PETITION TO:

UNITED NATIONS
WORKING GROUP ON ARBITRARY DETENTION

Chairman/Rapporteur: Mr. Malick El Hadji Sow (Senegal)
Vice-Chairperson: Ms. Shaheen Sardar Ali (Pakistan)
Mr. Mads Andenas (Norway)
Mr. Roberto Garretón (Chile)
Mr. Vladimir Tochilovsky (Ukraine)

HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY

In the Matter of

Bilgin Balanlı; Çetin Doğan; Ramazan Cem Gürdeniz; Mustafa Aydın Gürül; Ali Deniz Kutluk; Kadir Sağdıç; Ergin Saygun; Süha Tanyeri; Ahmet Zeki Üçok; Ahmet Yavuz,

And the Other 240 Detained Defendants in the Sledgehammer Trial[1]

Citizens of Turkey v. Government of Turkey

URGENT ACTION REQUESTED

And Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, 6/4, and 15/18[2]

Submitted By:
Jared Genser[3] and Chris Fletcher

PERSEUS STRATEGIES

Counsel to *Vardiya Bizde*[4]

September 12, 2012

[1] See Annex I (attached) for full list of detained defendants which totals 250 people.
[2] Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights to extend the mandate of the Working Group on Arbitrary Detention. Resolutions 6/4 and 15/18, further extending the mandate of the Working Group, were adopted by the Human Rights Council, which has "assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights . . . ." G.A. Res. 60/251, para. 6
[3] For further information, contact Jared Genser at info@perseus-strategies.com or +1 (202) 466-3069. Perseus Strategies would like to thank Dilpreet Minhas for her research, writing, and editing support.
[4] *Vardiya Bizde* (translation "we are on watch") is the platform founded by the family members of the detainees; *see* http://vardiyabizdeplatformu.com.

Executive Summary

As set forth in the attached Petition, the Turkish Government is arbitrarily depriving 250 defendants in the Sledgehammer Trial of their liberty.

The past 50 years of Turkish history have been fraught with tension between the military and successive ruling governments, with several notorious military coups to overthrow government leadership. Since the election of the Justice and Development Party (AKP) in 2002, the relationship between the secular military and Islamist government has been increasingly strained, providing the context for AKP sympathizers' suspicion of civilian and military criticism and potential subversion and coups. This has resulted in widespread court cases, first the expansive five-year Ergenekon case, still underway, and more recently, the Sledgehammer (*Balyoz*) Coup Plot Case. Both cases are strikingly similar in terms of the arbitrary investigation and prosecution of hundreds of defendants, in violation of their due process rights. As in the Ergenekon case, following an investigation launched by anonymous tips pointing to allegedly incriminating evidence of subversion and plots to destabilize the Government, Sledgehammer Defendants have been arbitrarily detained and denied their right to a fair trial.

The Sledgehammer Trial began on December 16, 2010, at the Istanbul 10th High Criminal Court. Presently there are 365 Defendants (363 serving and retired military officers and two civilians) charged with attempting to overthrow the Turkish government in 2003. The investigation began after the Turkish newspaper, *Taraf*, released a story of a military coup plot to topple the AKP Government. The story was based on a purportedly anonymous delivery of "incriminating" evidence by an informant. The evidence consisted of digital, unsigned documents dated 2002-2003, describing Turkish Military plans to engage in activities to provoke domestic political chaos and tensions with Greece, thereby creating the opportunity and justification for military takeover. Additionally, the informant provided voice recordings and digital documents linked with a March 2003 Turkish Military seminar, during which 162 officers led by then First Army Commander Çetin Doğan engaged in a series of workshops designed to test military readiness under extreme scenarios. Further anonymous tips led to the discovery of additional alleged evidence at the Gölcük Naval Command Base and the home of retired Colonel Hakan Büyük, in the form of CDs, a detached hard drive, and a thumb drive.

The first indictment, issued July 6, 2010, charged 195 Turkish Military officers; the second, issued on June 16, 2011, charged an additional 28 individuals; and the third, filed in November 2011, charged 143 individuals. The Defendants did not have access to any of the documents allegedly implicating them until after July 19, 2010, when the first indictment was accepted by the Court. At trial, the defense was not provided with access to the forensic images of the CDs until November 2011, 22 months after the prosecutors obtained the alleged evidence on CDs and began detaining individuals. The Court also consistently denied the defense access to photographs of the CDs until they were finally delivered in April 2011; on January 20, 2012, the Court granted the defense access to forensic images of "Hard disk number 5" and the CDs found at the Naval Base, 13 months after those items were seized. The images were not delivered to the defense until February 2012.

Once Defendants gained access on July 19, 2010 to the documents on which the charges were based, they noted scores of anachronisms, inconsistencies, and errors (examples of which will be given below) that indicated the documents in question could not have been produced in 2002-2003, as alleged, and that they had been forged. The defense produced and entered into the record documentary evidence of these anachronisms and inconsistencies (which have not been challenged by the prosecution). Moreover, it came out during the trial that evidence collected by the prosecution during the pre-trial investigation had revealed additional documented instances of anachronisms, showing that the dates on the alleged incriminating documents had been forged (which the prosecution, once again, ignored).

Finally, upon receiving the forensic digital images of the materials after November 2011, several independent forensic experts, from the U.S., Germany, and Turkey, were able to analyze the authenticity of the digital information on behalf of the defense. Their analyses conclusively established that the CDs and hard drive containing the coup plot documents were forged and thus are being used to frame the Defendants. As discussed further below, the forensic experts established that CD 11 and CD 17 (in which the incriminating documents are found) could not have been created in 2002-2003, as alleged; instead, the earliest these CDs could have been created is mid-2006. This conclusion is based on the forensic examinations that discovered Microsoft Office 2007 remnants in the incriminating documents that were allegedly last saved in 2002-2003. As such, there is consensus among all the forensic experts that analyzed the evidence, once the evidence was shared with the defense and the trial got under way, that the incriminating evidence is forged because it was created after 2003.

Despite all this, the Court repeatedly denied defense requests to reconsider the prosecution's claims and appoint an independent expert to verify the evidence, as well as repeated defense requests to call two key witnesses, former Commander of Land Forces, General Aytaç Yalman, and former Chief of General Staff, General Hilmi Özkök. Instead, following the completion of defenses, the Court skipped the stage of evaluating the validity of the evidence and requested the Prosecutor present his final statement. The day the Prosecutor concluded his presentation, the Court issued a decision stating new expert reports and testimony of other witnesses would not contribute materially to the case and were thus "not warranted." The previous events, including denial of the right to a fair trial, the right to be presumed innocent, the right to call and examine witnesses, and the right to confidential attorney-client communications, constitute violations of due process prescribed by Turkish and international human rights law.

Currently, there are 250 Defendants in jail pending a verdict. Approximately 21 of the defendants have been detained for up to 23 months (including up to 4 months of pre-trial detention), 142 have been detained up to 19 months, and 87 have been detained for up to 15 months. Prosecutors have requested 15-20 year sentences for the 365 defendants allegedly implicated. The Turkish Government's detention of the Defendants is in violation of due process rights afforded by Turkish law, as well as the International Covenant on Civil and Political Rights and the UN Body of Principles Regarding Persons Under Any Form of Detention or Imprisonment. Given the ongoing violations of both Turkish law and international human rights law described in this Petition, we respectfully request the Working Group take the following measures:

- Determine the Government of Turkey is holding the Defendants in contravention of its international legal obligations;

- Urge the immediate release of the Defendants and an enforceable right of compensation for their arbitrary detention;

Accordingly, it is hereby requested the Working Group consider the attached Petition be considered a formal request for an opinion of the Working Group pursuant to Resolution 1997/50 of the Commission on Human Rights as reconfirmed by Resolutions 2000/36, 2003/31, and Human Rights Council Resolutions 6/4 and 15/18.

QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION

I. IDENTITY

See Annex I, attached

II. ARREST

1. **Date of arrest:** *See* Section IV(A)(4) *infra*

2. **Place of arrest (as detailed as possible):** All occurred in or around Istanbul

3. **Forces who carried out the arrest or are believed to have carried it out:** Police Counter-Terrorism Unit

4. **Did they show a warrant or other decision by a public authority:** Yes

5. **Authority who issued the warrant or decision:** Special Authorized Courts – varies by Defendant

6. **Relevant legislation applied (if known):** Turkish Criminal Code (Law number 5237), Article 312

III. DETENTION

1. **Date of detention:** *See* Section IV(A)(4) *infra*

2. **Duration of detention (if not known, probable duration)**: *See* Section IV(A)(4) *infra*

3. **Forces holding the detainee under custody:** *See* III(4) *infra*

4. **Places of detention (indicate any transfer and present place of detention):** Suspects were first detained by various police forces in different cities. Subsequently, those who were not in Istanbul were transferred to Istanbul for their questioning by the prosecutors, and then were arrested. The active duty officers were transferred to one of

the following military prisons: HASDAL, MALTEPE, or HADIMKÖY (the transfer to this location occurred in November 2011 because it was a newly built facility). Retired officers and one civilian were transferred to the METRİS prison for their first night, and then transferred to the SİLİVRİ prison. In summary, all detainees are presently in one of these four prisons: SİLİVRİ, HASDAL, MALTEPE, and HADIMKÖY; (the latter three are military prisons).

5. **Authorities that ordered the detention**: The judge on duty at the Besiktas Courthouse

6. **Reasons for the detention imputed by the authorities:** *See* Section IV(B)(3) *infra*

7. **Relevant legislation applied (if known)**: *See* II(6) *supra*

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Situation of Those Imprisoned as a Result of the Alleged Sledgehammer Coup Plot

1. Turkish Military and Government Relations

Over the past half century, relations between the staunchly secular Turkish military and the national Government have become increasingly tenuous. Historically, the military's self-appointed role of enforcing Turkey's secular status[5] has been characterized by the execution of various coups against the government. In 1960, Turkish generals arrested and executed then Prime Minister Adnan Menderes, and following the bloody coup of 1980, the military rewrote the Turkish constitution, granting itself significant rights over civilian governments.[6] What is referred to as the "postmodern coup" took place in 1997 when the military issued several ultimatums to Islamist Prime Minister Necmettin Erbakan; he then resigned and his Welfare Party was subsequently banned.[7] It is believed that the military often acted as such on behalf of a class of elected officials and civil servants; "with the claim of suppressing anarchy, [the military] would take harsh action, often with the public's approval."[8] Additionally, according to Turkish politicians and journalists, the Kemalist[9] elite and its allies in the deep state[10] simultaneously "employed the press to exaggerate threats to the state."[11]

---

[5] Dexter Filkins, *The Deep State*, THE NEW YORKER, Mar. 12, 2012 [hereinafter *The Deep State*] (explaining that during the first 80 years of secular Turkey, the military "intervened four times to remove civilian governments that were thought to have lost control of the country or strayed from the principles of secularism or anti-Communism").
[6] *The Deep State*, *supra* note 5.
[7] *The Deep State*, *supra* note 5.
[8] *The Deep State*, *supra* note 5.
[9] Dariush Zahedi and Gokhan Bacik, *Kemalism is Dead, Long Live Kemalism*, FOREIGN AFFAIRS, Apr. 23, 2010, *available at* http://www.foreignaffairs.com/articles/66391/dariush-zahedi-and-gokhan-bacik/kemalism-is-dead-long-live-kemalism (noting Kemalism is the principle that Turkey should be secular and Western, the vision introduced and implemented by Mustafa Kemal Atatürk, the first President of Turkey).
[10] Gareth Jenkins, *Between Fact and Fantasy: Turkey's Ergenekon Investigation*, Central Asia-Caucasus Institute & Silk Road Studies Program, John's Hopkins University-SAIS, Aug. 2009 [hereinafter *Turkey's Ergenekon Investigation*] (explaining that Turkey's "deep state" is comprised of "shadowy networks with connections to state institutions" that "have been known to do the state's 'dirty work,' such as targeting terrorist sympathizers with extra-

2. Political Change in 2002

The Turkish political landscape changed in 2002, with the founding of the moderate Islamist organization, Justice and Development (AKP). The party's stated goal was to take leadership of the country without imposing a religious state and disrupting the secular order. On November 18, 2002, the AKP was elected as the ruling party, and current Prime Minister Recep Tayyip Erdoğan, who had been briefly jailed for reciting an Islamist poem, took office in early 2003. The AKP was under fire politically during its first six years in power, but managed to consolidate its power over state institutions. Despite tension and conflict, the AKP won a landslide reelection in 2007.

Since then, the AKP government has "backtracked on reforms and displayed at least a majoritarian view of democracy, if not an authoritarian streak."[12] In 2008, the AKP faced the possibility of being shut down by the Constitutional Court and banned for "allegedly seeking to undermine the secular nature of the Turkish state,"[13] and in an atmosphere of suspicion and pervasive distrust, the government adopted more authoritarian methods and definitive steps toward suppressing the media and silencing opposition.[14]

Symbolic of these trends is the Ergenekon investigation, which began in June 2007 when Turkish police were led by an anonymous tip to a crate of grenades in Istanbul; by May 2011, "a motley collection of over 300 people had been formally charged with membership of what public prosecutors described as the 'Ergenekon terrorist organization,' which was allegedly plotting to violently destabilize the AKP Government.[15] Once supported by many Turkish liberals "as a critical step toward uprooting Turkey's national security state," the Ergenekon case has lost considerable support due to a lack of due process and perceived defects in the government's case against various suspects.[16] Not only was there no proof the accused were Ergenekon members, they hold widely disparate political views (though none support the Islamist right); the only characteristic the accused seemingly share is their opposition to the AKP and its important

---

judicial killings; but they have also been known to collude with organized crime and to undermine Turkish democracy").

[11] *The Deep State*, *supra* note 5.

[12] Madeleine K. Albright et al., *U.S.-Turkey Relations, Independent Task Force Report No. 69*, May 2012, at 21 [hereinafter *U.S.-Turkey Relations*].

[13] *U.S.-Turkey Relations*, *supra* note 12, at 21 (noting the Constitutional Court found evidence supporting the charges, but the AKP was not banned because the judges fell one vote short of the seven required to ban a party and instead it was forced to pay a $20 million fine).

[14] *U.S.-Turkey Relations*, *supra* note 12, at 21 (stating "Prime Minister Erdoğan has used a legal investigation that initially targeted Turkey's so-called deep state—an alleged partnership of military, security, and intelligence officials who guard Atatürk's legacy—to go after the AKP's critics in the media, academia, and the bureaucracy").

[15] Gareth Jenkins, *Ergenekon, Sledgehammer, and the Politics of Turkish Justice: Conspiracies and Coincidences*, 15 MERIA, no. 2, Aug. 29, 2011, *available at* http://www.gloria-center.org/2011/08/ergenekon-sledgehammer-and-the-politics-of-turkish-justice-conspiracies-and-coincidences [hereinafter *Ergenekon, Sledgehammer, and Turkish Justice*].

[16] *U.S.-Turkey Relations*, *supra* note 12, at 21.

political ally, the Fethullah Gülen Movement (FGM).[17] In a 2012 article, *The New Yorker* summarized the numbers detained in the Ergenekon and Sledgehammer cases:

> In the past five years, more than seven hundred people have been arrested, including generals, admirals, members of parliament, newspaper editors and other journalists, owners of television networks, directors of charitable organizations, and university officials. Some fifteen percent of the active admirals and generals in the Turkish armed forces are now on trial for conspiring to overthrow the government.[18]

The procedural conduct in these cases has thus fueled suspicion that the prosecutions are politically motivated and reflect a general trend of the AKP's reliance on "many of the same abusive judicial tactics previous governments used to silence critics, including long detentions of suspects pending trial and indictments that appear to be based on innuendo and gossip."[19] The Ergenekon and Sledgehammer indictments were trumpeted and heavily supported by pro-AKP media, particularly the FGM daily newspaper, *Zaman*.[20] Further, FGM media outlets have "sought to shape domestic and international public opinion about the [Ergenekon and Sledgehammer] cases by running vigorous disinformation campaigns, including inaccuracies, distortions and outright untruths. They have also mobilized their resources to launch vicious defamation campaigns against anyone who criticizes or questions the investigations."[21] Gülen sympathizers now dominate large portions of the judiciary and police populations, especially police intelligence and counter-terrorism branches, which have been preparing the case files for the Ergenekon and Sledgehammer investigations.[22]

Critics of the Ergenekon and Sledgehammer investigations argue that they are merely one aspect of a "wide-ranging AKP-Gülenist effort to silence their opponents and intimidate the public from speaking out against them, thus ensuring the continuation of their monopoly over the social and political spheres."[23] This is, in part, because the 1997 "postmodern coup," instigated by the military, targeted the Gülen movement and other Islamist influence in Turkish society. Such persistent tension between the military and the increasingly influential non-secular forces in Turkish politics creates the context for the present Sledgehammer Coup Plot Case

---

[17] *U.S.-Turkey Relations*, *supra* note 12, at 56 (discussing the controversial nature of the FGM, named for its founder, Fethullah Gülen. "To secularists, Gülenists pose a threat to the secular foundations of the Turkish Republic. To Gülen's supporters and others, the movement is far more benign, engaged in a broad effort to develop an inclusive and tolerant interpretation of Islam through education (both secular and religious) and good works").

[18] *The Deep State*, *supra* note 5.

[19] *U.S.-Turkey Relations*, *supra* note 12, at 21; and *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15 (noting that the indictments against the accused were thousands of pages long and were "riddled with absurdities and contradictions" and "contained no convincing proof that either the Ergenekon organization or the coup plot existed…some of the evidence adduced to support the prosecutors' claims had clearly been fabricated").

[20] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.

[21] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.

[22] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.

[23] *U.S.-Turkey Relations*, *supra* note 12, at 60 (noting that "suspicion surrounding the Gülen movement almost exclusively arises from its ties to, and its overlap with the AKP, and its secretiveness and what seems to some an almost conspiratorial character." Critics believe Gülen sympathizers and the AKP are able to carry out "smear campaigns, investigations, detentions, and convictions of political opponents through control of large media outlets and a heavy presence in the police force and judiciary").

(Sledgehammer Case), discussed below. Hundreds of Sledgehammer Case Defendants have been investigated, arrested, charged, and imprisoned without the opportunity to exercise their due process rights.

3. The Sledgehammer (Balyoz) Coup Plot Media Debut

On January 21, 2010, *Taraf*, a well-known Turkish newspaper, broke the story of a 2003 military coup plot to topple the AKP Government. Earlier that month, an anonymous individual delivered three DVDs and a CD containing incriminating evidence to Mehmet Baransu, a reporter connected with police intelligence and the author of various anti-military exposés published in *Taraf*. The plot allegedly encompassed detailed preparations for the coup and plans to "provoke tensions with Greece, in order to spark political chaos and justify a military takeover."[24] The plans included the bombing of various mosques, the takeover of hospitals and pharmacies, the downing of a Turkish fighter jet in a false-flag operation, the shutting down of NGOs, the arrest of various journalists and politicians, and the appointment of a specially selected cabinet.

The material delivered by the informant also included voice recordings[25] and documents on discs linked with a March 5-7, 2003 Turkish Military seminar. During that seminar, 162 Turkish Military officers engaged in a series of workshops designed to test the military's readiness under extreme scenarios. The content of the seminar was laid out in PowerPoint slides and the workshops were recorded at the order of First Army Commander Çetin Doğan, who led the seminar. The officers were given various hypothetical situations of turmoil and domestic disturbance, and were to strategize how best to address such situations.[26]

Over subsequent weeks, more details about the alleged coup plan surfaced as *Taraf* and other newspapers serialized the contents of many of the alleged coup plot documents.

4. The Indictments: I, II, and III

A total of three indictments charge 365 Defendants with involvement in the alleged Sledgehammer Coup Plot to overthrow the AKP government. The primary evidence forming the basis for these indictments are the "Sledgehammer Security Action Plan" and other documents describing the alleged coup plan and related operations, all of which are unsigned digital documents that have not been authenticated by the Turkish Court or successfully traced to military computers, as will be discussed below. The recordings of the March 2003 military seminar noted above, however, are agreed by both the prosecution and the defense to be authentic, as these were ordered by Doğan himself. The recordings do not reference the alleged

[24] *Turkey: Military Chiefs Resign En Masse*, BBC NEWS, Jul. 29, 2011, *available at* http://www.bbc.co.uk/news/world-europe-14346325 [hereinafter *Military Chiefs Resign En Masse*].

[25] Note that out of the 10 cassettes delivered by the informant, 9 are linked to the seminar. The one outlier cassette contains recordings of a seminar on earthquake preparation, in which a professor talks about a possible earthquake in Istanbul. One has to assume this cassette got in to this batch by mistake.

[26] Fifteen of the seminar participants had been sent as observers from Ankara by the Chief of General Staff, the Commander of the Land Forces, and the Commander of the Air Force, as is routine in such seminars. These 15 individuals had reported back to their superiors about the seminar. Neither these reports nor the observers' subsequent testimonies during the trial gave any indication that the seminar was connected to a coup plot.

Sledgehammer plan or any other alleged criminal activities detailed in the digital documents used as evidence, and the indictments acknowledge that there was no mention of the word "Sledgehammer" during the seminar.[27]

Indictment I

The first indictment, charging 195 officers, was issued on July 6, 2010.[28] Under this indictment, the court arrested 163 of the defendants, as soon as the indictment was read on February 11, 2011. 163 of the 195 Defendants from this indictment have been detained since their arrest. The indictment alleges that the Defendants planned a series of activities and operations designed to destabilize the country, with the eventual aim of overthrowing the elected government and replacing it with a cabinet of their choosing. According to the indictment, the March 5-7, 2003, military seminar was essentially a "dress rehearsal" for the Sledgehammer coup.[29] The indictment was based on evidence Baransu turned over to the prosecutors. Following the release of his news story, the prosecutors requested the evidence he had anonymously received, but he informed them he did not have the original documents. However, Baransu soon contacted the prosecutors, claiming to have subsequently obtained a suitcase containing original evidence from the aforementioned anonymous informant.

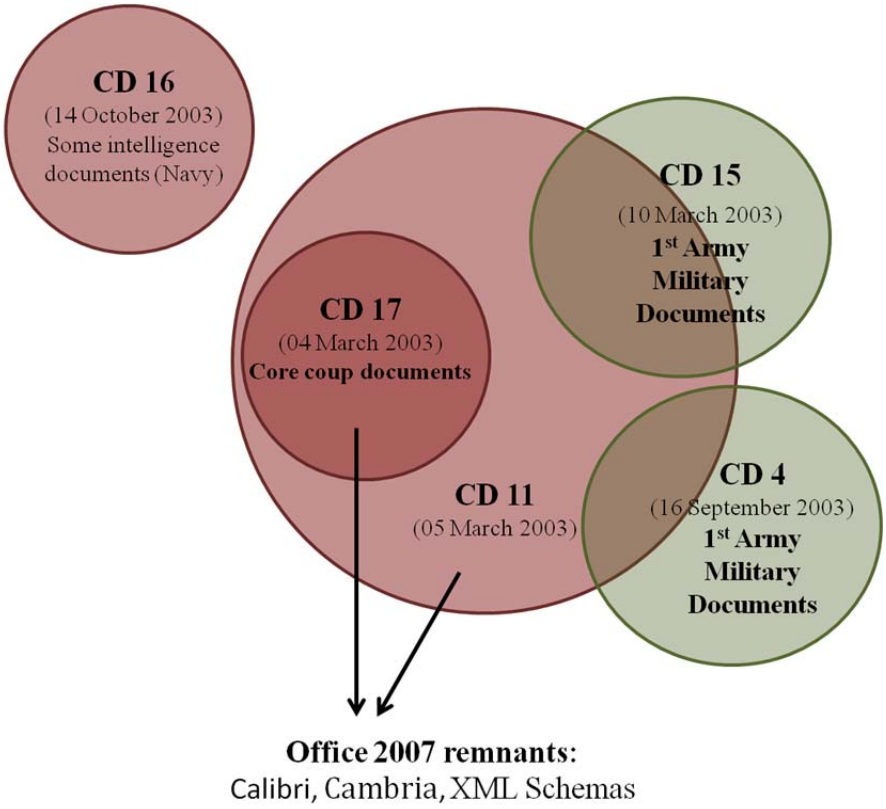
The suitcase contained 2,229 pages of documents, 19 data CDs, and 10 audiocassettes.[30] Of the 2,229 pages of alleged hard copy evidence, some 1,077 pages are not relevant to the case and date back to 1980-1984 and the 1980 Turkish Military coup; the remaining pages are dated 2002-2003 and are listed in the indictment as military plans, documentation, photographs, etc. of the 1st Army.[31] The audiocassettes contain recordings of the March 2003 military workshops, as discussed above. The authenticity of the audiocassettes, hard copy documents and 16 of the 19 CDs containing digital documents has not been contested by the Defendants. These are deemed genuine and were apparently stolen from the military's archives.[32] This has been agreed upon by the prosecution and defense.

The allegedly incriminating materials are found only on three CDs, #11, #16, and #17,[33] with all material related to the purported coup plot found on CD #11 (referred to as No. 11 in the indictment).[34] The defense believes about half the files on these three CDs are authentic and were not forged; for example, some files on CD #11 are replicas of files on the other 16 CDs that both the prosecution and defense agree do not contain any allegedly incriminating elements. The defense believes the remainder of the documents on CD #11 and #17 are forged. CD #11, the primary source of alleged evidence against the Defendants, contains 282 files (comprised of 204 Microsoft Word, 71 PowerPoint, and 7 Excel documents). Approximately 130 of those files are

[27] Istanbul Prosecution of the Turkish Republic, Indictment number 2010/420, Jul. 6, 2010, *available at* http://www.ergenekonteror.com/readfile.php?id=108 [hereinafter Indictment I].
[28] Indictment I, *supra* note 27.
[29] *Turkey Coup Plots: Major Suspects*, BBC NEWS, Jan. 6, 2012, *available at* http://www.bbc.co.uk/news/world-europe-16438136.
[30] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.
[31] Indictment I, *supra* note 27, at 43, 47.
[32] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.
[33] Indictment I, *supra* note 27, at 50.
[34] Indictment I, *supra* note 27, at 81, *and see Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.

also found on the other CDs not containing any incriminating material, and which both parties take to be authentic and not forged.[35]

See below chart as a visual aid:



CD 17 contains the core coup documents (**22 Word documents and 4 PowerPoint documents**): Sledgehammer Action Plan, Mosque bombing plans, downing jets . . . (all these documents are also in CD 11)

CD 11 contains **282 documents in total.** It contains all the documents that are in CD 17 + other documents related to coup plans (NGOs, journalists, etc.) + authentic military documents that are found in other CDs, such as CD 4, CD 15.

CD 16 contains **15 Word documents**; these are unsigned Navy intelligence documents, allegedly prepared by one of the defendants. These are not related with Sledgehammer plans.

The evidence used against the Defendants consists of the following:

- A digital document dated December 2002, purportedly prepared by Doğan, and outlining plans for a military coup (code-named Sledgehammer);
- Documents that allege plans by the Turkish military to precipitate the coup, such as shooting down a Turkish fighter jet and bombing two mosques during Friday prayers;
- Names of cabinet members to be appointed after the coup;
- A document describing the economic and political strategy to be followed by the new government;

[35] *See* TÜBİTAK Reports. Note the lists of the relevant files are available in these reports and any individual can verify the aforementioned numbers of files by looking through the reports. The number of files in the first TÜBİTAK report is incorrect, as some files were omitted and some duplicates were listed.
The 1st TÜBİTAK Report can be found in the Annex Files to indictment, in File number 47 (sequence numbers 1-549) and File number 48 (sequence numbers 1-481). The 1st Report is dated 19 February 2010, and signed by three experts. The 2nd TÜBİTAK Report can be found in Annex File number 52 (sequence numbers 1 -257). The 2nd Report is dated 16 June 2010, and signed by three experts.

- Two lists of journalists: one naming those to be arrested and the other naming those the military planned to cooperate with;
- Various other lists, such as pharmaceutical depots, hospitals, newspapers, public officials, politicians, military officers, NGOs, and so on, to be used during the operations;
- Voice recordings from the three-day war simulation workshop held at the headquarters of the 1st Army on March 5-7, 2003.

Of these, only the audiotapes are believed to be authentic by the defense. The rest are digital, unsigned documents found on CDs #11 and #17. The defense believes all these other documents are forged, as will be explained.

The indictment does not ascribe any criminal activities directly to the military workshop. But it alleges that the workshop was a covert dress rehearsal for the Sledgehammer plans that are detailed in the digital documents. To make the linkage, the indictment cites quotes from the workshop and compares them to passages from the aforementioned digital documents. The resemblance between the two is used to implicate the military workshop and link it with the digital files on the CDs. This linkage, the digital evidence, and three expert reports (one by the military and two by the Scientific and Technological Research Council of Turkey (TÜBİTAK)) analyzing the evidence, formed the basis of this indictment, in which the prosecutors demand that the suspects be penalized in accordance with the Turkish Criminal Code, Articles 250-252.[36]

Indictment II

A second wave of arrests occurred during May and the beginning of June 2011, in which 15 additional suspects were jailed. As a result, a second indictment charging the 28 Defendants was accepted by the Court on June 28, 2011, which also issued an arrest warrant for 8 of the non-detained Defendants. The indictment is based on evidence found on December 6, 2010, at the Gölcük Naval Command Base and on April 27, 2011, at the home of retired air force Colonel Hakan Büyük.[37] Turkish police received an anonymous letter explaining where to find evidence pertaining to a military coup, and the police forwarded these letters to the prosecutors, who subsequently conducted the naval base search. In a storage area, the prosecution found a hard drive (Hard Disk #5) containing numerous allegedly incriminating documents similar to those on CD #11. A second anonymous tip led police to raid the home of Büyük, where they claimed to have found a thumb drive containing more documents related to the alleged Sledgehammer plot. None of the Defendants charged in this indictment participated in the 1st Army military workshop of March 2003. Nevertheless, as in the first indictment, Indictment II cites quotes from the workshop, comparing the resemblance of those statements to those from the aforementioned digital documents, in an attempt to implicate the military workshop by linking it with the evidence seized from the Naval Base and Büyük's home. The indictment thus states, "all the suspects have committed the crime of attempting to overturn the Turkish Government by force, and should be PENALIZED according to the TCK (Turkish Criminal Code) Law no. 765 Articles 147, 61/1, 31, 33, 40."[38]

[36] Indictment I, *supra* note 27, at 1001.
[37] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.
[38] Istanbul Prosecution of the Turkish Republic, Indictment number 2011/288, Feb. 20, 2011, at 82 *available at* http://cdogangercekler.files.wordpress.com/2011/06/2011-142-esas-iddianame.pdf

Indictment III

The third wave of arrests took place between the end June and September 2011, during which 64 suspects were arrested. The third indictment charged 143 individuals with attempting to overthrow the government, and was accepted by the Court on November 23, 2011. This third indictment is largely based on the digital documents found at the Gölcük Naval Command Base, namely on Hard Disk #5. It also charges some Defendants based on documents on another CD found in Gölcük (identified as CD #10), which contains additional plans allegedly prepared by the gendarmerie. Additionally, the indictment mentioned CD #1, also found at the Base and nearly identical to CD #11, except that it houses one additional Word document containing the names of all the purported plans associated with the alleged Sledgehammer Coup plot. Thus, the third indictment heavily references CD #11, as it contains various documents related to the all of the alleged coup plans. Like Indictment II, Indictment III also cites quotes from the 2003 military seminar in order to try to establish a link between the seminar and the digital documents found. The final page of the third indictment states "the suspects are understood to have attempted to overthrow the Turkish Government by force, and should be PENALIZED according to the TCK (Turkish Criminal Code) Law no. 5252, Article 9/3, TCK (Turkish Criminal Code) Law no. 5237, Article 7/2, and TCK (Turkish Criminal Code) Law no. 765, Articles 147, 61/1, 31, 33, 40."[39]

In response to the mass arrests in the Sledgehammer case and related trials, on July 29, 2011, the Chief of the Turkish Armed Forces along with the heads of the Army, Navy, and Air Force resigned together in protest against what they viewed as the unjust imprisonment of their colleagues.[40] The dramatic mass resignation of various high-ranking military officials is unprecedented in Turkey.[41]

5. The Sledgehammer Coup Plot Case

The trial began on December 16, 2010, at the Istanbul 10th High Criminal Court, with 195 suspects charged with attempting to overthrow the government. Approximately 21 were detained pre-trial shortly following the January 2010 *Taraf* news story, and as a result of the three aforementioned indictments, there are now 250 Defendants in jail pending a verdict.[42] Of the 250, dozens were held in pre-trial detention, ranging from 1-4 ½ months. Prosecutors have requested 15-20 year sentences for the 365 allegedly implicated defendants.[43]

Because of the secrecy of the investigation, the Defendants did not have access to any of the documents allegedly implicating them during the investigation, though some documents were

[39] Istanbul Prosecution of the Turkish Republic, Indictment 2011/554, Nov. 15, 2011, at 264 *available at* http://cdogangercekler.files.wordpress.com/2011/11/2011-332-soruc59fturma-sayc4b1lc4b1-iddianame.pdf
[40] *Military Chiefs Resign En Masse*, *supra* note 24.
[41] *Military Chiefs Resign En Masse*, *supra* note 24 (noting the series of military coups from 1960 to 1980 in Turkey, as well as the 1997 army-led campaign that forced the resignation of the Turkey's first Islamist-led government).
[42] Ece Toksabay, *Turkish Coup Case Cast in Limbo by Lawyers' Boycott*, ARAB NEWS, Jun. 15, 2012, *available at* http://www.arabnews.com/turkish-coup-case-cast-limbo-lawyers%E2%80%99-boycott [hereinafter *Turkish Coup Case Cast in Limbo*].
[43] *See id.*

briefly shown to suspects during their interrogation. However, excerpts from some of these documents were published in *Taraf*. The Defendants did not have access to these documents until after July 19, 2010, the date the first indictment was accepted by the Court. The indictment's Annex Files contain approximately 44,000 pages and all of the alleged evidence, including printouts of the allegedly incriminating materials on CD #11, police and expert reports, all legal correspondence, etc.—except for evidence hidden by the prosecutors.[44] Once the indictment was accepted, the Annex Files were scanned by the Court clerk and given to the defense. However, since the alleged evidence is digital and the CDs and their forensic images were not given to the defense, no forensic examination could be conducted to verify the files' authenticity.

At trial, the defense was not provided with access to the forensic images of CD #11, #16, and #17 until November 2011, 22 months after the prosecutors obtained the CDs and began detaining individuals, despite the defense's numerous requests to the Court.[45] The Court consistently denied access to the CDs on the grounds that there were a sufficient number of expert reports in the file and no further analyses were needed.[46] The relevant interim decision on this matter is dated October 28, 2011, but the decision was not announced by the Court until November 24, 2011.

The Court also consistently denied access to photographs of the 19 CDs. On January 3, 2011, *Zaman* published photographs of the CDs on its front page, though the defense still did not have access to them. Finally, in April 2011, the photographs of the 19 CDs were given to the defense. In an interim decision on January 20, 2012, the Court granted access to forensic images of "Hard disk number 5" and CDs found at the Naval Base (CD #1 and CD #10), 13 months after these items were seized. The images were not delivered to the defense until February 2012.

6. Problems with the Evidence

Once Defendants gained access in July 19, 2010 to the documents on which the charges were based, they noted scores of anachronisms, inconsistencies, and errors (examples of which

---

[44] In the first indictment, *supra* note 27, the prosecutors state that they did not include some in the Annex File. The English translation on page 50 of the indictment, reads: "In order to determine the validity and accuracy of the information contained in the incriminating documents on the assessments and data regarding certain people and to collect evidence, we have done some correspondence with the institutions, and asked them whether these people were employed during the date of the alleged crime. The responses to our letters by various military institutions, administrations, ministries, universities, and various institutions are filed under "RECEIVED RELATED TO THE ASSESMENT" responses in 6 files in total. As mentioned above, the documents contain private information such as employment, ID number, etc., of the people subject to assessment, and hence they are put into judicial storage within the folders that were given the number (DG 1-6)." As stated above, the Prosecution claims it held this information in order to protect private information of individuals discussed within. However, once the defense eventually obtained these documents, it discovered that several did not contain private information. Moreover, the documents revealed many anachronisms and errors in the Sledgehammer documents, as discussed below. Such action by the prosecution points toward misconduct.

[45] *Boston-Based Arsenal Consulting Finds New Evidence of Electronic Forgery in Critical Turkish Coup Plot Case*, ARSENALEXPERTS.COM, Apr. 2, 2012.

[46] *See* Interim Decision, Jan. 6, 2011, at Clause 10 (Istanbul 10th High Crim. Ct.)(Turk.) and Interim Decision, Feb. 11, 2011, at Clause 3(b) (Istanbul 10th High Crim. Ct.)(Turk.); *reaffirmed* in Interim Decision, May 6, 2011, at Clause 14 (Istanbul 10th High Crim. Ct.)(Turk.); Interim Decision, Jun. 24, 2011, at Clause 20 (Istanbul 10th High Crim. Ct.)(Turk.); and Interim Decision, Aug. 26, 2011, at Clause 15 (Istanbul 10th High Crim. Ct.)(Turk.).

will be given below) that indicated the documents in question could not have been produced in 2002-2003, as alleged, and that they had been forged. The defense produced and entered into the record documentary evidence of these anachronisms and inconsistencies (which have not been challenged by the prosecution). Moreover, it came out during the trial that evidence collected by the prosecution during the pre-trial investigation had revealed additional documented instances of anachronisms, showing that the dates on the alleged incriminating documents had been forged (which the prosecution, once again, ignored).

Finally, upon receiving the forensic digital images of the materials after November 2011, several independent forensic experts, from the U.S., Germany, and Turkey, were able to analyze the authenticity of the digital information on behalf of the defense. Their analyses conclusively established that the CDs and hard drive containing the coup plot documents were forged and thus are being used to frame the Defendants. U.S.-based Arsenal Consulting, Inc. (Arsenal) and other experts based in Turkey and Germany discovered that the majority of the digital evidence was created after 2003 on computers whose clocks had been manually set back to 2002-2003.[47] As discussed further below, the forensic experts established that CD 11 and CD 17 (in which the incriminating documents are found) could not have been created in 2002-2003, as alleged; instead, the earliest these CDs could have been created is mid-2006. This conclusion is based on the forensic examinations that discovered Microsoft Office 2007 remnants in the incriminating documents that were allegedly last saved in 2002-2003. As such, there is consensus among all the forensic experts that analyzed the evidence, once the evidence was shared with the defense and the trial got under way, that the incriminating evidence is forged because it was created after 2003.

Anachronisms

The documents presented as evidence contain hundreds of anachronisms suggesting they were produced after 2003 and were manually backdated to reflect earlier creation. Names of various organizations that only existed after 2003 appear in these documents, making it impossible for the documents to have been produced during or before 2003. Examples of this include:

- The mention of Yeni Recordati İlaç in a document purportedly last saved on February 4, 2003, though the company was not given this name until July 2009, after it was bought by Recordati. Thus, the company was still called Yeni İlaç in 2003 and should have appeared as such in a document saved that year.

- The mention of Medical Park Sultangazi in a document purportedly saved on February 5, 2003, though a hospital by this name did not exist in 2003. There was a hospital in the Sultangazi district of Istanbul named Sultan Hastanesi, which was taken over by the Medical Park group of hospitals in July 2008 and only then given the name appearing in the document.

[47] Seth Daniel, *Key Evidence in Major Turkish Trial Blown to Pieces by Chelsea Company*, CHELSEA RECORD, Apr. 26, 2012 [hereinafter *Key Evidence Blown to Pieces by Chelsea Company*].

- The mention of employees of ASELSAN (a Turkish company which produces tactical military radios and defense electronic systems for the Turkish military) in a document purportedly last saved on February 25, 2003, though ASELSAN provided the prosecutors with information that three of the listed employees were not employed by the company in 2003 and did not begin to work there until 2007.

- The mention of CC MAR NAPLES in two Word documents purportedly last saved on January 20, 2003, and February 20, 2003, though it did not exist in 2003. Following structural changes in the NATO headquarters, the Headquarters Allied Naval Forces Southern Europe (HQ NAVSOUTH) was renamed Allied Maritime Component Command Naples (CC-Mar Naples) on July 1, 2004.[48]

- A list of newspapers, including *Gurcu Ekspres* and *Ilk Adim*, which were not established until September 12, 2003, and August 15, 2005, respectively.[49]

- The naming of *Turkiye Genclik Birligi* as an NGO sympathetic to a coup, though *Turkiye Genclik Birligi* was not founded until 2006.[50] This organization is mentioned in the main coup document, the Sledgehammer Action Plan, dated December 2002.

Inconsistencies

In the documents presented as evidence during the trial, there are numerous instances of misstated ranks and misspelled officer names, even instances in which the alleged authors misstated their own rank and misspelled their own names. Frequent mistakes of this kind make the authenticity of such documents highly suspect. Further, the evidence allegedly implicates many Defendants who, at trial, presented counterevidence that they were far from their offices or outside Turkey on the dates they were alleged to have been physically present in certain places. Such suspect proof necessarily casts doubt on the legitimacy of the documents and thus the coup plot itself. Examples of this include:

- Naval Officer Yaşar Barbaros Büyüksağnak, listed in the first indictment, is mentioned in two Word documents as having attended two coup planning meetings. The documents were purportedly last saved in December 2002 and January 2003. It is indicated that he allegedly attended these meetings in Ankara, Turkey, on December 12, 2002, and January 2, 2003, though he was in EUROMARFOR headquarters in Rome during that period and he proved he was not present in Turkey at any point during November 2002-September 2003. During the investigation phase he provided his official assignment letter as well as proof in the form of his passport, which contained entry and exit stamps reflecting he was not in Turkey at the time alleged. Later, he provided the Court with a document his lawyers obtained from the national border/passport police unit, which keeps records of country entry and exits. Further, though his name appears as Yaşar Barbaros Büyüksağnak in the documents in evidence, his name was listed as Barbaros

[48] *NATO Allied Maritime Command Naples*, *available at* http://www.manp.nato.int/Factsheets/Factsheet_History.html.
[49] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.
[50] *Ergenekon, Sledgehammer, and Turkish Justice*, *supra* note 15.

Büyüksağnak in military records. In 2007, the Military's Human Resources updated their records and his identity card was only then issued with his full name, as it appears in the documents in evidence. He provided both the prosecutors and the judges with numerous official military documents (i.e. diplomas, assignment letters, all sorts of correspondence), in order to demonstrate that "Yaşar" was never used prior to 2007, and thus the documents allegedly implicating him could not have been produced prior to 2007.

- Naval Officers Erhan Şensoy and Fahri Can Yıldırım, listed in the third indictment, are mentioned in a Word document as having attended a coup planning meeting in Aksaz, Turkey, on January 3, 2003. The document was purportedly created by the user name "Erhan Şensoy" on January 2, 2003, which is not possible as both officers were engaged in Reliant Mermaid-V, a humanitarian rescue exercise in Haifa, Israel, at that time. Both during the investigation phase and their defense in Court, they presented official documentation, including the stamped and signed logbook of the ship Yıldırım and Şensoy, of which they were the Commander and Second Commander, respectively.

- Tülay Delibaş is alleged to have prepared a Word document purportedly created and last saved in a military base on April 3, 2003, and April 5, 2003, respectively. The document was found on the thumb drive allegedly retrieved from retired air force Colonel Hakan Büyük's home, and "Tülay" appears in the document's metadata, though Delibaş was on maternity leave at that time. This document also references a legal amendment that did not occur until 2005 and even states the amendment date as 15/6/2005 and the amendment number as 5365/7.[51]

- Nuri Alacalı is listed in the first indictment and is alleged to have prepared a Word document purportedly created by the user name "Nuri Alacalı" on January 6, 2003, in Ankara, Turkey. However, Alacalı was attending the U.S. Naval War College in Newport, Rhode Island, and was not present in Turkey at any point during July 2002-June 2003. He provided his passport, police records, and the official assignment letter from the Commander of the Naval Forces, and upon the Court's demand, this information was also verified by the documentation sent by the Directorate of the National Police and the General Staff.

In addition, the evidence is suspect because the formatting of various documents does not comply with the military directive on document preparation that was valid in 2003, the year such documents were allegedly created and last saved (the Headquarter Duties Directive MY 75-1 (**A**) of the Turkish Armed Forces). Instead, the documents' format complies with the directive that was adopted March 4, 2008 (Headquarter Duties Directive MY 75-1 (**B**) of the Turkish Armed Forces). Some of the Word documents use the header format: "Re: XX letter, dated YY, number

[51] Ümit Cizre, ALMANAC TURKEY 2005: SECURITY SECTOR AND DEMOCRATIC OVERSIGHT, TESEV Publications, Sept. 2006 (noting that Law No. 5365, enacted on June 16, 2005, was entitled Law Amending TSK Internal Service Law; TSK Personnel Law; Gülhane Military Medical Academy Law; and the Law Concerning the Establishment and Management of Circulating Capital in Institutions Attached to the Ministry of National Defense and to the Land, Naval and Air Forces).

ZZ, subject 'WW,'" the format adopted in 2008. Prior to the 2008 Directive, the format did not contain the subject "WW." For example, the "CANER BEN_1.doc" Word document states:

- "Re: Naval Forces letter, dated 7 November 2002, number ISTH: 3200-27-02, subject 'Restructuring Activities'"

If prepared in 2003, the last "subject" phrase would not be present, in compliance with the aforementioned 2003 Directive; the format would thus appear:

- "Re: Naval Forces letter, dated 7 November 2002, number ISTH: 3200-27-02"

Forensic Reports

The evidence forming the basis of the indictments was forensically analyzed by Arsenal and Turkish experts at Yıldız Technical University. On the CDs analyzed, both experts found references to Microsoft Office elements (ClearType fonts and XML[52] schemas) that were first introduced in 2006 and concluded that the CDs used as evidence against the Defendants were backdated to 2003. These findings were subsequently also verified by German forensic experts EDV-Sachverständigenbüro Gramberg & Vogel.[53]

Examples of these anachronistic references to later Microsoft Office elements include:

- The Word document containing the Sledgehammer Coup Plan, the central piece of evidence in the case, was purportedly last saved on December 2, 2002, but it contains a reference to the "Calibri" font. This font was first introduced by Microsoft Office in its 2007 version, in mid-2006.

- The PowerPoint document containing a drawing of the Fatih Mosque, which was targeted for bombing in the alleged plot, was purportedly last saved on February 19, 2003, but it contains references to XML schemas first introduced by Microsoft Office in its 2007 version.

- The Excel document, in which General Doğan allegedly listed generals in the Turkish Army according to their level of support for the coup, was purportedly last saved on February 27, 2003, but it contains references to the "Calibri" font first introduced by Microsoft Office in its 2007 version.

Arsenal concluded that CD #11 and #17 were forged, as they contained references to the 2007 version of Microsoft Office, first released in mid-2006, even though their metadata indicated their creation dates as March 5, 2003, and March 4, 2003, respectively. Specifically, Arsenal found nine PowerPoint files on CD #11 and #17 contained references to a particular type

[52] *Microsoft XML Core Services (MSXML)*, TECHOPEDIA.COM, *available at* http://www.techopedia.com/definition/24773/microsoft-xml-core-services-msxml (explaining Extensible Markup Language (XML) is used to display, transport and exchange arbitrary data structures).
[53] Bernhard O. Gramberg and Norbert Vogel, BALYOZVERFAHREN: STELLUNGNAHME, EDV-Sachverständigenbüro Gramberg & Vogel, August 2, 2012.

of XML and 67 Word and Excel documents had references to the ClearType font Calibri, neither of which was available in Microsoft Office until the 2007 version of the program was released.[54] Both CDs were created in a single session, with no subsequent modification or updating. Therefore Arsenal concluded that the CDs could not have been created in 2003 and must have been produced in mid-2006 at the earliest, as they contain documents that reference a 2007 version font and XML schemas.[55] The presence of these forged documents indicates the CDs themselves were forged.[56]

Furthermore, Arsenal concluded that the dates and times related to at least 65 documents on CD #1 found at the Gölcük Naval Command Base were forged, as these documents were purportedly last saved in 2002 and 2003 but contained references to Office 2007 version fonts (Calibri and Cambria) and XML schemas.[57] The CD, which was created in one session, was purportedly created on March 13, 2002, but this is not possible given the presence of the Office 2007 elements.[58]

In addition, the handwriting on the surface of the CDs was analyzed by two forensic specialists, Grant Sperry of the United States and Jale Bafra of Turkey. Both concluded that the handwriting was forged by mechanical replication of individual letters written by one of the Defendants in his notebook, one of the items in the suitcase of alleged evidence delivered to Baransu. Thus, the defense believes the forger(s) of the CDs previously possessed this notebook as well, using the handwriting inside as a model for the forged handwriting on the surface of the CDs in question.

Both the thumb drive and the hard drive listed as evidence in the second indictment were also forensically analyzed by Arsenal. Arsenal determined that at least four files found on the thumb drive contain date and time values that are not possible based on the file content; specifically, two scanned images and two documents contain references to things that did not exist when those documents were purportedly last saved.[59] Hence, Arsenal concluded these files were forged and stated concerns about the integrity of all other files on the thumb drive.[60] Arsenal also determined that the Sledgehammer-related files found on the detached hard drive

---

[54] *Key Evidence Blown to Pieces by Chelsea Company*, *supra* note 47.
[55] *See id.*
[56] There are few ways to forge metadata; the simplest entails changing (backdating) the system clock of the computer being used, as the metadata of documents will reflect this altered date and time and not the actual date and time the document is saved. Metadata can also be forged through the use of special software. Arsenal's report and others are conclusive that at least 76 documents' metadata does not reflect the real date and time they were saved, and hence the CDs' metadata does not reflect the real date and time they were created. However, the reports are not conclusive on how the forgery was done, and it is extremely difficult to detect forgery on digital material recorded on a CD, as forensic techniques are rather limited for analyzing such media. In this case, the forgery is detectable because the forger(s) were unaware of the aforementioned Windows 2007 references that are not visible to the naked eye they left behind in the digital raw files. These references to ClearType fonts, etc. exist as a result of some interaction with Windows 2007 in the process of creating the documents, such as copying and pasting from a document prepared with Windows 2007, for example.
[57] Arsenal Consulting, PRELIMINARY GÖLCÜK CD NO. 1 AND ESKIŞEHIR THUMB DRIVE REPORT, 2-3, May 1, 2012 [hereinafter Arsenal Report].
[58] Arsenal Report, *supra* note 57, at 6.
[59] *See id.*, at 9.
[60] *See id.*

retrieved from the Naval Base were copied from a computer whose system clock was manually set back to reflect an earlier time. Arsenal found 120 files and folders on the drive, which at first appeared to have been created on April 8, 2004. In exploring the file system records further, however, Arsenal determined the files and folders could not have been created before July 28, 2009.[61] Almost all of the incriminating documents are contained in that particular batch of files and folders. The analysts concluded the most plausible explanation is that the hard drive was attached to an already backdated computer, the files and folders were then copied to the hard drive, and the hard drive was then detached and returned to its normal place.[62]

Court's Refusal to Seek Independent Fact Finding and Expert Reports

According to Turkish law, while the defense can submit forensic reports, the Court is bound by the conclusions only of those experts that have been specifically appointed and charged by the Court. Throughout the trial, the defense has made numerous requests for independent forensic expert analysis by Court-appointed experts, even prior to the release of the Arsenal reports. However, the Court repeatedly postponed any decision on this matter; in an interim decision on January 20, 2012, it stated, "Demands for hearing witnesses and assigning experts for analysis will be evaluated after the defenses are completed."[63] Following the completion of defenses, however, the Court omitted the stage in which it was obliged to evaluate the validity of the evidence and instead asked the prosecutor to present his final statement. The prosecutor presented his statement on March 29, 2012, stating that the CDs in question were prepared and last saved in 2003, that the existing reports in the file were sufficient, and that no further analyses were necessary. Later that day, the Court issued an interim decision, stating, "hearing witnesses or new expert reports (…) would not add any concrete contribution to the case file, and hence, are not warranted."[64] The Court issued another interim decision on April 19, 2012, stating "the demands of the defense for hearing other witnesses and experts, assigning experts to analyze the evidence and for discoveries are denied on the grounds explained in the previous interim decisions."[65]

Turkish Courts are not required to recognize outside experts, and it is within the Court's discretion to take outside expert opinion into account. However, here the Court, in an unexpected manner, repeatedly refused defense requests to appoint an independent technical expert to verify (or deny) that the dates on the digital materials and handwriting on the CDs are forged. Despite the substantial aforementioned evidence of forged fabrications, the Court also refused to recognize the findings of the defense's experts, whose analyses revealing anachronisms and inconsistencies rebut evidence allegedly obtained from the confiscated computer files.[66] The defense asserts the experts' forensic analysis of the CDs show that the data files could not have been produced before 2007, and that the Defendants have simply been framed.

---

[61] *Key Evidence Blown to Pieces by Chelsea Company*, *supra* note 47.
[62] *See id.*
[63] Interim Decision, Jan. 20, 2012, at Clause 11(Istanbul 10th High Crim. Ct.)(Turk.).
[64] Interim Decision, Mar. 29, 2012, at Clause 2 (Istanbul 10th High Crim. Ct.)(Turk.) [hereinafter March 2012 Interim Decision].
[65] Interim Decision, Apr. 19, 2012, at Clause 3 (Istanbul 10th High Crim. Ct.)(Turk.)
[66] *Turkish Coup Case Cast in Limbo*, *supra* note 42.

Additionally, the Court has refused to act on or release several Defendants who provided evidence proving they were out of the country or not physically present at the times and places the digital evidence implicating them was allegedly created.

Court's Refusal to Call Key Witnesses

As indicated above, the Defendants and their lawyers have also repeatedly requested that two key witnesses be called by the Court: former Commander of Land Forces, General Aytaç Yalman, and former Commander of the Turkish Army and Chief of General Staff, Hilmi Özkök. The indictment claims General Yalman prevented the alleged coup, while media reports have often pointed to General Özkök as having halted the alleged coup preparations. Also, as the two most senior officers of the military at the time, both are in a position to clarify the role of the seminar of March 5-7, 2003. Neither individual was questioned by prosecutors, yet the Court unjustifiably and arbitrarily refused their testimony as "unnecessary."

7. Where the Trial Stands Today

Presently, there are 365 Defendants, 250 of which are imprisoned as a result of the three indictments. On April 6, 2012, the Istanbul Bar Association presented a letter to the Court to offer support to the defense lawyers, in which they asked for a fair trial that respects the rules for procedure. On April 16, 2012, the defense lawyers filed a complaint with the Supreme Board of Judges and Prosecutors (HSYK) against the prosecutors in the case, claiming their right to defense and a fair trial had been violated;[67] previously, on March 26, 2012, the defense lawyers had staged a walk out due to unfairness in the legal proceedings. On June 15, 2012, the prosecution requested a change of venue.[68]

On August 4, 2012, as reported in the *New York Times*,[69] the Turkish Supreme Military Council, led by Prime Minister Recep Tayyip Erdogan, forcibly retired 40 generals and admirals, 34 of which are on trial in this case. By definition, their forced retirement prior to the conclusion of the trial reaffirms that their guilt has been pre-determined. As one Turkish journalist noted: "Based on human rights and the concept of innocent until proven guilty, these commanders, who may be innocent, should not have been forced to retire. It seems odd and little more than an excuse to reshape the military."[70]

---

[67] *Balyoz Case to be Relocated*, HÜRRIYET DAILY NEWS, Jun. 16, 2012, *available at* http://www.hurriyetdailynews.com/comment-rules.aspx?pageID=511 [hereinafter *Balyoz Case to be Relocated*].

[68] *Balyoz Case to be Relocated*, *supra* note 67 (reporting that on June 15, lead Prosecutor Kaplan demanded the trial be transferred to another Court, based on Article 19 of the Code of Criminal Procedure, "which states that the Court will transfer the case to another equal Court of law in the event that the authorized judge or the Court cannot proceed with its duties for juridical or factual reasons." To present support for the defense lawyers protesting the trial; Istanbul Bar Association President Ümit Kocasakal and 10 managers entered the Courtroom during an April 6 hearing, without the Court delegation's permission. On May 25, Istanbul's Silivri district's chief prosecutor launched an investigation into Kocasakal and the 10, on charges of "attempting to influence a judicial authority." The investigation was a response to the Bar Association's failure to provide another defense lawyer following the boycott, even though the Court requested it do so three times").

[69] Dan Bilefsky, *Turkey Retires Charged Commanders*, N.Y. TIMES, Aug. 4, 2012, *available at* http://www.nytimes.com/2012/08/05/world/europe/turkey-retires-all-40-commanders-charged-in-plot-to-overthrow-government.html?_r=1 [hereinafter *Turkey Retires Charged Commanders*].

[70] *Turkey Retires Charged Commanders*, *supra* note 69.

On August 6, 2012, the trial resumed. The prosecution withdrew its request for reassignment of venue but added its request that the judges rule in favor of its previously stated position that all the proffered evidence is authentic and that all defendants are guilty. Given the retirement of the 34 generals and admirals on August 4, there was hope among the relatives of the Defendants that the judges would allow the retired to be released from custody for the remaining duration of the trial. However, on August 6, the Court ruled that the detentions will continue. The Court also indicated the trial will resume with or without the presence of the defense lawyers at the subsequent sessions in August and September, even though Turkish law requires defense lawyers to be present; previously the defense lawyers sent a letter to the Court indicating they would not appear due to the numerous violations of due process during the trial.[71] Finally, one defense lawyer, on behalf of all the other defense lawyers, submitted a letter to the judges summarizing the violations of due process in the trial. He asked to speak to the Court to summarize the letter but the judges refused, resulting in the lawyer walking out of the courtroom in protest. The next court sessions are scheduled over the next several weeks during which all defendants will make their final statements. A verdict is expected at some point in October.

In addition, based upon complaints from the judges, new indictments have been issued against a number of the Defendants for so-called defamatory statements they had made during the trial with which the judges took objection. The following two examples are illustrative. Defendant Ahmet Zeki Üçok was indicted on February 29, 2012 under the Turkish Criminal Code 125/1, 125/3.a, 125/4, 125/5[72] for allegedly "openly insulting" the three judges presiding in the Court. The indictment cites the following two statements made by Üçok during his defense on November 10 2011, "These [are] extra-legal approaches to the law of the…courthouse, which sees itself above Turkish judiciary…" "There exists no other court in any country of the world that so cruelly violates the rights and the freedom of the soldiers of its own army with unfounded charges based on fraudulent documents."[73]

Defendant Çetin Doğan was indicted on June 26, 2012, for allegedly insulting public officials (Istanbul Counter-Terrorism Branch police officers) during his defense in court. The indictment cites the following statement made by Doğan, "The Counter-Terrorism Branch has

---

[71] On March 27, 2012, (Court session number 97), the judge read the letter submitted by the attorneys, dated March 26, 2012, which outlined the Court's violations of law, and put forth a declaration that the attorneys would not attend future court sessions unless the Court complied with the Constitution (Articles 38 and 138) and the Turkish Code of Criminal Procedure (Articles 175 and 206).

[72] Turkish Criminal Code, *available at* http://legislationline.org/documents/action/popup/id/6872/preview, at Article 125 ("(1) Any person who acts with the intention to harm the honor, reputation or dignity of another person through concrete performance or giving impression of intent, is sentenced to imprisonment from three months to two years or imposed punitive fine. In order to punish the offense committed in absentia of the victim, the act should be committed in presence of least three persons. (2) The offender is subject to above stipulated punishment in case of commission of offense in writing or by use of audio or visual means directed to the aggrieved party. (3) In case of commission of offense with defamatory intent; a) Against a public officer, b) Due to disclosure, change or attempt to spread religious, social, philosophical belief, opinion and convictions and to obey the orders and restriction of the one's religion, c) By mentioning sacred values in view of the religion with which a person is connected, the minimum limit of punishment may not be less than one year. (4) The punishment is increased by one sixth in case of performance of defamation act openly; if the offense is committed through press and use of any one of publication organs, then the punishment is increased up to one third. (5) In case of defamation of public officers working as a committee to perform a duty, the offense is considered to have committed against the members forming the committee").

[73] Silivri Civil Penalty Court, Indictment number 2012/237 against Ahmet Zeki Ucok, Feb 29, 2012 at pg 1.

turned into the branch for producing terror. We have said that this branch, which has prepared and produced the reports that form the basis of the indictments, has distorted the facts by claiming a document from the Ankara Police Department had come from the associations branch, and we filed a complaint about it…"[74] Consequently, Doğan is being charged pursuant to Turkish Criminal Code Articles 125/1-3a-4[75] and 131/1.[76]

B. Turkey's Violations of International Law

The deprivation of the Defendants' freedom falls within Category III of the Working Group's classification[77] of cases because it results from the deprivation of freedoms[78] under Turkish law, the International Covenant on Civil and Political Rights[79] (ICCPR), Universal Declaration of Human Rights[80] (UDHR), and UN Body of Principles Regarding Persons Under Any Form of Detention or Imprisonment[81] (Body of Principles). This is a straightforward case in which the Defendants are being held arbitrarily in violation of their due process rights. The ICCPR, UDHR, and the Body of Principles provide the Petitioners with the right to a fair trial, which Turkey has denied them, and in the process of doing so, violated Turkish law providing for due process protections.

The Working Group considers a deprivation of liberty to be a Category III arbitrary detention "[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character."[82] Additionally, the Working Group looks to the Body of Principles.[83] Because the trial and detention of the Defendants failed to observe the minimum international norms relating to a fair trial, as contained in the UDHR, the ICCPR, and

---

[74] Silivri Civil Penalty Court, Indictment number 2012/750 against Çetin Doğan, Jun. 26, 2012 at pg 1.
[75] Turkish Criminal Code, *supra* note 72.
[76] Turkish Criminal Code, *supra* note 72, at Article 131 ("(1) Excluding offenses committed against a public officer due to performance of duty, proceeding of investigation and prosecution for defamatory offense is bound to complaint of the victim. (2) If the victim dies before filing a complaint, or the offense is committed against the memory of the deceased person, then complaint may be raised by second degree antecedents and descendents, or spouses or brothers/sisters of the deceased").
[77] *See* Office of the High Comm'r for Human Rights, United Nations, Fact Sheet No. 26: The Working Group on Arbitrary Detention, at pt. IV(B) [hereinafter Fact Sheet No. 26].
[78] An arbitrary deprivation of liberty is defined as any "depriv[ation] of liberty except on such grounds and in accordance with such procedures as are established by law." *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* 23 March 1976, at art. 9(1) [hereinafter ICCPR]. Such a deprivation of liberty is specifically prohibited by international law. *Id.* "No one shall be subjected to arbitrary arrest, detention or exile." *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at art 9 (1948) [hereinafter Universal Declaration]. "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law…" *Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment*, at Principle 2, G.A. Res. 47/173, Principle 2, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles].
[79] ICCPR, *supra* note 78.
[80] Universal Declaration, *supra* note 78.
[81] Body of Principles, *supra* note 78.
[82] Fact Sheet No. 26, *supra* note 77.
[83] *See id.*

the Body of Principles, their detention is arbitrary under Category III.

Turkey is a party to the ICCPR[84] and must therefore abide by all its provisions contained therein. ICCPR Article 14(1) affords individuals "a fair and public hearing by a competent, independent and impartial tribunal established by law."[85] Toward this end, ICCPR Article 14 provides additional protections: the right to be presumed innocent,[86] to call and examine witnesses,[87] and to have a prompt trial.[88] In addition, the Body of Principles provides for confidential attorney-client communications.[89]

1. Burden has Shifted to Defendants to Prove Their Innocence

ICCPR Article 14(2) affords individuals "the right to be presumed innocent until proved guilty according to law."[90] The Human Rights Committee (HRC), the body tasked by the treaty with authoritatively interpreting its provisions, has noted that the presumption of innocence is

---

[84] United Nations Treaty Status: ICCPR, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (noting that Turkey signed the treaty on August 15, 2000, and ratified it on September 23, 2003).

[85] ICCPR, *supra* note 78, at art. 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.…"). This same right is established by the Universal Declaration Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[86] ICCPR, *supra* note 78, at art. 14(2) ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"). *See also* Universal Declaration, *supra* note 78, at art. 11(1) ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence"); and Body of Principles, *supra* note 78, at Principle 36 ("A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence").

[87] ICCPR, *supra* note 78, at art. 14(3)(e) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees…To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him").

[88] ICCPR, *supra* note 78, at art. 14(3) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees… To be tried without undue delay). *See also* Body of Principles, *supra* note 78, at Principle 38 ("A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial") and Principle 39 ("Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review").

[89] Body of Principles, *supra* note 78, at Principle 18 ("1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel; 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel; 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order; 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official; 5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime").

[90] ICCPR, *supra* note 78.

expressed in unambiguous terms, and "the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."[91]

In the present case, the recent forced retirement of the 34 Officers indicates the outcome of the trial has been predetermined, despite the principle that public authorities—which in the instant case includes the Turkish State—must refrain from engaging in such prejudgment. The Government's retirement of the generals and admirals indicates the Government is operating from a presumption that the Defendants are guilty. The Government's position is further made clear given the issuance of additional indictments against the Defendants for their unfavorable comments[92] which the Court views as "defamatory." Defamation-related charges are only valid if the statements made are not true; the presumption is always that the statements are false unless proven to be true. Here, given that the 'defamatory' statements relate to the forged evidence and the Defendants' desire to challenge it—combined with the fact that the Court has denied the Defendants all opportunities to prove the evidence is forged (as described further below)—demonstrates that the Court violated the Defendants' right to be presumed innocent.

These actions are in violation of both the ICCPR and Turkish law, the latter of which also places the burden of proof on the prosecution to prove Defendants' guilt,[93] thereby affording Defendants the presumption of innocence.[94]

---

[91] Sarah Joseph, et al., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 308 (2000) [hereinafter Joseph, et al.] (emphasis added).

[92] In addition to a due process violation, charges for exercising the right to freedom of expression violate ICCPR, *supra* note 78, at Article 19.

[93] Turkish Criminal Procedure Code (2005), at Article 160, *available at* http://www.justice.gov.tr/basiclaws/cmk.pdf [hereinafter Turkish Criminal Procedure Code].

[94] Constitution of the Republic of Turkey, at Article 38, *available at* http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf [hereinafter Constitution of the Republic of Turkey] ("No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed. The provisions of the above paragraph shall also apply to the statute of limitations on offences and penalties and on the results of conviction. Penalties, and security measures in lieu of penalties, shall be prescribed only by law. No one shall be considered guilty until proven guilty in a court of law. No one shall be compelled to make a statement that would incriminate himself/herself or his/her legal next of kin, or to present such incriminating evidence. Findings obtained through illegal methods shall not be considered evidence. Criminal responsibility shall be personal. No one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation. Neither death penalty nor general confiscation shall be imposed as punishment. The Administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the Armed Forces. No citizen shall be extradited to a foreign country on account of an offence except under obligations resulting from being a party to the International Criminal Court"); Article 15 ("In times of war, mobilization, martial law, or state of emergency, the exercise of fundamental rights and freedoms can be partially or entirely suspended, or measures may be taken, to the extent required by the exigencies of the situation, which derogate the guarantees embodied in the Constitution, provided that obligations under international law are not violated. Even under the circumstances indicated in the first paragraph, the individual's right to life, and the integrity of his or her material and spiritual entity shall be inviolable except where death occurs through lawful act of warfare; no one may be compelled to reveal his or her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive, nor may anyone be held guilty until so proven

a. Allegedly Incriminating and Exculpatory Evidence Was Not Provided to the Defense in a Timely Fashion, or Altogether Omitted

Turkish law requires prosecutors to collect and present evidence that is both inculpatory and exculpatory.[95] Toward this end, "protect[ing] the rights of the suspect[s]" under Article 160[96] necessarily includes presenting the evidence in a complete and substantiated manner.

Here, however, the prosecutors have failed to act in a manner consistent with Turkish law. Facts known to the prosecutors that pointed toward exoneration were either not included in the indictment or were presented in a distorted manner. Moreover, some of the exonerating documents were placed in storage, preventing defense lawyers from having access to them until the court ruled at a later stage to release them.[97] Examples of this egregious prosecutorial misconduct include:

- Not a single one of the numerous anachronisms and physical inconsistencies (described above) that point to the fraudulent nature of the Sledgehammer documents were mentioned in the indictment, even though prosecutors were made aware of them in their questioning of Defendants and in their communications with various agencies and institutions. These communications were hidden from the defense by placing them in storage, where defense lawyers had no access to them.[98]

- A military report, issued by Yb Hakan Erdoğan and concluding there were no traces of the allegedly incriminating info from CD #11, #16, and #17 found on computers of the 1st Army, was not mentioned in the indictment or included in the case file, nor was it shared with the defense for 15 months. Such behavior is troubling, given that the indictment states the following assertion: "all documents were produced in computers belonging to the Turkish Military."[99]

- Statements by two civil secretaries in the 1st Army stating they did not remember or recognize the incriminating CDs were distorted in the indictment, presented as if they corroborated the CDs' authenticity. In the indictment, the prosecution claims the aforementioned secretaries stated they recognized CD #11 and CD#17, which have "Or.K.na" and "K.Özel", respectively, written on their surfaces. However, the secretaries' statements are in the case file, and one indicated she did not recognize them

---

by a court judgment") (emphasis added).

[95] Turkish Criminal Procedure Code, *supra* note 93, at Article 160 ("(1) As soon as the public prosecutor is informed of a fact that creates an impression that a crime has been committed, either through a report of crime or any other way, he shall immediately investigate the factual truth, in order to make a decision on whether to file public charges or not. (2) In order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged, through the judicial security forces, who are under his command, to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect"), and Article 170(5) ("The conclusion section of the indictment shall include not only the issues that are disfavorable to the suspect, but also issues in his favor") (emphasis added).

[96] Turkish Criminal Procedure Code, *supra* note 93, at Article 160.

[97] Jan. 6, 2011 Interim Decision, *supra* note 46.

[98] *See supra* note 44 and 89.

[99] Indictment I, *supra* note 27, at 957.

and they did not belong to the military archive, and the other secretary made two contradictory statements. Furthermore, a Police Criminal Lab report that found the writing on CD #11, #16, and #17 did not belong to the civil secretaries was not mentioned in the indictment.

The above examples of prosecutorial misconduct are evidence that the Defendants have not received a fair trial, in violation of their due process rights. By allowing such actions, the Court has acted against the presumption of innocence afforded to the Defendants, effectively shifting the burden to the Defendants.

b. Court Omitted Process of Proper Evaluation of Evidence

In every trial, Turkish law requires courts to undergo a process of evaluating the evidence in accordance with Articles 206-216 of its Criminal Procedure Code.[100] Despite persistent demands from the Defendants and their lawyers, however, this phase of the trial was skipped. On March 9, 2012, the presiding judge simply read a statement summarizing the main items of evidence presented by the prosecutors, bypassing any examination of the validity and admissibility of the proffered evidence.

In doing so, the Court ignored the following specific requirements. Article 206(2)(a)[101] requires that evidence obtained illegally be separated and ruled inadmissible; Articles 209-214[102] mandate a full reading be undertaken of all the documents and reports cited as evidence; Article 215[103] affords defendants and lawyers the opportunity to respond to the proffered documents and reports; and Article 216[104] requires that all parties be given the right to speak and discuss the evidence.

Overlooking all these requirements prescribed by Turkish law, in its session of March 29, 2012, the Court asked the prosecutor to present his final statement. In doing so, the Court relied upon evidence that was illegally recorded.[105] In addition, the unsigned digital documents—on which the prosecution is basing its entire case—have not been authenticated and/or traced to computers used by the Defendants, and as such, do not constitute valid evidence. Despite this, the Court issued an interim decision on March 29, 2012, stating, "…new expert reports or

---

[100] Turkish Criminal Procedure Code, *supra* note 93.

[101] *See id.*, at Article 206(2)(a) ("The request of presentation of any evidence shall be denied in the below mentioned cases…a) If the evidence is unlawfully obtained").

[102] *See id.*

[103] *See id.*, at Article 215 ("After the accomplice, the witness or the expert has been heard and after any document has been read, the intervening party or his representative, the public prosecutor, the accused and his defense counsel shall be asked, if they have something to say against these").

[104] Turkish Criminal Procedure Code, *supra* note 93, at Article 216 ("(1) In the discussion regarding the evidence that has presented, the permission to speak in the following order shall be granted to the intervening party or his representative, the public prosecutor, the accused and his defense counsel or his legal representative; (2) The public prosecutor, the intervening party or his representative may respond to the explanations of the accused, his defense counsel or his legal representative; the accused and his defense counsel or his legal representative also may respond to the explanations of the public prosecutor and the intervening party or his representative; (3) Before the judgment the accused who is present shall be granted to have the very last word") (emphasis added).

[105] On pages 134-139 of the third indictment, *supra* note 39, the prosecutor quotes several tapes, including that of the resigned former Chief of Staff (Işık Koşaner) and others making comments related to the case. These tapes were recorded illegally, and have been published anonymously online on dailymotion.com.

hearing witnesses would not add any concrete contribution to the case file, and hence, are not warranted."[106] The Court later affirmed this decision.

By not evaluating all the evidence, the Court did not allow the Defendants to present a full and proper defense, thus violating the presumption of innocence they are entitled to by both the ICCPR and Turkish law. These actions of the Court are in violation of the Defendants' rights and their detention is therefore arbitrary.

2. Court Rejected Defense Requests for Two Key Figures to be Called as Witnesses and for Independent Forensic Experts to be Appointed

ICCPR Article 14(3)(e) provides the following protection, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees . . . To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf."[107] Article 14(3)(e) is concerned with equality of rights to call witnesses as between the defense and the prosecution,[108] and in the Sledgehammer Case, the defense has not had equal access to the Court. The Defendants and their lawyers have repeatedly asked that two key witnesses be heard in court, General Aytaç Yalman and General Hilmi Özkök, as the indictment asserts that General Yalman prevented the coup, while media reports often claim General Özkök stopped coup preparations. However, prosecutors have not questioned either General, and the Court has unjustifiably and arbitrarily refused the defense's requests as unnecessary.[109] As with the ICCPR, Turkish law permits defendants to ask the court to call witnesses for testimony,[110] and the Court's refusal to allow this directly contravenes the Defendants' rights under both international and Turkish law.

Turkish law also mandates procedures for the designation of experts, requiring forensic findings to be issued by court-appointed experts in order to have decisive standing.[111] Here,

---

[106] March 2012 Interim Decision, *supra* note 64.
[107] ICCPR, *supra* note 78.
[108] Joseph, et al., *supra* note 91, at 325.
[109] *See e.g* March 2012 Interim Decision, *supra* note 64; Interim Decision, Apr. 4, 2012, (Istanbul 10th High Crim. Ct.)(Turk.); Interim Decision, Apr. 29, 2012, (Istanbul 10th High Crim. Ct.)(Turk.); Interim Decision, May 8, 2012, at Clause 9 (Istanbul 10th High Crim. Ct.)(Turk.) ("With respect to the demands of some of the defendants and the attorneys regarding new expert reports and for hearing of witnesses, there are no grounds for issuing a new decision as our Court has already ruled on these matters in previous sessions); Interim Decision, Jun. 15, 2012, at Clause 7 (Istanbul 10th High Crim. Ct.)(Turk.) ("With respect to the demands of some of the defendants and the attorneys regarding excluding TUBITAK reports from the case file, for getting new expert reports and for hearing of witnesses, there are no grounds for issuing a new decision as our Court has already issued denials on these matters in previous sessions").
[110] Turkish Criminal Procedure Code, *supra* note 93, at Article 177 ("(1) In cases where the accused requests to summon the witness or expert to appear in the main trial, or requests defense evidence to be collected, he shall submit his written application thereof, indicating the events they are related to, at least five days prior to the day of the main hearing, with the president of the court, or the trial judge; (2) The ruling about this written application shall be notified to him immediately; (3) The approved requests of the accused shall also be notified to the public prosecutor").
[111] Turkish Criminal Procedure Code, *supra* note 93, at Article 64 ("(1) The experts shall be chosen from the names of the natural or legal persons, yearly listed by the judicial commission at the courts of ordinary jurisdiction. Public prosecutors and judges may choose the experts not only from the lists of experts compiled for the city of their jurisdiction, but may also choose from lists of other cities. The internal regulation shall regulate the principles and

however, the Court ignored the required procedures, as the prosecutors' initial assignment of experts from TÜBİTAK (the Scientific and Technological Research Council of Turkey) to provide a forensic report on the CDs violated Article 64(1)-(4).[112] Rather than asking TÜBİTAK to provide a list from which to choose, prosecutors named a specific expert to carry out the forensic analysis. They then passed the CDs on to the expert before formally charging him with the assignment and did not ensure the expert and his collaborators were properly sworn in, in violation on Article 64(5)-(6).[113] Instead of these individuals being sworn in before commencing their work, they were sworn in two years after producing their analytical report, which was used by the Court to justify detaining the Defendants.

Furthermore, as discussed above, the defense has made repeated requests that the Court appoint its own experts to examine the validity (or lack thereof) of the reports obtained by the defense that demonstrate the proffered evidence was forged. But the Court has also rejected these requests, on the grounds that appointing independent experts would unnecessarily prolong the trial and that additional reports would "not make any concrete contribution"[114] to the evidence. The Court's refusal to acknowledge the defense's reasonable request to call witnesses and its request that the Court appoint an independent expert to verify suspect evidence denies the Defendants their rights afforded by Turkish and international law.

3. Right to Trial Without Undue Delay was Violated

ICCPR Article 14(3) affords individuals the right "to be tried without undue delay."[115] Previous HRC decisions suggest "a delay of twenty-three months or more between arrest and conviction at first instance, and/or between conviction and the conclusion of an appeal, [are]

---

procedures on how the lists of experts shall be prepared or how the experts named in the list shall be removed; (2) An expert, whose name is not listed, may be appointed if the motive of this appointment is explained in the decision of the appointment; (3) Where official experts have been designated by Statute for certain areas of expertise, such experts have a priority at the appointment. However, civil servants shall not be appointed as an expert in a case that is related to the office to which they are attached; (4) In cases where a legal person is appointed as an expert, this legal person shall name the natural person or persons who shall conduct the examination on his behalf to the judicial authority for its approval; (5) The experts, who are placed on the expert-lists, shall give an oath, repeating the following words in front of the judicial commission at the courts of ordinary jurisdiction: 'I swear on my honor and conscience, that I shall fulfill my duty pursuing the justice and in accordance with sciences and technology, in an impartial manner.' These experts need not take a repeated oath for every single expert testimony they shall give in the future; (6) The experts who are not enlisted shall take the oath in the above-mentioned manner before the authority that appointed them. The protocol for attesting that the oath had been given shall be signed by the judge or public prosecutor, court recorder and the expert") (emphasis added).

[112] Turkish Criminal Procedure Code, *supra* note 93, at Article 64(1)-(4).

[113] *See id.*, at Article 64(5)-(6).

[114] *See* March 2012 Interim Decision, *supra* note 64, at Clause 2 ("Considering that the Court will evaluate and consider at the verdict stage all the evidence in the file contained in existing expert reports and statements by the defense, we deny at this stage requests for additional witnesses, new expert reports, experts to be brought in as witnesses, and for new documents and information as they would not make any concrete contribution to the file") and Apr. 4, 2012 Interim Decision, *supra* note 109, ("The prosecution has opined that the expert reports and statements by witnesses in the file have cast sufficient light on the case and therefore that the request should be rejected. …Even though some defendants and lawyers have requested in between court sessions that new witnesses be called, that the authors of expert reports in the file be called as witnesses or that new export reports be requested, since there is no provision to that effect in the Turkish Criminal Code as explained above, we unanimously rule to deny the requests in line with the views of the Prosecution").

[115] ICCPR, *supra* note 78.

prima facie breaches [of] article 14(3)(c)," and it is often the State's responsibility to show such delay is necessary in a particular case.[116] Moreover, in its Decision No. 43/1995, the Working Group stated, "Preventive detention must not be the general rule and is provided for solely as a means of guaranteeing the accused's appearance for trial"[117] and the "provision of the Covenant that a person shall be brought without delay before a judge requires promptness not only at the initial moment of detention, but at all subsequent stages."[118] Further, the Working Group regarded the "continued detention of persons in custody for more than two years after deprivation of liberty" as "serious."[119] In the present case, approximately 21 of 163 Defendants from the first Indictment have been detained for up to 23 months (including up to 4 months of pre-trial detention) with the remaining 142 having been detained up to 19 months, and 87 Defendants from the second and third Indictments have been detained for up to 15 months. During this period, neither the Court nor the prosecution provided any reasoning for the protracted proceedings.

The HRC has also specified that deprivation of liberty permitted by the law must not be manifestly disproportionate, unjust, or unpredictable:

> The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability . . . remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.[120]

The detention of the Sledgehammer Defendants is both unjust and disproportionate, given that the Court has offered no evidence to suggest the Defendants present a potential flight risk or that they could be involved in the recurrence of any crimes. The Defendants have not presented a risk of either in the 25 months since the first indictment was issued.

Moreover, the Court refused the defense lawyers' request to speak following the demand for continued detention. Such illegal action by the Turkish Court is further puzzling in light of the fact that some Defendants in the Sledgehammer Case have been released and are being tried while free, while the 250 that make up the vast majority, remain in detention, despite all the Defendants having similar factual circumstances. Most of these detained suspects were in prison

---

[116] Joseph, et al., *supra* note 91, at 314.
[117] UN Working Group on Arbitrary Detention, Communication Addressed to the Government of Peru on May 4, 1994, Decision No. 43/1995, Adopted Nov. 30, 1995 [hereinafter WGAD Decision No. 43/1995] (stating in further support, "This finding is confirmed by article 9 of the International Covenant on Civil and Political Rights, which provides that 'it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.' In this instance, after more than 24 months of deprivation of liberty, an order for the unconditional release of four persons and an order to initiate formal proceedings for the others remain in abeyance").
[118] *Id.*
[119] *Id.*
[120] *Hugo van Alphen v. The Netherlands*, Communication No. 305/1988, Adopted Jul. 23, 1990, A/46/40 vol. II, 131, at para. 5.8.

for 1-4 ½ months prior to the start of the trial. During this period and for duration of the trial thus far, the Defendants have had no opportunity for release on bail.

The protection offered by ICCPR 14(3)(c) is buttressed by Turkish law; the Turkish Criminal Procedure Code[121] and Constitution[122] require courts to render written decisions to justify the continued detention of defendants in lieu of releasing them on bail. Such decisions must be issued monthly[123] and contain legal and factual grounds for detention.[124] The Court must also allow the defense an opportunity to offer a response following the prosecutor's demand for continued detention,[125] which it nevertheless denied, as discussed above. Despite these laws, the Turkish Court, in all its decisions affirming continued detention, offered no detailed explanation as to why the Defendants could not be released, other than invoking generic pronouncements that the detention was necessary due to, for example, "the nature of the charges"

---

[121] Turkish Criminal Procedure Code, *supra* note 93, at Article 34(1) ("All kinds of decisions rendered by the judge and courts, including dissenting opinions, shall be delivered in a written form and contain the motives. While writing the motives, Art. 230 shall be considered. The duplicates of the decisions shall also include the dissenting opinions"); and Article 101 ("(1) During the investigation phase, upon the motion of the public prosecutor, the Justice of the Peace in Criminal Matters shall issue an arrest warrant for the suspect, and during the prosecution phase the trial court shall issue an arrest warrant for the accused upon the motion of the public prosecutor, or by its own motion. The aforementioned motions must contain reasons and must contain an explanation for why the application of judicial control would not be sufficient in a given case, based on legal and factual grounds. (2) The decisions on arrest with a warrant, continuation of the detention, or a decision denying the motion of release from detention, must be furnished with the legal and factual grounds and reasons. The contents of the decision shall be explained to the suspect or accused orally, additionally a written copy of the decision shall be handed out and this issue shall be mentioned in the decision") (emphasis added).

[122] Constitution of the Republic of Turkey, *supra* note 94, at Article 141 ("Court hearings shall be open to the public. It may be decided to conduct all or part of the hearings in closed session only in cases where absolutely required for reasons of public morality or public security. Special provisions shall be provided in the law with respect to the trial of minors. The decisions of all courts shall be made in writing with a statement of justification. It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost") (emphasis added).

[123] Turkish Criminal Procedure Code, *supra* note 93, at Article 108 ("(1) During the investigation phase while the suspect is in jail, and in time limits not exceeding 30 days each, an evaluation on whether the continuation of the status of the arrest with a warrant is necessary or not, shall be conducted by the Justice of the Peace upon the motion of the public prosecutor; Article 100 shall apply during this evaluation. (2) Within the time limit mentioned in the foregoing paragraph, the suspect may also file a motion of evaluation of the status of his arrest with a warrant. (3) The judge or court on their own motion shall evaluate the status of the accused who is in jail on each trial day or, if the conditions make it necessary, between the trial days, or within the time limits foreseen in the first subparagraph whether it is necessary that the detention period to continue") (emphasis added).

[124] *See id.*, at Articles 34, 101.

[125] *See id.*, at Article 101(3) ("In cases where a motion for an arrest has been submitted, the suspect or accused must have the legal help of a defense counsel chosen by him, or appointed by the bar association"); Article 104(2) ("The judge or trial court shall decide on this motion that whether the detention period should continue, or the suspect or accused should be released. The decision that denies the motion of release may be subject to opposition"); Article 105 ("In cases where there is a motion filed according to the provisions of Arts. 103 and 104, the decision on approving the motion, denying the motion or ordering judicial control shall be rendered by the competent authority within three days, after the opinions of the Public Prosecutor, suspect, accused or defense counsel have been obtained. These decisions may be subject to a motion of opposition"); and Article 33 ("Decisions to be rendered during the main hearing, shall be ruled on after hearing the public prosecutor, the defense counsel who is present at the main trial, the representative and the other related persons; decisions to be rendered besides during the main hearing shall be rendered after the oral or written opinion of the public prosecutor had been taken") (emphasis added). *Note, since in practice the motion to arrest is filed during the trial phase, these articles require the suspect to have a legal counsel, which means that the defense counsel should be listened to about the motion to arrest. The physical presence of the defense counsel is not sufficient; instead, they must be heard by the judge.*

or "the continued presence of strong suspicion of criminal activity."[126] These vague and overly broad statements lack robust legal justification, much less minimal grounding in fact or law, and are thus in violation of international and Turkish law.

Ultimately, the actions of the Court violate the protections afforded by the ICCPR and Turkish law, thus rendering the detention of the Defendants arbitrary.

4. Court Violated Right to Attorney-Client Confidentiality

ICCPR Article 14(3)(b) dictates that the accused "should be able to have recourse to a lawyer" and further "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter."[127] The HRC and the Working Group have also discussed the importance of attorney-client confidentiality,[128] with both bodies finding that, in maintaining the right to a fair trial, the ability of lawyers and their clients to communicate in private is of paramount importance. Principle 18 of the Body of Principles similarly provides for confidential communications between lawyers and their clients.[129] And Turkish law[130] offers the same protection and in addition, provides for fines and imprisonment for those who violate this right.[131]

In this case, however, the Court has violated this right of the Defendants. On June 13, 2011, shortly before the second indictment was accepted, the Court placed microphones on the

---

[126] Interim Decision, Apr. 6, 2012, at Clause 7 (Istanbul 10th High Crim. Ct.)(Turk.) ("In view of the nature of the charges faced by the detained defendants, the continued presence of strong suspicion of criminal activity as per the evidence in the case file, the charges being part of the "catalog crimes" under TCC 100/3, the insufficiency of bail for these stated reasons, we reject the defendants and lawyers' requests for release and rule for the continued detention of all detained defendants") and Jun. 15, 2012 Interim Decision, *supra* note 109, at Clause 9 ("In view of the nature of the charges faced by the detained defendants, the continued presence of strong suspicion of criminal activity as per the evidence in the case file, the charges being part of the "catalog crimes" under TCC 100/3, the insufficiency of bail for these stated reasons, we reject the defendants and lawyers' requests for release and rule for the continued detention of all detained defendants").

[127] Office of the High Comm'r for Human Rights, United Nations, *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by* Law (Art. 14), Apr. 13, 1984.

[128] UN Working Group on Arbitrary Detention, Communication Addressed to the Government on March 16, 2009, Decision No. 27/2009, Adopted Nov. 24, 2009 (noting that "in order to determine whether a detention is arbitrary or not, a number of critical procedural safeguards need to be confirmed by the Government. For instance, the Working Group has not received an unequivocal confirmation that the three detainees were arrested pursuant to a warrant; that they had access to a lawyer; that they were able to have private meetings with their lawyer…").

[129] Body of Principles, *supra* note 78.

[130] Turkish Criminal Procedure Code, *supra* note 93, at Article 154 ("(1) Any suspect or accused at any time shall have the right to an interview with a defense counsel in an environment where other individuals are unable to hear their conversation; a power of attorney is not required. Written correspondence by these individuals to their defense counsel are not subject to control").

[131] Turkish Criminal Code, *supra* note 72, at Article 133 ("(1) Any person who listens [to] non general conversations between the individuals without the consent of any one of the parties or records these conversations by use of a recorder, is punished with imprisonment from two months to six months"); and Article 134 ("(1) Any person who violates secrecy of private life, is punished with imprisonment from six months to two years, or imposed punitive fine. In case of violation of privacy by use of audio-visual recording devices, the minimum limit of punishment to be imposed may not be less than one year").

ceiling to record all conversations, including those between the defense attorneys and their clients. This effectively prevents confidential communication between them.

The above violations of ICCPR Article 14 also render the detention of the Defendants arbitrary in violation of ICCPR Article 9(1).[132] For these reasons, the Defendants have not been given a fair trial in accordance with Turkish and international law, and their detention is arbitrary under Category III.

C. Conclusion

The trial of the Defendants has failed to meet the minimum standards required for a fair and impartial trial. Therefore, the Defendants' detention is arbitrary under Category III and is in violation of both Turkish and international human rights norms. Given these violations of international law, the Working Group should determine that the Government of Turkey is holding the Defendants in contravention of its legal obligations. Furthermore, the Working Group should urge for the immediate release of the Defendants and an enforceable right of compensation for their arbitrary detention.

INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN.

365 Defendants stand on trial before the Istanbul 10th High Criminal Court. On April 6, 2012, the Istanbul Bar Association presented a letter to the Court to offer support to the defense lawyers, in which they asked for a fair trial that respects the rules for procedure. On April 16, 2012, the defense lawyers filed a complaint with the Supreme Board of Judges and Prosecutors (HSYK) against the prosecutors in the case, claiming their right to defense and a fair trial had been violated; previously, on March 26, 2012, the defense lawyers had staged a walk out due to unfairness in the legal proceedings. On June 15, 2012, the prosecution requested a change of venue.

On August 4, 2012, the Turkish Government retired 40 of the generals and admirals, 34 of whom are on trial in the Sledgehammer case, in an apparent conclusion that the outcome of the trial would result in a guilty verdict.

On August 6, 2012, the trial resumed. At this hearing, the prosecution withdrew its demand for relocation but reaffirmed its position that the evidence is authentic and therefore the defendants are guilty. The Court also reaffirmed the continued detention of the 250 Defendants who are currently imprisoned. The defense offered a letter to the Court describing the numerous violations of due process, but the Court refused an oral presentation of the same argument;

[132] ICCPR, *supra* note 78, at art. 9(1) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"). This same right is established by the Universal Declaration Article 9 ("No one shall be subjected to arbitrary arrest, detention or exile").

consequently, the defense attorney walked out in protest. Further proceedings are scheduled for the remainder of August and into September if needed, during which all Defendants will make their final statements. A verdict is expected in October.

Submitted By:

Jared Genser and Chris Fletcher

PERSEUS
STRATEGIES

1146 19th Street, NW, Suite 500
Washington, D.C. 20036
+1 (202) 466-3069
info@perseus-strategies.com