

# Turkey

## Briefing on the wide-ranging, arbitrary and restrictive draft revisions to the Law to Fight Terrorism

Amnesty International is concerned that the “Draft Law revising some articles of the Law to Fight Terrorism [Law 3713 of 12/4/1991]” presented to the Turkish parliament on 18 April 2006 – and currently again being scrutinized by the Parliamentary Justice Sub-Commission before being resubmitted to parliament – contains sweeping and draconian provisions which may in practice contravene international human rights law and facilitate violations of the human rights of individuals. The organization considers that the draft law is dominated by a security agenda which poses a fundamental threat to individual freedoms, including the rights to freedom of expression and to fair trial. In the new draft law the definition of terrorism found in the existing Law to Fight Terrorism of 1991 has not been amended and remains too broadly drawn and vague. Of equal concern, the new draft law dramatically increases the spectrum of crimes potentially punishable as terrorist offences. Accordingly, if the law enters into force, many more individuals may find themselves categorized as “terrorists” and subjected to trial in heavy penal courts whose remit is organized crime and terror offences, and to the harsher sanctions provided for in anti-terrorism legislation.

Amnesty International has in the past expressed deep concern over the introduction of draconian anti-terrorism laws in other jurisdictions. Not least among these has been legislation introduced in the UK, including the Terrorism Act 2000 and, most recently, the Terrorism Act 2006 introduced at the end of March 2006.<sup>1</sup>

Amnesty International reminds the Turkish government and the Parliamentary Justice Sub-Commission currently scrutinizing the draft law of the necessity of ensuring that all measures taken to combat terrorism comply with Turkey’s obligations under international human rights and refugee law. This has been expressed repeatedly by the UN Security Council, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe, among others.<sup>2</sup>

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<sup>1</sup> See respectively, *United Kingdom: Briefing on the Terrorism Bill* (AI Index: EUR 45/43/00) and *United Kingdom: Amnesty International’s Briefing on the Draft Terrorism Bill 2005* (AI Index: EUR 45/038/2005).

<sup>2</sup> See respectively, UNSC Resolution 1456 (2003), Annex para.6; *Aksoy v Turkey* (1996) 23 EHRR 553, para. 62; Council of Europe Guidelines on Human Rights and the Fight against Terrorism, 11 July 2002; UN Doc. S/RES/1624 (2005), para. 4.

Amnesty International reminds the Turkish government and the Parliamentary Justice Sub-Commission of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism state, which state, in particular, that:

II. All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III.1. All measures taken by States to combat terrorism must be lawful.

III.2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

IV. The use of torture or of inhuman or degrading treatment or punishment, is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.<sup>3</sup>

A number of aspects of the “Draft Law revising some articles of the Law to Fight Terrorism [Law 3713 of 12/4/1991]” are of particular concern to Amnesty International and are set out below.

### **1) A broadly formulated and vague definition of terrorism, and a very wide range of crimes to be counted as terrorist offences**

The definition of terrorism in the revised draft law has not changed and continues to describe terrorism as “any kind of act” aimed at “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”.

Amnesty International considers that this definition of terrorism – and thereby any offence which is based on it – violates the principles of legality and legal certainty by being too wide and vague and, therefore, by failing to meet the precision and clarity requirements for criminal law.

Tied to this over-broad and vague definition of terrorism, the draft law has dramatically increased in the number and range of crimes that may now be categorized and punished as terrorist offences (Article 3 of the draft law; amending Article 4 of Law 3713). In

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<sup>3</sup> Council of Europe Guidelines on Human Rights and the Fight Against Terrorism, H(2002)4.

effect this widens the scope of the definition of terrorism still further. Counted as terrorist offences when they are construed as having been “carried out for terrorist aims” are over 50 offences listed in the Turkish Penal Code (including sexual harassment, trafficking of humans, undertaking hunger strikes, activities which “alienate people from military service”), as well as crimes listed in the Law on Firearms and Knives, the crime of intentional burning down of forests in the Law on Forests, crimes described in the Law on the Fight against Smuggling and in the Law on the Protection of Culture and the Natural Environment. The purported rationale for the law is presented in an accompanying explanatory note which states: “Even if these various crimes do not by their nature contain coercion, violence or threats, in cases where they are committed in the context of a terrorist organization’s activity they will be counted as terrorist offences.” When construed as terrorist offences all these crimes will be brought to trial in special courts whose remit is terrorist and organized crime offences and will be punishable with aggravated sentences.

Amnesty International is deeply concerned that the grounds on which it is to be established that a crime has been committed “for terrorist aims” are not made explicit. This, together with the increase in ordinary crimes which would now be counted as terrorist offences, may allow for suspects accused of committing ordinary crimes arbitrarily to be labelled as terrorists and punished with aggravated sentences. Amnesty International fears that the result of the widely drawn wording of the draft law, should it come into force, would be a flood of prosecutions in the special heavy penal courts opened by prosecutors interpreting the law arbitrarily.

The confusion arising from the inclusion of a wide range of offences already provided for in the Turkish Penal Code and other laws as potential terrorist crimes is exacerbated by the incorporation of a provision entirely lacking clarity about the nature the crime. Paragraph (d) of Article 3 defines one category of terrorist offence as: “crimes linked with incidents giving rise to the announcement of a state of emergency, in places where a state of emergency has been announced”. The nature of the offences indicated in this paragraph remains completely unclear, the provision lacks legal certainty and its vagueness offers the possibility that it may be widely and indiscriminately used to prosecute crimes committed in areas when state of emergency laws are enacted (for example, unauthorized protests leading to the declaration of a state of emergency might be counted as terrorist offences).

Amnesty International has learnt from press reports that the Turkish government and the Parliamentary Justice Sub-commission are currently negotiating a reduction in the number of crimes punishable as terrorist offences, withdrawing crimes such as the sexual abuse of children and organized prostitution, among other amendments to the draft law. While welcoming attempts to narrow the spectrum of ordinary offences – some of them undoubtedly extremely serious crimes in their own right – punishable as terrorist crimes, Amnesty International remains concerned that such an approach fails to address the problem of the wide and vague definition of terrorism in Article 1. The organization considers that the Parliamentary Justice Sub-Commission must as a priority take steps to redraft Article 1 to introduce greater legal clarity and precision to the debate about the offences punishable under the Law to Fight Terrorism. Nothing less than a redrafting of the defining article of this law

can ensure that the law will not be applied arbitrarily to anyone suspected of having committed any one of a spectrum of crimes.

## **2) Serious restrictions on freedom of expression**

Amnesty International considers that the wide and vague terms in which the current draft law is written constitute a grave threat to the fundamental right to freedom of expression.

Article 7 of Law 3713 provides for the punishment of those who are founders or members of armed organizations and of those who make propaganda on their behalf. The revision to this article provided for in Article 6 of the draft law now revises the original wording and, repeating the formulation in Article 220/8 of the Turkish Penal Code, provides for the punishment of those who “make propaganda for a terrorist organization or for its aims [for the aims of a terrorist organization]” and applies harsher sentences for those who do this in published writings or through media channels.

International human rights law recognizes that freedom of expression is not an absolute right. However, in a democratic society the permissible imposition of lawful restrictions on the exercise of the right to freedom of expression on grounds such as national security and public order must be demonstrated in every case to be necessary and proportional. Amnesty International reminds the Turkish authorities that the permissible restrictions are to be strictly construed and that any legal provision restricting the exercise of the right must be “accessible and unambiguous”, narrowly drawn and precise enough so that individuals subject to the law can foresee whether a particular action is unlawful.<sup>4</sup>

The provision in Article 6 as it stands does not fulfil these criteria, nor does it refer directly to the intention to incite violence or meet the requirement to demonstrate that such propaganda caused a clear and present danger that such an offence would be committed.<sup>5</sup> Even where an individual may be completely opposed to the use of violence, they may find themselves indicted as a terrorist by a prosecutor who determines that their political views accord with those of an alleged terrorist organization. Amnesty International fears that this article may thus become a means to restrict the peaceful expression of non-violent dissenting opinion and constitute a serious assault on the right of freedom of expression.

The article also specifies some of the activities that constitute the offence it outlines. Among the description of offences that will be punished on the grounds that they indicate membership or support for armed organizations are the “carrying of emblems and signs belonging to organizations, and the wearing of clothes reminiscent of uniforms bearing these emblems or signs”. The carrying of banners and leaflets and the shouting or broadcasting via sound systems of slogans “directed at an organization’s aims” are also included in this.

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<sup>4</sup> See Principle 1.1 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, UN Doc. E/CN.4/1996/39(1996).

<sup>5</sup> See Article 5, Council of Europe Convention on the Prevention of Terrorism; Principle 6 of the Johannesburg Principles; see also, *Arslan v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999.

Amnesty International is concerned that these wide-ranging provisions may amount to a restriction on freedom of assembly and freedom of expression since decisions about whether to count forms of dress as evidence of “propaganda for a terrorist organization or its aims” – in the absence of direct mention of incitement to violence – are again open to too wide a margin of interpretation.

The organization is also concerned that Article 6 of the draft law provides for particularly harsh sanctions on the media – prison sentences for journalists and heavy fines for editors and owners of media organs – and that the vagueness of the crime described in the Article may result in prosecutions which amount to an arbitrary restriction on the legitimate reporting of news stories. A further move to increase sanctions on the media is found in Article 5 of the draft law (amending Article 6 of Law 3713) and provides *inter alia* for prison sentences of between one and three years for those who reveal the identities of officials engaged in counter-terrorism operations or who print or publish declarations of terrorist organizations and heavy fines for owners of media organs and editors. The article also now incorporates a vague formulation providing for the temporary closure of “periodicals whose content... praises crimes and criminals [in the framework of a terrorist organization’s activities] or has the quality of terrorist organization propaganda”. Temporary closure can initially be ordered by a public prosecutor rather than a judge. Amnesty International fears that the introduction of such harsh penalties may have a chilling effect on the rights to freedom of expression and to impart information.

### **3) A return to incommunicado detention? The limiting of terror suspects’ rights**

After the draft law was presented to Parliament on 18 April, the Minister of Justice emphasized that there had been no move to extend the pre-charge detention period for those suspected of terrorist offences (which is currently 48 hours). However, Amnesty International is alarmed at the fact that Article 9 of the revised draft law (amending Article 10 of Law 3713) restricts the immediate right to legal counsel for those detained on suspicion of committing terrorism offences. Paragraph (b) of the article specifies that, at a prosecutor’s request and on the decision of a judge, a detainee’s right to legal counsel from the first moments of detention may be delayed by 24 hours.

The immediate right to legal counsel has been one of the major gains of the reform process in Turkey and is set out in the Code of Criminal Procedures (Article 149). The fact that incommunicado detention was effectively brought to an end through such a provision is of particular significance in a country in which allegations of torture and ill-treatment in police custody have been extremely widespread and where there are serious concerns about the extent to which individuals accused of terrorist offences can receive a fair trial. Amnesty International is extremely concerned that in the Turkish context restriction of the immediate right to legal counsel for those suspected of terrorist offences may reverse the progress made in this area, and urges the Turkish government to withdraw a provision which compromises the avowed “zero tolerance for torture” policy.

A further worrying provision in the article allows for the defence lawyer to be restricted, on the request of the prosecutor and decision of a judge, from examining the contents of the file about a suspect and obtaining copies of documents. This applies in cases where it is deemed that full access to the file might “endanger the aims of the investigation” into the suspect. In other words the suspect’s right to a full defence is restricted. Amnesty International considers that this may seriously compromise the possibility of the right of a suspect – if prosecuted – to receive a fair trial.

A further provision allows, at the request of the prosecutor and on decision of a judge, for an official to be present during meetings between a person suspected of having committed a terrorist offence and their lawyer, and for a judge to be able to examine documents passed between them. This is stated as applying in cases where there is evidence of the defence lawyer acting as an intermediary between an organization and a suspect. Amnesty International considers that such a measure erodes the principle of the right to confidential meetings between lawyer and client as outlined in the UN Basic Principles on the Role of Lawyers.<sup>6</sup> Moreover, the organization considers that the provision may conflict with Principle 18 of the Basic Principles on the Role of Lawyers which states: “Lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions.”

A further provision in Article 9 of the draft law limits legal counsel for persons suspected of terrorist offences to just one lawyer (as opposed to three for crimes which do not fall under anti-terrorism legislation). Amnesty International notes that this provision allows for the unequal treatment of terror suspects and those suspected of ordinary crimes, and that the complexity of terrorist crimes may in any case provide grounds for arguing that a suspect should be able to benefit from more than one defence lawyer. Furthermore, the organization notes that – in contrast to the restriction of the right to more than one lawyer for terrorist suspects – there has been no adjustment to Article 15 of the Law to Fight Terrorism which has always provided that members of the security forces suspected of criminal offences in the course of counter-terrorism operations are entitled to benefit from three defence lawyers whose fees are paid by the security directorate under which they are employed.

#### **4) Protection for alleged perpetrators of human rights violations who are members of the security forces**

The draft law introduces further protective measures for members of the security forces involved in counter-terrorism operations who are suspected of criminal offences. The most striking of these is the provision in Article 10 of the draft law (a revision to Article 15 of Law 3713) that members of the security forces can be tried while released on bail, regardless of the nature of the crime for which they stand trial or the sentence they would face if convicted. In practice, however, it has been very rare in Turkey for members of the security forces on trial

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<sup>6</sup> See Principle 8 and 22 of the UN Basic Principles on the Role of Lawyers.

for even severe human rights violations such as torture or killings to be detained pending trial. The impact of the provision in Article 10 of the draft law which formally provides that they can be bailed is to inscribe in law what is already common practice. Amnesty International is concerned that the decision to allow bail for members of the security forces being prosecuted for serious human rights violations such as torture and killings may conflict with the duty of the authorities to protect witnesses in trials from possible intimidation or harassment by defendants and that the provision may leave witnesses at significant risk.

Article 15 of the draft law (amending Appendix Article 2) specifies that in operations carried out against terrorist organizations “in cases where attempts are made to use firearms and where the order to surrender is disobeyed, the security forces have the authority to use arms unhesitatingly against the target proportionate to rendering the danger ineffective”. Amnesty International notes that the inclusion of this article means the restoration of a provision in slightly amended form previously included in the Law to Fight Terrorism but repealed in 1999 upon the Constitutional Court’s ruling (1996/68E; 1999/1K) that it was unconstitutional. In its determination, the Constitutional Court viewed the use of this right by the security forces as a threat to the right to life.

Amnesty International is seriously concerned that, formulated in such a way, the provision fails to make explicit the clear stipulation in international standards that the use of force must be strictly necessary and proportionate to the aim, and that the use of lethal force is only permissible when “strictly unavoidable to protect life”.<sup>7</sup>

Amnesty International is concerned that the re-introduction of such a provision may contribute to the climate of impunity in Turkey around killings by members of the security forces which too often meet with the official explanation of having occurred as a result of a suspect’s failure to obey a warning to stop or to surrender. Amnesty International reported in the Turkey entry of its 2006 Report (AI Index: POL 10/001/2006 ) that there were around 50 killings by members of the security forces and that many of these may have been the result of excessive use of force or summary executions. The organization fears that a provision which sanctions the “unhesitating” use of firearms to “render the danger ineffective” may contribute further to the current unwillingness to pursue thorough and impartial investigations into shootings by members of the security forces.

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<sup>7</sup> See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, including Principle 9. See also UN Code of Conduct for Law Enforcement Officials.