International Delegation of Trial Monitors Report

Observation of the trial against Dr. Serdar Küni
Şırnak 2nd Heavy Penal Court
Case no: 2017/230

May 2017

I. INTRODUCTION

1. This report sets out the joint findings of two observation missions in the trial of Dr. Serdar Küni. An international delegation of trial monitors, composed of legal and medical health experts, observed the first hearing against Dr. Küni before the Şırnak 2nd Heavy Penal Court on 13 March 2017[1] and the second hearing before the same court on 24 April 2017.[2] The report reflects the observations of the international delegation of trial monitors and identifies several issues of concern in relation to the prosecution and fairness of the trial of Dr. Küni.

2. Dr. Küni is a physician based in Cizre who has provided health services in various capacities and assumed positions of responsibility in the medical profession. Following the issuance of an arrest warrant against him on 18 April 2016, Dr. Küni was subject to various charges. He was accused of assisting an armed organisation and subsequently convicted for having assisted a terrorist organisation. The case for the prosecution is based on the allegation that Dr. Küni provided medical treatment to members of a separatist terrorist organisation who had been injured in clashes with the security forces.

3. The prosecution of a health professional for providing medical treatment, in conformity with medical ethics, is a matter of international concern for the health profession. This prosecution has sought to criminalise the basic duties and ethics of the profession, which is in and of itself an act of intimidation and harassment. We are concerned about the precedent this case will set across the medical profession. The justification of the prosecution on what are essentially security grounds demands close scrutiny of the propriety of legal proceedings, and adherence to international fair trial standards in the case of Dr. Küni.

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II. BACKGROUND INFORMATION AND PROCEEDINGS

4. Dr. Küni is a physician who has conducted his work in Cizre since 2004. In the course of his work, he assumed the position of chairperson of the Şırnak medical chamber (2010-2012), representative of the Human Rights Foundation of Turkey in Cizre (2015-) and director of the Bişeng Health Centre (2011-) founded by the Cizre Municipality. At the Bişeng Health Centre, health services were to be provided "for everyone everywhere in the mother tongue for free".

5. On 18 April 2016, the Cizre Magistrate judge issued an arrest warrant against Dr. Küni. The arrest warrant was not executed at the time, and Dr. Küni was detained on 19 October 2016 after he had attended, on his own initiative the office of the prosecutor to give a statement. He was initially suspected of having committed the crime of disrupting the unity and integrity of the state pursuant to article 302(1) of the Turkish Penal Code. Subsequently, on 18 January 2017, he was indicted for the crime of membership in an armed organisation under article 314(1) of the Turkish Penal Code, an indictment that was amended on 13 February 2017 to include additional charges under article 314(2). On 24 April 2017, the Şırnak 2nd Heavy Penal Court found Dr. Küni guilty of having assisted a terrorist organisation under article 220(7) of the Turkish Penal Code. He was convicted and sentenced to 4 years and 2 months' imprisonment, and temporarily released upon the court's orders. The reasoned verdict, dated 28 April 2017, is subject to an appeal by Dr. Küni's lawyers.

6. At the first hearing on 13 March 2017 before the Şırnak 2nd Heavy Penal Court, Dr. Küni was questioned by the court via video-link. Dr. Küni stated that he had provided health services publicly and within the law. Subsequently, the court heard four witnesses of the prosecution, Rojhat Dündar, Salih Acar, Ramazan Durman and Kahraman Malgaz. It did so after rejecting a request by the defence team not to hear the witnesses because their pre-trial statements had been obtained in the absence of a lawyer. According to the indictment, the witnesses had stated that the suspect "was treating the injured members at the health centre and condolence house in the Cudi neighbourhood." Each of the four witnesses, all of whom were still in custody (one was present in the courtroom in person, three others attended via video-link) recanted their statements, testifying that they had been coerced by the authorities to sign a prepared statement, and that they had not seen Dr. Küni before. Rojhat Dündar, the witness who testified in person before the court showed visible signs of fear and distress when making his statement concerning the torture he alleged he had suffered. Notwithstanding the lack of any evidence brought by the prosecution to support its case, the court agreed to the Prosecutor's motion to adjourn the case. It thereby heeded the prosecutor's request to be given additional time to collect further evidence, to hear an anonymous witness known by the name of Asya who had provided a statement to the Cizre Security Directorate, and to examine the medical reports of the witnesses who alleged that they had been tortured. The court also decided that Dr. Küni be remanded in custody on the grounds of flight risk. The court deduced such a risk from the supposed inability of the authorities to find Dr. Küni in the period of 8 March to 19 October 2016.

7. At the second hearing before the Şırnak 2nd Heavy Penal Court on 24 April 2017, the prosecutor used his opening statement to refer to 'evidence' which appeared to be

outside the timeframe of the charges apparently provided by witness ‘Vatan’, who was not produced in Court and thus the defence had no opportunity to test the veracity of what was alleged. A forensic medical expert called by the defence explained why the medical reports prepared by the official medical doctors and produced by the prosecutor to demonstrate that the statements of the four witnesses were voluntary was flawed and inconsistent with international standards on the documentation of torture. No further ‘evidence’ was tendered as to the commission by Dr. Küni of any crime. Despite this, after a short deliberation, the judges found Dr. Küni guilty of having assisted a terrorist organisation.

8. In its reasoned verdict of 28 April 2017, the court did not find sufficient evidence to convict Dr. Küni of membership in a terrorist organisation. Instead, the court held that he had knowingly and voluntarily treated wounded members of terrorist organisations. The court based its conviction of assisting a terrorist organisation on the evidence of the four witnesses who had recanted their statements before the court during the first hearing. It held that the statements were admissible on the grounds that neither the medical legal reports nor the statements of the witnesses made in the course of investigations against them provided evidence that they had been subjected to torture.

III. ISSUES OF CONCERN

The nature of charges

9. Dr. Küni was indicted for membership in an armed organisation, and convicted of assisting a terrorist organisation. States may, or even have to under international law, stipulate that certain serious conduct which endangers the public or national security constitutes a crime under its national law. However, human rights bodies have repeatedly raised concerns over overly broad security and anti-terrorism legislation. As highlighted by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: “[f]ailure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.”[3]

10. According to the principle of legality, offences need to be clearly defined so that “the individual can know from the wording of the relevant provision, and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable.”[4] In the absence of such precision, the application of relevant laws may, and often has, resulted in the criminalisation of conduct that should not entail criminal liability. This applies in particular to the exercise of internationally recognised human

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[3] *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, UN Doc. A/HRC/16/51, 22 December 2010, para. 26.

[4] *Kokkinakis v. Greece*, Application no. 14307/88, European Court of Human Rights, Judgment of 25 May 1993, para. 52.

rights, such as the rights of human rights defenders to exercise their profession.[5] It also applies to conduct that is in accordance with internationally recognised medical ethics, such as that of health professionals treating injured persons in line with the Hippocratic Oath. The World Medical Association's Ethical Principles of Health Care in Times of Armed Conflict and Other Emergencies of 2016, for example, make it clear that "[t]he primary task of health-care personnel is to preserve human physical and mental health and to alleviate suffering." Security and anti-terrorism legislation therefore needs to be narrowly circumscribed and must not apply to conduct that constitutes a legitimate exercise of a person's rights under international human rights law. Where the legislation is vague, courts are called upon to interpret relevant provisions in such manner that their application does not result in a breach of international standards binding on the state concerned.

11. Dr. Küni was accused of, and convicted for the provision of medical treatment. As stated by the United Nations General Assembly, "attacking, threatening or otherwise preventing medical and health personnel from fulfilling their medical duties undermines their physical safety and the integrity of their professional codes of ethics, and … impedes the attainment of the right to the enjoyment of the highest attainable standard of health, as well as being a barrier to universal access to health services."[6] Physicians should therefore not be subject to sanctions for the provision of medical treatment in accordance with medical ethics, which demands treatment of an injured person irrespective of their identity. In the present case, there is no evidence to the effect that Dr. Küni did anything other than conform to his medical duties. As a representative of the Human Rights Foundation of Turkey and considering the mandate of the Biseng Health Centre, Dr. Küni also falls within the definition of a human rights defender. In that regard, "[t]he State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration."[7]

Fairness of the trial

Presumption of innocence

12. The presumption of innocence is a fundamental principle integral to the right to a fair trial. As stipulated in article 6(2) of the European Convention on Human Rights, "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law." The presumption of innocence entails that the burden of

[5] See United Nations General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, A/RES/53/144, 8 March 1999.

[6] United Nations General Assembly, *Global health and foreign policy*, A/RES/69/132, 9 January 2015.

[7] Article 12(2) UN General Assembly Declaration, above note 5.

proof is on the prosecution.[8] The evidence against the accused must be thus that there is no reasonable doubt concerning his or her guilt.[9]

13. The Şırnak 2nd Heavy Penal Court did not dismiss the case and acquit Dr. Küni after the first hearing even though the prosecution had failed to discharge its burden of proof. The court partially justified the adjournment based on evidence to be obtained from an anonymous witness whose statement appears to have influenced the court's decision at the time, although it was not referred to in the verdict itself. Dr. Küni was subsequently convicted based on statements that included hearsay evidence and which the witnesses had recanted due to alleged torture. The statements should therefore have been declared inadmissible (see below at paragraphs 14-17). Under these circumstances, particularly the alleged torture of the four witnesses and the reliance on apparently fabricated hearsay evidence, there were considerable doubts concerning Dr. Küni's guilt in relation to the 'crime' he was convicted of. His conviction is therefore based on a breach of the presumption of innocence.

Admissibility of evidence

(i) Evidence obtained as a result of torture

14. Admitting evidence obtained as a result of torture invariably renders a trial unfair.[10] Indeed, the use of such evidence has been considered to constitute "a flagrant denial of justice".[11] As set out in article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." This general rule is recognised in the jurisprudence of the European Court of Human Rights and other treaty bodies, as well as the law and practice of national jurisdictions.[12] Where a person raises a credible allegation of torture, the State carries the burden of proof to show that a witness statement to be admitted as evidence has not been made as a result of torture.[13]

15. In the case of Dr. Küni, all four witnesses raised specific allegations of torture during the first hearing. This shifted the burden of proof on the prosecution to disprove the

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[8] *Telfner v. Austria*, Application no. 33501/96, European Court of Human Rights, Judgment of 20 March 2001, para.15; United Nations Human Rights Committee, *General Comment No.32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 30.

[9] Telfner v. Austria, ibid, and UN Human Rights Committee, General Comment No.32, ibid.

[10] *El Haski v. Belgium*, Application no. 649/08, European Court of Human Rights, Judgment of 25 September 2012, para.85.

[11] *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, European Court of Human Rights, Judgment of 17 January 2012, paras. 263-267.

[12] Ibid., paras. 264-266.

[13] El Haski v. Belgium, above note 10, paras. 88-89; Committee against Torture, *G.K. v Switzerland*, Communication No. 219/2002, UN Doc. CAT/C/30/D/219/2002, 7 May 2003, para. 6.10.

allegations of torture. The prosecution relied on official medical reports, which were said to prove that the witnesses had not been tortured as claimed. During the second hearing, the defence team alleged that the medical reports were produced in a matter of seconds, or at least in less than two minutes. The format and content of the reports are ostensibly not in conformity with internationally recognised standards, as set out in the Istanbul Protocol, which is a manual that sets out minimum standards on the documentation and investigation of torture.[14] A considerable number of Turkish officials have participated in training programmes on the Istanbul Protocol. However, the format and cursory nature of the reports cast serious doubts on the adequacy of the official reporting practice.[15] Due to their lack of conformity with recognised minimum standards, the medical reports are not capable of proving that the witnesses have not been tortured.[16] The second limb of the court's reasoning is that the witnesses did not raise allegations of torture in their statements during the investigations against them. This fact cannot be considered conclusive. It is well known that detainees who have been tortured, or are at risk of torture, often refrain from complaining about torture to the authorities so as not to expose themselves to the risk of further torture.[17] For these reasons, the prosecution has not discharged its burden of proof that the witness statements had not been extracted under torture. The court should have therefore declared the statements inadmissible.

16. The allegations of torture have not been the subject of an independent investigation. According to international standards, as set out, inter alia, in articles 12, 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 3 of the European Convention on Human Rights, an allegation of torture should be subject to a prompt, impartial and effective investigation.[18] The reference to the inadequate medical reports and to the fact that the witnesses had not raised allegations during the investigation does not substitute for an investigation in conformity with these standards. Such an investigation would have to be carried out by an authority that is institutionally independent of the alleged

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[14] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)*, Submitted to the United Nations High Commissioner for Human Rights, 9 August 1999, OHCHR, Professional Training Series No.8/Rev.1, 2004.

[15] See in this regard, United Nations Committee against Torture, *Concluding observations on the fourth periodic reports of Turkey*, UN Doc. CAT/C/TUR/CO/4, 2 June 2016, para. 26: "The Committee regrets the scant information provided on training programmes for professionals directly involved in the investigation and documentation of torture, as well as medical and other personnel dealing with detainees, on how to detect and document physical and psychological sequelae of torture and ill-treatment (art.10 [of the Convention against Torture])."

[16] In any case, the Istanbul Protocol, above no. 14, para. 161, rightly emphasises that "the absence of such physical evidence [of torture] should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars." See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'Combating Impunity', *14th General Report on the CPT's activities covering the period 1 August 2003 to 31 July 2004*, CPT/Inf (2004) 28, para. 29.

[17] See in this context, *Kurt v. Turkey*, Application no. 15/1997/799/1002, European Court of Human Rights, Judgment of 25 May 1998, para. 160.

[18] *Mocanu and others v. Romania*, European Court of Human Rights, Grand Chamber, Judgment of 17 September 2014, paras. 314-326.

perpetrators, and would need to take expeditious steps to secure available and reliable evidence, including medical reports produced in line with the Istanbul Protocol. Such an investigation is all the more imperative as the allegations of torture are not isolated; a series of reports have documented acts of torture and raised concerns over the prevalence of the practice in the relevant parts of Turkey.[19] Ultimately, it would only be on the basis of an investigation that was undertaken in accordance with international standards that the prosecutor would be able to discharge his burden of proof, as set out in paragraph 14 above.

(ii) Reliance on hearsay evidence

17. The European Court of Human Rights has in its jurisprudence emphasised that the "dangers inherent in allowing untested hearsay evidence to be adduced are all the greater if that evidence is the sole or decisive evidence against the defendant."[20] Adequate safeguards against undue reliance are essential because "[l]egal history shows that convictions based on untested hearsay evidence are often wrong and certainly a favourite element of political abuse."[21] The evidence adduced against Dr. Küni relied on statements by witnesses who did not claim to have personally witnessed what Dr. Küni was supposed to have done but relied on what others were supposed to have said. The fact that all the statements are similarly vague lends credibility to the witnesses' claim that they had been tortured into making incriminating statements against Dr. Küni without having any actual knowledge of him and his work. Notwithstanding these evident shortcomings, the court relied on the statements. It thereby used hearsay evidence as decisive evidence, which was in the circumstances of the case contrary to the jurisprudence of the European Court of Human Rights on the right to a fair trial.
18. Use of anonymous witnesses: The prosecutor, in his opening statement at the second Hearing, referred to 'evidence' provided by anonymous witness 'Vatan'. As this witness was never produced in Court, there was no way for the defence to test the veracity of what was alleged, to know the conditions under which the evidence was taken, or indeed to confirm that 'Vatan' was a real person. Furthermore, the information contained in the statement of 'Vatan' as summarised by the prosecutor, appeared to relate to allegations concerning events in 2012, which were outside the timeframe of the charges set out in the indictment.

IV. FINDINGS

19. The proceedings against Dr. Küni and the verdict of Şırnak 2nd Heavy Penal Court raise a series of concerns over their compatibility with the principle of legality and adherence to fair trial standards, particularly the use of evidence obtained as a result of torture. There was no evidence that Dr. Küni had treated "members of a terrorist organisation", leaving aside the broader question why someone should be prosecuted

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[19] See in particular the serious concerns expressed by the United Nations Committee against Torture, above note 15, para. 11.

[20] *Al-Khawaja and Tahery v. The United Kingdom*, Application nos. 26766/05 and 22228/06, European Court of Human Rights, Grand Chamber, Judgment of 15 December 2011, para. 142.

[21] Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajó and Karakaş, ibid., p. 70.

for having provided health services in the first place. The case sets a dangerous precedent where members of the health profession are subject to criminal prosecution in relation to the exercise of their medical duties. This is incompatible with internationally recognised standards, and adversely impacts a number of human rights.

20. The allegations of torture raised by the four witnesses are a matter of serious concern, both in relation to the use of evidence obtained as a result of such torture, and as a serious human rights violation in its own right. The allegations of torture should be subject to a prompt, impartial and effective investigation in conformity with international standards, which includes full transparency of the steps taken.
21. In view of the deficiencies identified in this report, the International Delegation of Trial Monitors is of the firm view that the verdict against Dr. Küni should be overturned, and Dr. Küni be acquitted on the grounds of a lack of evidence to sustain the charges brought against him.

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* This report represents the findings of the observers, and is not a public statement by the organisations or institutions with which the observers are affiliated.