



IN THE ISTANBUL 26th HIGH CRIMINAL COURT

Case no. 2017/127

Between: -

Republic of Turkey

Prosecution

- and -

Ahmet Hüsrev Altan and Mehmet Hasan Altan

Defendants

EXPERT OPINION BY ARTICLE 19

Introduction

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. We have been asked by the lawyer, Veysel Ok, representing Messrs Ahmet Hüsrev Altan and Mehmet Hasan Altan (the defendants) to advise on the compatibility of the charges brought against them with international and European standards on freedom of expression. We understand that this opinion will be relied upon by the defendants in cases currently pending against them before the Istanbul 26th High Criminal Court.
2. In this opinion, we conclude that the provisions under which the defendants have been charged, namely Articles 3 and 5 of Law no. 3713 on Counter-Terrorism and Articles 309/1, 311/1 and 312/1 of the Turkish Penal Code, do not comply with international and European standards on freedom of expression. As such, it is ARTICLE 19's view that the charges levelled against the defendants amount to unlawful restrictions on the exercise of the right to freedom of expression. Having reviewed the indictment, ARTICLE 19 further considers that the charges brought against the defendants are unfounded and amount to a politically motivated campaign of harassment against journalists, contrary to Article 5 of the International Covenant on Civil and Political Rights and Article 18 in conjunction with Article 10 of the European Convention on Human Rights.

ARTICLE 19's expertise on freedom of expression and national security

ARTICLE 19 is an international non-governmental organisation that advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and the implementation of such standards in domestic legal systems. It has produced a number of standard-setting documents and policy briefs on freedom of expression issues, including on counter-terrorism, national security, access to information and protests. ARTICLE 19 also regularly intervenes in domestic and regional human rights court cases and comments on existing laws and legislative proposals that affect the right to freedom of expression. This includes the publication of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,¹ the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom,² Tunisia³ and Russia⁴ and interventions in a number of high profile national security cases, most recently in the *Miranda* case before the Court of Appeal of England and Wales.⁵

3. ARTICLE 19 has been closely monitoring respect for the right to freedom of expression in Turkey since the failed coup against President Erdogan in July 2016. From 31 August to 2 September 2016, ARTICLE 19 led an international delegation of civil society organisations to Istanbul to demonstrate solidarity with writers, journalists, and media outlets in Turkey. The mission included representatives from Danish PEN, the European Federation of Journalists, German PEN, Index on Censorship, My Media, the Norwegian Press Association, the Norwegian Union of Journalists, Norwegian PEN, PEN International, Reporters Without Borders, and Wales PEN Cymru. This led to the publication of the report *State of Emergency in Turkey: the Impact on Freedom of the Media* in September 2016.⁶
4. This expert opinion draws on interviews and observations made during the mission, as well as ARTICLE 19's extensive legal analysis and expertise outlined above. In our view, the trial of Ahmet Hüsrev Altan and Mehmet Hasan Altan presents a crucial opportunity for Turkey to demonstrate its commitment to the protection of freedom of expression under international and European human rights law. It also represents a test case for the independence of the Turkish judiciary following the failed coup against President Erdogan.
5. In this expert opinion, ARTICLE 19 addresses: (i) key international and European standards on freedom of expression and terrorism offences; (ii) the compatibility of the provisions under which the defendants have been charged with those standards; and (iii) our assessment of the nature of the case brought against the defendants.

¹ ARTICLE 19, *Johannesburg Principles on national security, freedom of expression and access to information*, 1996; at <http://bit.ly/2rsvYd8>.

² ARTICLE 19, UK: Submission on Terror Legislation to ICJ, April 2006; at <http://bit.ly/2rCFdpA>.

³ ARTICLE 19, Tunisia: Human rights and counter-terrorism, April 2016; at <http://bit.ly/2qXix5C>.

⁴ ARTICLE 19, Russia: Amendments to Extremism Legislation, July 2007; at <http://bit.ly/2qXoU4R>.

⁵ ARTICLE 19, UK: Free speech groups welcome win for press freedom in Miranda case, January 2016; at <http://bit.ly/1ODylvx>.

⁶ ARTICLE 19, Turkey: "You cannot report the news under the state of emergency," September 2016; at <http://bit.ly/2qXQCys>.

I. Applicable international and regional standards on freedom of expression and terrorism offences

General principles

6. Turkey is a party to, and has ratified, both the International Covenant on Civil and Political Rights ('ICCPR') and the European Convention on Human Rights ('ECHR'). As such, the rights enshrined in these instruments, including the right to freedom of expression under Article 19 ICCPR and Article 10 ECHR, form part of Turkish law.
7. The right to freedom of expression is also protected in the Turkish Constitution (Article 26). In addition, the Constitution guarantees the right of everyone to apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms contained in the ECHR has been violated by public authorities (Article 148).
8. Under international and European human rights law, the right to freedom of expression is not an absolute right, but rather one which can be legitimately restricted by the State provided certain conditions are met.⁷ Such conditions comprise a three-part test against which any proposed restriction on freedom of expression must be scrutinised:
 - **The restriction must be provided by law:** This means that it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate their conduct accordingly.⁸
 - **The restriction must pursue a legitimate aim:** Legitimate aims are those which are exhaustively enumerated in Article 10, paragraph 2 of the ECHR and Article 19, paragraph 3 of the ICCPR.
 - **The restriction must be necessary in a democratic society:** This requirement demands an assessment of, first, whether the proposed limitation satisfies a "pressing social need."⁹ Second, it must be established whether the measures at issue are the least restrictive means to achieve the aim.
9. Moreover, States are required to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (Article 20 (2) ICCPR).¹⁰
10. Assessing the proportionality of an impugned measure requires a careful consideration of the particular facts of the case. The assessment should always take as a starting point that it is incumbent upon the State to justify any restriction on freedom of expression, including freedom of the press.¹¹

International standards on freedom of expression and national security

⁷ See Article 19 (3) ICCPR and Article 10 (2) ECHR.

⁸ European Court of Human Rights ("European Court"), *The Sunday Times v United Kingdom*, Application No. 6538/74, para.49, 26 April 1979.

⁹ European Court, *The Observer and Guardian v United Kingdom*, Application No. 13585/88, para.59., 26 November 1991.

¹⁰ On the interpretation of Article 20(2) ICCPR, see in particular, OHCHR, *The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, February 2013; at <http://bit.ly/1zk6n2S>.

¹¹ European Court, *Lingens v Austria*, Application No. 9815/82, para. 41, 8 July 1986.

11. Under Article 19 (3) ICCPR and Article 10 (2) ECHR, the right to freedom of expression may legitimately be restricted for the purposes of national security, provided that the restriction at issue complies with the requirements set out above (para. 8).
12. Moreover, under international law, States are required to prohibit incitement to terrorism.¹² The former UN Special Rapporteur on human rights and counter-terrorism has elaborated upon the threshold that laws relating to incitement to terrorism must meet in order to comply with international human rights law, stipulating that laws:
- Must be limited to the incitement of conduct that is truly terrorist in nature;
 - Must restrict freedom of expression no more than is necessary for the protection of national security, public order and safety or public health or morals;
 - Must be prescribed by law in precise language, and avoid vague terms such as “glorifying” or “promoting” terrorism;
 - Must include an actual (objective) risk that the act incited will be committed;
 - Should expressly refer to intent to communicate a message and intent for this message to incite the commission of a terrorist act; and
 - Should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.¹³
13. Similarly, the UN Human Rights Committee (HR Committee) has highlighted that laws criminalising the “praising” or “glorifying” of terrorism must be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression.¹⁴
14. Furthermore, “incitement to terrorism” offences will only be necessary in a democratic society if they are constructed and construed narrowly. *The Johannesburg Principles*¹⁵ provide that an act of expression should be criminalised on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence (Principle 6). The UN Secretary-General has supported this interpretation, stating that “*laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.*”¹⁶
15. By contrast, expression that only transmits information from or about an organization that a government has declared threatens national security must not be restricted.¹⁷ In this sense, the HR Committee has found that “*the media plays a crucial role in informing the public about acts of terrorism and its capacity to*

¹² UN Security Council Resolution 1624 (2005); at <http://bit.ly/1SMOH9r>.

¹³ A model offence of incitement to terrorism was also provided in A/HRC/16/51, paras 29-32. See also Article 5 of the Council of Europe’s Convention on the Prevention of Terrorism on the “public provocation to commit acts of terrorism;” and OSCE, “Preventing Terrorism and Countering Violent Extremism and Radicalization that lead to terrorism,” *op. cit.*, p. 42.

¹⁴ HRC, General Comment 34, CCPR/C/GC/34, para 46.

¹⁵ The Johannesburg Principles; *op.cit.* The Principles authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression

¹⁶ A/63/337, para 62.

¹⁷ The Johannesburg Principles, *op.cit.*, Principle 8.

*operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities”.*¹⁸

ECHR case-law on national security, “hate speech” and the role of the press

16. The European Court of Human Rights (ECtHR) generally uses different terminology to examine cases involving alleged terrorist activity. Rather than “incitement to terrorism”,¹⁹ the Court relies on the concepts of “apology of violence” and “incitement to hostility”.²⁰ These cases are generally considered to form part of the ECtHR’s case-law on “hate speech.” In particular, the Court has stressed the importance of the context in each case, including the form of the speech at issue, its impact and its author.
17. In cases involving the dissemination by the press of material that is alleged to amount to “incitement to violence or hostility”, the ECtHR’s starting point is that it is “*incumbent [upon the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them*”.²¹ For this reason, the Court has repeatedly held that the public enjoyed the right to be informed of different perspectives on the situation in south-east Turkey, however unpalatable they might be to the authorities.²²
18. Similarly, the ECtHR has found that the fact that interviews or statements have been given by a member of a proscribed organisation cannot in itself justify an interference with a newspaper’s freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of government policy. The same principles apply to the direct publication of statements by proscribed organisations.²³
19. This does not relieve the press or terrorist organisations from the ECtHR’s scrutiny, however. As noted above, the ECtHR focuses its analysis on the words being used and the context in which they were published with a view to determining whether the texts taken as a whole can be considered as inciting to violence.²⁴
20. At the same time, the ECtHR takes into account the “position of strength occupied by a government”, which “commands it to show restraint in the use of criminal proceedings”, especially when there are other means of responding to unjustified attacks and criticisms of the opposition or the media”.²⁵

State of emergency

¹⁸ See CCPR/C/GC/34, *op cit*.

¹⁹ The ECtHR refers to ‘condoning terrorism’. See *Leroy v France*, no. [36109/03](#), 2 October 2008.

²⁰ See especially several cases against Turkey in the context of the conflict in the Southeastern part of the country e.g. *Karataş v. Turkey*, App. No. 23168/94, 1999-IV Eur. Ct. H.R.; *Sürek v. Turkey (No. 1)*, App. No. 26682/95, 1999-IV Eur. Ct. H.R.; *Sürek and Özdemir v. Turkey*, App. No. 23927/94 & 24277/94, Eur. Ct. H.R. 8 July 1999; see also ECtHR, Factsheet on hate speech, updated March 2017: at <http://bit.ly/1ezKRQE>.

²¹ See *Lingens v Austria*, *op.cit*.

²² See *Özgür Gündem v. Turkey*, no. [23144/93](#), 16 March 2000, para.60 and 63.

²³ See *Nedim Şener v. Turkey*, no. 38270/11, para. 115, 8 July 2014

²⁴ See, for example, *Sürek and Özdemir v. Turkey* [GC], nos. [23927/94](#) and [24277/94](#), para. 61, 8 July 1999, unreported.

²⁵ See *Nedim Şener v. Turkey*, *op.cit*, para. 122.

21. Under Article 4 ICCPR and Article 15 ECHR, States have a right to derogate – in exceptional circumstances, in a temporary, limited and supervised manner – from their obligations to secure certain rights.²⁶ In order to be valid, derogations must comply with a number of substantive and procedural requirements. In particular:²⁷
- The right of derogation can be invoked only in time of war or other public emergency threatening the life of the nation;
 - A State may take measures derogating from its human rights obligations “only to the extent strictly required by the exigencies of the situation”; this includes an obligation for these measures to meet both the necessity and proportionality requirements;²⁸
 - Derogations cannot be incompatible with other obligations under international law;
 - The State must provide a formal and public notice of the derogations;
 - The State must provide information on the measures adopted and give reasons for them;
 - The State must provide information on the date on which the measures cease to apply.
22. On 25 July 2016, Turkey notified the Secretary General of the Council of Europe of its derogation from the ECHR. However, it appears that this has not been followed-up by a notification of the specific articles from which Turkey intends to derogate.²⁹
23. By contrast, Turkey notified the Secretary General of the United Nations on 11 August that it was derogating from the following articles under the ICCPR: Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27.³⁰

Limitation on use of restrictions on rights

24. Under Article 18 of the ECHR, permitted restrictions under the ECHR “*shall not be applied for any purpose other than those for which they have been prescribed.*” In a similar vein, Article 5 of the ICCPR provides that nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised in the ICCPR or at their limitation to a greater extent than is provided for in the ICCPR.
25. The ECtHR has found a breach of Article 18 of the ECHR in conjunction with other articles of the ECHR in a limited number of cases. In particular, it has highlighted that the standard of proof in respect of Article 18 complaints is particularly exacting.³¹ In *Rasul Jafarov v. Azerbaijan*, the ECtHR examined whether the arrest and detention of the applicant, a well-known civil society and

²⁶ Some rights are non-derogable, including the right to life, the prohibition of torture, inhuman and degrading treatment, the prohibition of slavery and servitude, the right not to be punished without law and the right to not to be tried or punished twice.

²⁷ See ECHR Factsheet on Derogation in time of Emergency, February 2017; at <http://bit.ly/1QodyRo>.

²⁸ See UN Human Rights Committee, General Comment no. 29 on Article 4 ICCPR, CCPR/C/21/Rev.1/Add.11, para. 4; at <http://bit.ly/2rMJfxS>.

²⁹ See Martin Scheinin, *Turkey's Derogation from the ECHR: What to Expect?*, 27 July 2016; at <http://bit.ly/2sxiK1s>.

³⁰ See Martin Scheinin, *Turkey's Derogation from Human Rights Treaties: An Update*, 18 August 2016; at : <http://bit.ly/2rYlvaO>.

³¹ See e.g. *Khodorkovskiy v. Russia*, no. 5829/04, para. 256, 31 May 2011

human rights defender, were politically motivated and in breach of Article 18 in conjunction with Article 5 ECHR (detention).³² The applicant had been charged with illegal entrepreneurship, large-scale tax evasion and abuse of power. In finding a violation of Article 18 in conjunction with Article 5, the ECtHR considered that the following factors were relevant:³³

- The general context of the increasingly harsh and restrictive legislative regulation of NGO activity and funding;
- The numerous statements by high-ranking officials and articles published in the pro-government media, where local NGOs and their leaders, including the applicant, were consistently accused of being a “fifth column” for foreign interests, national traitors, foreign agents;
- Several notable human rights activists who had cooperated with international organisations for the protection of human rights, including, most notably, the Council of Europe, were similarly arrested and charged with serious criminal offences entailing heavy imprisonment sentences.

II. The applicable Turkish law provisions fail to comply with international and regional standards on freedom of expression

26. In the present case, the defendants have been charged with “attempting to destroy the constitutional order,” “attempting to destroy the Turkish Grand National Assembly or preventing it from carrying out its duties” and “attempting to destroy the government or attempting to prevent it from carrying out its duties” under Articles 309 (1), 311 (1) and 312 (1) of the Turkish Penal Code respectively.
27. Under Article 3 of Law no. 3713 on Counter-Terrorism, the offences laid down above are terrorist offences. As a result, they are punished more harshly (by one half) under Article 5 of Law no. 3713 on Counter-Terrorism and are tried following a different procedure than other offences.
28. In addition, the defendants have been charged with “committing a crime in support of a terrorist organisation” under Article 220 (6) of the Turkish Penal Code (“committing a crime on behalf of an organisation although he is not a member of that organisation”). Reference is also made in the indictment to Article 314 (2) of the Penal Code, which provides that any person who becomes a member of an armed organisation may be sentenced to imprisonment between 5 to 10 years.
29. In ARTICLE 19’s view, the provisions, which form the basis of the defendants’ indictment, are in breach of international and European standards on freedom of expression:
- **“Attempting to abolish the constitutional order etc.”:** Article 309 (1) of the Turkish Penal Code provides that *“any person who attempts to abolish, replace or prevent the implementation of, through force and violence, the constitutional order of the Republic of Turkey, shall be sentenced to a penalty of aggravated life imprisonment”*. In our view, this provision is couched in hopelessly broad terms and as such, plainly fails to comply with the requirement that any restriction on freedom of expression must be “provided by law”. In particular, it is unclear what *actus reus* is involved in order to

³² no. [69981/14](#), paras. 153-163 ,17 March 2016

³³ *Ibid.*

attempt to “abolish” or “replace” the constitutional order of Turkey. Moreover, it is unclear what “the constitutional order” of Turkey comprises of or what institutions should be abolished or replaced for the offence to be constituted. More importantly, the provision fails to specify whether the use of “force or violence” includes the “instigation” of or “incitement” to violence. In any event, it is hard to see how speech can simply be equated with “force and violence” in the ordinary meaning of those terms. If, however, the interpretation of “force and violence” were stretched to include mere expression, we consider that such an interpretation would be arbitrary and, indeed, so broad as to be virtually meaningless. In any event, a sentence of aggravated life imprisonment is plainly disproportionate given the breadth of this provision.

- **“Attempting to destroy the Turkish Grand National Assembly”:** Article 311 (1) of the Turkish Penal Code provides that *“any person who attempts, by use of force and violence, to abolish the Turkish Grand National Assembly, or to prevent in part or in full, the fulfilment of the duties of the Turkish Grand National Assembly, shall be sentenced to a penalty of aggravated life imprisonment”*. In ARTICLE 19’s view, this provision suffers from the same shortcomings as Article 309 (1) above. It is incredibly vague and as such fails the requirement of legality under Article 19(3) of the ICCPR and Article 10(2) of the ECHR.

Moreover, it is unclear what *actus reus* amounts to the “prevention” of the “fulfilment of the duties” of the Turkish Grand National Assembly. Whilst the use of the words “by use of force or violence” somewhat reduces the scope of the offence, the indictment appears to include speech within the ambit of this offence. If that analysis is correct, however, merely protesting in front of the Turkish Grand National Assembly could potentially be taken to “prevent” the Turkish Grand Assembly from carrying out its “duties” – insofar as such duties involve the passing of legislation. Indeed, in the absence of a definition of the Assembly’s duties, a wide range of similarly legitimate and innocuous actions could fall within its scope. For the same reasons as above, such an interpretation would make the provision wholly arbitrary and the proposed sentence of aggravated life imprisonment manifestly disproportionate given its breadth.

- **“Attempting to destroy the government etc”:** Article 312 (1) of the Turkish Penal Code provides that *“any person attempting, by the use of force and violence, to abolish the government of the Turkish Republic, or to prevent in part or in full, the fulfilment of its duties, shall be sentenced to a penalty of aggravated life imprisonment”*. Like the preceding offences, ARTICLE 19 considers that Article 312 (1) of the Penal Code fails to comply with the legality and proportionality requirements under Article 19(3) of the ICCPR and Article 10(2) of the ECHR. It is unclear what amounts to abolishing or preventing the government from carrying out its duties. We reiterate our concerns regarding the lack of definition of “use of force and violence”. It must, on any common-sense view, exclude reporting on matters of public interest.

Moreover, like the preceding offences, we take the view that the applicable sentence under Article 312 (1) is disproportionate given the incredibly broad scope of this offence.

- **“Committing a crime in support of a terrorist organisation”:** Article 220 (6) of the Turkish Penal Code provides that *“any person who commits an offence on behalf of an organisation, although he is not a member of that organisation, shall also be sentenced for the offence of being a member of that organisation. The sentence for being a member of that organisation may be decreased by half. This provision shall only be applied in respect of armed organisations”*. In ARTICLE 19’s opinion, this provision is exceedingly vague. In particular, it fails to specify what “offence” must be committed on behalf of an “organisation” for the Article 220 (6) offence to be constituted. Given the number of offences in the Penal Code, the scope of this provision is staggering. This is very concerning given that the Penal Code contains numerous provisions in breach of international standards on freedom of expression such as Article 214 (provocation to commit an offence) or Article 215 (praising an offence or offender). As a result, Article 220 (6) may be used to criminalise the legitimate coverage of news articles or other statements on matters of public interest, including terrorism. This is plainly at odds with the ECtHR’s jurisprudence, which makes it clear that newspapers must be able to publish statements made by terrorist organisations without interference so long as such statements do not amount to incitement to violence or hatred.³⁴

The fact that the prison sentence of non-members is reduced by half compared to actual members of terrorist organisations is of limited assistance given the breadth of this provision. In particular, it does not make it any more proportionate. In any event, reference to Article 314 (2) in the indictment suggests that the notion of membership of a terrorist organisation remains sufficiently undefined and fluid so that individuals may be charged and sentenced as members in a wide range of circumstances rather than benefit from a reduction in sentencing as non-members. For all these reasons, we consider that Article 220 (6) of the Penal Code clearly fails to comply both with the legality and proportionality requirements under Article 19(3) of the ICCPR and Article 10(2) of the ECHR.

30. In light of our analysis above, ARTICLE 19 concludes that the charges brought against the defendants amount to unlawful restrictions on freedom of expression under Article 19 (3) ICCPR and Article 10 (2) ECHR.

III. The charges against the defendants amount to a campaign of harassment in breach of international and regional standards on freedom of expression

31. In line with our analysis above, ARTICLE 19 believes that the actions of the defendants in the present case do not contravene the provisions of the Penal Code and Anti-Terror Act under which they are charged. We further consider that the charges levelled against the defendants form part of a campaign of harassment against journalists and other dissenting voices in the country following the failed coup against President Erdogan in July 2016. In our view, they appear to be politically motivated and as such fall foul of Article 5 ICCPR and Article 18 ECHR in conjunction with Article 10 ECHR. This conclusion is unaffected by Turkey’s derogations from the ICCPR and notice of intention to derogate from the ECHR.

³⁴ See *Nedim Şener v. Turkey*, no. 38270/11, para. 115, 8 July 2014

The charges against the defendants are unfounded

32. The defendants, Messrs Ahmet Altan and Mehmet Altan, are brothers and are both journalists and writers. In addition to practising journalism, Ahmet Altan was the co-founder and editor of the newspaper *Taraf* until 2012, while Mehmet Altan is an academic.
33. In support of the charges against the defendant, Ahmet Altan, the prosecution is relying on the following news articles as evidence:
- A column entitled "Absolute Fear", which was published on 12 May 2016. The article allegedly accused President Erdogan of violating the Constitution and several laws; it posited that President Erdogan was a dictator dominating all branches of government and that he had come to the end of his political life. In particular, the article allegedly said "I think we are watching the final act of a bad play. The price is somewhat heavy (...) but it is still good to know that it will end".
 - A column entitled "Crashing Through" in which the defendant alleged that President Erdogan wanted a civil war to break through in Turkey. According to the prosecution, the article further created an atmosphere of social and political chaos in support of the terrorist organisation (the Gülen movement), which was allegedly behind the coup attempt in July 2016.
 - A column authored by the defendant entitled "Montezuma" published on 10 July, in which the defendant allegedly likened President Erdogan to Aztec Emperor Montezuma and suggested that the President was under the influence of ultranationalists who wanted to reinstate military rule.
34. The prosecution's case is that these articles, which were critical of President Erdogan, created an atmosphere whereby the (failed) coup of July 2016 was expected from the public. More generally, the prosecution seeks to establish that the coverage by the defendants' newspaper in previous cases, in particular the *Balyoz* (Sledgehammer) case, in or around 2010 are evidence of its link to the Gülen movement and tendency to stir up propaganda against the current government. More specifically, the *Taraf* newspaper is accused of having published falsified documents, which led to the arrest of a number of members of the judiciary and military in 2010.
35. In support of the charges against Mehmet Altan, the prosecution further relies on the following:
- An article entitled "The meaning of *Balyoz*", published on 17 December 2010, as evidence that the defendant supported and sought to disseminate the ideology of a proscribed organisation, the Gülen Movement.
 - An article entitled "Turbulence", published on 20 July 2016, in which the defendant seeks to analyse the failed coup against President Erdogan.
 - The defendant's statements questioning that the attempted coup was the sole responsibility of the Gülen movement and criticising the government's response as "unlawful purges".
36. In addition, the prosecution contends that both defendants had contacts with senior members of the Gülen network, including its media arm. They also imply that the fact that the defendants were in contact with individuals who may have

used an app, Bylock, which was primarily used by members of the Gülen movement, is further evidence of their terrorist connections.

37. Based on the information available to us, ARTICLE 19 considers that the articles outlined at paragraphs 32-34 above amount to the legitimate reporting and expression of opinions on political events. In our view, it is apparent from the indictment that these articles do not contain any language that could be said to constitute incitement to violence or hatred. In examining the evidence before it, we would respectfully urge the trial court to consider the detailed standards on freedom of the media, "hate speech" and national security outlined above. In particular, we consider that there is no possible causal link between the defendants' news articles and the failed coup of July 2016. In any event, we note that the defendants have been charged with offences that refer to the "use of force or violence". In our view, the publication of news articles plainly does not amount to the "use of force or violence". As such, the charges brought against the defendants are clearly unfounded.
38. We further note that investigative journalism benefits from particularly high protection under international and European human rights law.³⁵ In particular, journalists have a right to protect the confidentiality of their sources in order to carry out their investigative work.³⁶ They must also be able to communicate with as wide a range of sources as possible, even including terrorist organisations, in order to provide coverage of matters of public interest. Communicating with terrorist groups can simply not be equated with support for these organisations. Similarly, criticism of the government does not amount to an endorsement of the policies of the opposition or groups proscribed as terrorist organisations in Turkey. In any event, we note that the Gülen movement was not a proscribed terrorist organisation at the time when the defendants had contacts with its alleged media arm. If the defendants were to be convicted for acts which did not constitute a criminal offence at the time they were committed, this would in itself raise further serious issues under Article 15 of the ICCPR and Article 7 of the ECHR (no punishment without law). For all these reasons, we believe that the evidence presented before the Court simply does not sustain the charges brought against the defendants.
39. In short, ARTICLE 19 believes that the charges brought against the defendants are unfounded and amount to an arbitrary interference with their right to freedom of expression.

The charges against the defendants amount to a campaign of harassment

40. ARTICLE 19 further considers that the charges levelled against the defendants form part of a campaign of harassment against journalists and other dissenting voices in the country. In our view, they are politically motivated and as such fall foul of Article 5 of the ICCPR and Article 18 of the ECHR in conjunction with Article 10 of the ECHR.
41. Since the failed coup against President Erdogan in July 2016, several international bodies, including the Council of Europe Commissioner for Human

³⁵ *Mosley v the United Kingdom*, no. [48009/08](#), para. 129, 10 May 2011

³⁶ *Goodwin v the United Kingdom*, no. [17488/90](#), para. 39, 27 March 1996

Rights³⁷ and the UN Special Rapporteur on freedom of expression,³⁸ have voiced their alarm at the state of media freedom in Turkey.

42. As noted above, the defendants merely published news articles commenting on the political situation in Turkey. Whilst their views may have been critical of the government, they did not incite to violence or hatred within the meaning of European jurisprudence or international standards on freedom of expression in this area.
43. We further reiterate the ECtHR's jurisprudence according to which "the position of strength occupied by a government commands it to show restraint in the use of criminal proceedings, especially when there are other means of responding to unjustified attacks and criticisms of the opposition or the media".³⁹
44. That the defendants may be sentenced to aggravated life imprisonment merely for publishing news articles commenting on the political situation in Turkey is grossly disproportionate and would amount to a grave miscarriage of justice. Moreover, it deprives Turkish citizens of their right to access information on matters of public interest.
45. Our conclusion is unchanged by Turkey's derogations from the ICCPR and notice of intention of derogation from the ECHR. As set out above, international and European human rights law is clear that any measures taken during a state of emergency must be "only strictly to the extent required by the exigencies of the situation" and proportionate. This is plainly not the case of the prosecution of the defendants.

Conclusion

46. In light of the foregoing, ARTICLE 19 concludes that the charges brought against the defendants and the legislation on which these charges are based fail to comply with Turkey's obligations under international human rights law, in particular the right to freedom of expression. As such, they amount to an unlawful restriction on the right to freedom of expression under Article 19 (3) ICCPR and Article 10 (2) ECHR. We further consider that the charges against the defendants amount to a campaign of harassment in breach of Article 5 ICCPR and Article 18 in conjunction with Article 10 ECHR.



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³⁷ Nils Muižnieks, Human Rights in Turkey, Euronews, 10 March 2017; at <http://bit.ly/2mVXDBo>.

³⁸ See UN Special Rapporteur on freedom of expression, Turkey country visit (14-18 November 2016), Preliminary conclusions and observations; at <http://bit.ly/2rN8rEk>.

³⁹ See *Nedim Şener v. Turkey*, *op.cit.*, para. 122.