commission

European Criminal Bar Association (**ECBA)**

Fair Trial Watch, the Netherlands

Gelderland Bar Association, the Netherlands

Geneva Bar Association, Switzerland

German Bar Association (DAV), Germany

Giuristi Democratici, Italy

The Group of International Legal Intervention (GIGI)

The Hague Bar Association, the Netherlands

Human Rights in Practice, the Netherlands

The Institute for the Rule of Law of the International Association of Lawyers (UIA-IROL)

The International Association of People's Lawyers (IAPL)

The International Observatory of Human Rights (IOHR)

Index on Censorship

International Association of Democratic Lawyers (IADL)

The joint Presidents of the Local Bar Associations of the Netherlands

The Law Society of England and Wales, the United Kingdom

Lawyers for Lawyers, the Netherlands

Lawyers' Rights Watch Canada, Canada

Limburg Bar Association, the Netherlands

Midden-Nederland Bar Association, the Netherlands

The National Association of Democratic Lawyers, South Africa

National Forensic Union M. G. A., Italy

National Lawyers Guild International Committee, the United States of America

Netherlands Helsinki Committee, the Netherlands

Noord-Holland Bar Association, the Netherlands

Noord-Nederland Bar Association, the Netherlands

Oost-Brabant Bar Association the Netherlands

Overijssel Bar Association, the Netherlands

Research Institute on Turkey, the United States of America

Rotterdam Bar Association, the Netherlands

Swiss Democratic Lawyers, Switzerland

Turkey Human Rights Litigation Support Project, the United Kingdom

Zeeland-West-Brabant Bar Association, the Netherlands