IN THE ISTANBUL HIGH CRIMINAL COURT

Case no. 2017/112

Between: -

Republic of Turkey

Prosecution

- and -

Şahin Alpay

Defendant

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 Ferat Çağıl, lawyer representing Mr Şahin Alpay ('the defendant') to advise on the compatibility 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 defendant in cases currently pending against them before the Istanbul 13th High Criminal Court.

2. In this opinion, we conclude that the provisions, under which the defendant has been charged, in particular Article 5 of Law no. 3713 on Counter-Terrorism and Articles 309/1, 311, 312 and 314(2) 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 defendant 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 defendant 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

3. 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. The ARTICLE 19 Law Programme has produced a number of standard-setting documents and policy briefs based on international and

comparative law and best practice on issues ranging from freedom of expression and national security to access to information and protests.

4. On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation regularly intervenes in domestic and regional human rights court cases, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed domestic legislation.

5. ARTICLE 19 has specific expertise in the area of counter-terrorism legislation that affects 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] Tunisia[3] or Russia[4] and interventions in number of high profile national security cases, most recently in the *Miranda* case in the Court of Appeal of England and Wales.[5] ARTICLE 19 delivered training to Turkish high court judges on the subject of protecting freedom of expression while countering terrorism in May 2016 as part of a joint Council of Europe / European Union event in Antalya.

6. ARTICLE 19 has been closely monitoring respect for the right to freedom of expression in Turkey since the failed coup 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] Since then ARTICLE 19 has attended a number of hearings in trials of journalists in Turkey. In June 2017, ARTICLE 19 further submitted an expert opinion in the Altan brothers' trial.[7] We have also recently intervened with others in a number of Turkish cases involving the detention of journalists at the European Court of Human Rights.[8]

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

[2] ARTICLE 19, United Kingdom: Submission on Terror Legislation to ICJ, 24 April 2006; available at http://bit.ly/2rCFdpA.

[3] ARTICLE 19, Tunisia: Human rights and counter-terrorism, 28 April 2016; available at http://bit.ly/2qXjx5C.

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

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

[6] ARTICLE 19, Turkey: You cannot report the news under the state of emergency, 29 September 2016; available at http://bit.ly/2qXQCys.

[7] ARTICLE 19, Expert opinion, 5 June 2017; available at http://bit.ly/2A4DNuw.

[8] ARTICLE 19, Free expression organisations intervene on cases of detained Turkish journalists before the European Court of Human Rights, 26 October 2017; available at http://bit.ly/2A8DCvU.

7. This expert opinion draws observations made during missions to Turkey, as well as ARTICLE 19's extensive legal analysis and expertise outlined above. In our view, the trial of Şahin Alpay presents an important opportunity for Turkey to demonstrate its commitment to the protection of freedom of expression in the context of national security under international and European human rights law.

Outline

8. 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 key provisions under which the defendant. have been charged with those standards; and (iii) our assessment of the nature of the case brought against the defendant.

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

General principles

9. 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.

10. 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).

11. 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.[9] 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.[10]
- **The restriction must pursue a legitimate aim:** Legitimate aims are those, which are exhaustively enumerated in Article 10, paragraph 2 and Article 19, paragraph 3 of the ICCPR.
- **The restriction must be necessary in a democratic society:** This requirement encapsulates the dual principles of necessity and proportionality. It demands an assessment of, first, whether the proposed limitation satisfies a "pressing social need"[11]. Secondly, it must be established whether the measures at issue are the least restrictive to achieve the aim.

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[9] See Article 19 (3) of the ICCPR and Article 10 (2) of the ECHR.

[10] European Court of Human Rights ("European Court"), *The Sunday Times v UK*, App. No. 6538/74, para.49, 26 April 1979.

[11] European Court, *The Observer and Guardian v UK*, App. No. 13585/88, para 59, 26 November 1991.

12. 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".[12]

International standards on freedom of expression and national security

13. 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. 11).

14. Moreover, under international law, States are required to prohibit incitement to terrorism[13] as well as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (Article 20 (2) ICCPR).[14] In practice, restrictions imposed on freedom of expression to give effect to these provisions are often abused.

15. 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.[15]

16. Similarly, the UN Human Rights Committee ("HR Committee") has highlighted that laws criminalising the "praising" or "glorifying" of terrorism must be clearly defined to

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[12] European Court, *Lingens v Austria*, App. No. 9815/82, para 41, 8 July 1986.

[13] UN Security Council Resolution 1624 (2005); available at http://bit.ly/1SMOH9r.

[14] 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, available at http://bit.ly/1zk6n2S.

[15] 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.

ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression.[16]

17. Furthermore, "incitement to terrorism" offences will only be considered necessary in a democratic society if they are constructed and construed narrowly. *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,[17] which authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression, 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."[18]

18. By contrast, expression that only transmits information from or about an organization that a government has declared threatens national security must not be restricted.[19] 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 operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities".*[20]

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

19. The European Court of Human Rights (European Court) generally uses different terminology to examine cases involving alleged terrorist activity. Rather than "incitement to terrorism",[21] the Court relies on the concepts of "apology of violence" and "incitement to hostility".[22] These cases are generally considered to form part of the European Court's case-law on hate speech. In contrast to the UN, however, the European Court's approach to "hate speech" is much less systematic and hard to predict. [23] Nonetheless, both stress the importance of the context in each case, including the form of the speech at issue, its impact and its author.

20. In cases involving the dissemination by the press of material, which is alleged to amount to "incitement to violence or hostility", the European Court's starting point is

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

17 *T*he Johannesburg Principles *op.cit*.

18 A/63/337, para 62.

19 Johannesburg Principles, *op.cit.,* Principle 8.

20 See CCPR/C/GC/34, *op cit*.

21 The European Court refers to 'condoning terrorism;' see *Leroy v France*, App. No. 36109/03, 2 October 2008.

22 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; available at http://bit.ly/1ezKRQE.

23 *Op.cit*. For an analysis of the ECtHR's early case-law on hate speech, see Mario Oetheimer, Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law, 17 Cardozo J. Int'l& Comp. L. 427 (2009).

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"*.[24] 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.[25]

21. Similarly, the European Court 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.[26] 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.[27]

22. This does not relieve the press or terrorist organisations from the European Court's scrutiny however. As noted above, the Court focuses its analysis of 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.[28]

23. At the same time, the Court 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".[29]

State of emergency

24. Under Article 4 of the ICCPR and Article 15 of the ECHR, States have a right to derogate – in exceptional circumstances, in a temporary, limited and supervised manner - from their obligations to secure certain rights.[30] In order to be valid, derogations must comply with a number of substantive and procedural requirements. In particular:[31]

    - 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

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[24] See *Lingens v Austria, op.cit*.

[25] See *Özgür Gündem v. Turkey*, App. No. 23144/93, 16 March 2000, para 60 and 63.

[26] See *Gözel et Özer v. Turkey*, App. No. 43453/04 and 31098/05), 6 July 2010.

[27] *Nedim Şener v. Turkey*, App. no. 38270/11, 8 July 2014, para 115/

[28] See, e.g. *Sürek and Özdemir v. Turkey* [GC], App. No. 23927/94 and 24277/94, 8 July 1999, unreported, para 61.

[29] See *Nedim Şener v. Turkey,* op.cit, para 122.

[30] 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.

[31] See ECHR Factsheet on Derogation in time of Emergency, February 2017; available at http://bit.ly/1QodyRo.

obligation for these measures to meet both the necessity and proportionality requirements;[32]

- 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.

25. On 21 July 2016, Turkey notified the Secretary General of the Council of Europe that it "may" derogate 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.[33]

26. 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.[34]

Limitation on use of restrictions on rights

27. Under Article 18 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.

28. The European Court 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, the Court has highlighted that the standard of proof in respect of Article 18 complaints is particularly exacting.[35] In *Rasul Jafarov* v. Azerbaijan, the Court examined whether the arrest and detention of the applicant, a well-known civil society and human rights defender, were politically motivated and in breach of Article 18 in conjunction with Article 5 of the ECHR (detention). [36] The applicant had been charged with illegal entrepreneurship, large-scale tax evasion and abuse of power. In finding a violation of Articles 18 in conjunction with Article 5, the Court considered that the following factors were relevant:[37]

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[32] See UN Human Rights Committee, General Comment no. 29 on Article 4 ICCPR, CCPR/C/21/Rev.1/Add.11, para 4; available at http://bit.ly/2mZeIMw.

[33] See Martin Scheinin, Turkey's Derogation from the ECHR: What to Expect?, 27 July 2016; available at http://bit.ly/2sxjK1s.

[34] See Martin Scheinin, Turkey's Derogation from Human Rights Treaties: An Update, 18 August 2016; available at http://bit.ly/2rYlvaO.

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

[36] *Jafarov v. Azerbaijan,* App. No. 69981/14, paras. 153-163,17 March 2016.

[37] *Ibid.*

- 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

29. In the present case, the defendant has been charged with "attempting to abolish, replace or prevent the implementation of the constitutional order", "attempting to abolish the Turkish Grand National Assembly or preventing it from carrying out its duties", "attempting to abolish the government or attempting to prevent it from carrying out its duties" and "establishing or commanding an armed organisation with the purposes of committing offences listed " under Articles 309 (1), 311 (1), 312 (1) and 314 (1) of the Turkish Penal Code respectively. 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. 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.

30. In ARTICLE 19's view, the provisions, which form the basis of the defendant's 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 ARTICLE 19's 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 attempt to "abolish" or "replace" the constitutional order of Turkey. Moreover, it is unclear what "the constitutional order" of the Republic of Turkey comprises 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) ICCPR and Article 10 (2) 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"**: 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) ICCPR and Article 10 (2) 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 all expression. 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.

- **"Membership of an armed organisation**": Article 314 of the Turkish Penal Code criminalises the establishment and command, as well as membership of an armed organisation that engages in the offences listed in Chapter IV of the Penal Code.

Sections four and five of Chapter IV to which Article 314 refers contain a list of offences against State security (Section 4 – Disrupting the unity and integrity of the State, alliance with the enemy, incitement to war against the State, benefiting from performing activities against the fundamental national interests, recruitment of soldiers or engaging in other hostile activities against a foreign State in a manner putting the Turkish state at risk of war, destruction of military facilities and conspiracy which benefits enemy military movements, material and financial aid to enemy States) and against the constitutional order and its functioning (Section 5 - Violation of the constitution, assassination of and physical attack on the President, offence against a legislative body, offence against the government, armed revolt against the government of the Turkish Republic, supplying arms, agreement to commit an offence - against Nation and State).[38] More specifically, Article 314 (2) provides that "*anyone who becomes a member of an (armed) organisation mentioned in the first paragraph of this Article shall be liable to a term of imprisonment of between five and ten years*".

ARTICLE 19 notes that the Penal Code does not define what constitutes an "armed organisation" or an "armed group". However, its meaning has been developed in the case-law of the Turkish Court of Cassation. In its Opinion No. 831/2015, the Venice Commission carried out a detailed analysis of the case law of the Turkish Court of Cassation on Article 314 and concluded:[39]

> 106. In conclusion, the Venice Commission recommends, first, that the established criteria in the case law of the Court of Cassation that acts attributed to a defendant should show "in their continuity, diversity and intensity", his/her "organic relationship" to an organisation or they should prove that he/she acted knowingly and willingly within the "hierarchical structure" of the organisation, should be applied strictly. The loose application of these criteria may give rise to issues concerning in particular the principle of legality within the meaning of Article 7 ECHR
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> 107. Second, the expression of an opinion in its different forms should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation. Where the only evidence consists of forms of expression, the conviction for being a member of an armed organisation would constitute an interference with the right of the defendants to freedom of expression, and that the necessity of this interference on the basis of the criteria as set forth in the case - law of the ECtHR, in particular the criteria of "incitement to violence", should be examined in the concrete circumstances of each case.

In ARTICLE 19's view, Article 314 may be considered sufficiently foreseeable by the European Court of Human Rights in light of the clarification of the meaning of 'membership' in the case-law of the domestic courts but only where it is interpreted consistently with the Venice Commission's recommendations. If Article 314 were interpreted more broadly, it would not be compatible. In particular, a conviction based solely on the expression of opinions would be considered an arbitrary interference with the right to freedom of expression, save

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[38] See Venice Commission Opinion on Article 216, 299, 301 and 314 of the Turkish Penal Code, CDL-AD(2016)002, March 2016, at para 96; available at http://bit.ly/2jkaCcE.

[39] *Ibid*., paras 106 and 107.

where such expression constitutes 'incitement to violence' within the meaning of the Convention.[40] A similar analysis would apply under Article 19 (3) of the ICCPR.

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

III. The charges against the defendant 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 defendant in the present case do not contravene the provisions of the Penal Code or Anti-Terror Law under which he is charged. We further consider that the charges levelled against the defendant form part of a campaign of harassment against journalists and other dissenting voices in the country following the failed coup against President Erdoğan 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.

The charges against the defendant are unfounded

32. The defendant, Mr Şahin Alpay, is a columnist who has been writing opinion pieces and news articles for the Zaman newspaper on a regular basis since 2002. The prosecution's case against the defendant and others[41] essentially rests on their connection to Zaman, which is described as the 'media arm' of the Gülen movement, a proscribed organisation in Turkey since 16 June 2016.[42] Whilst acknowledging that the defendant's articles were not necessarily criminal *per se*, the prosecution nonetheless rely on them in support of the charges laid again him. In particular, the prosecution's evidence consists of a number of news articles and excerpts from articles written between 2013 and 2014 when various public officials were investigated under corruption charges. These include the articles: 'Supposedly a religious war…' ('Din savaşıymış…') from 21 December 2013; 'Between Erdoğan and the West' ('Erdoğan ile Batı arasında') from 28 December 2013; 'Yes, both crime and punishment are individual' ("Evet, suç da ceza da şahsidir") from 8 February 2014; 'This nation is not 'barrel-headed' ('Bu millet 'bidon kafalı' değildir') from 1 March 2014; 'A government without Erdoğan is the way out' ("Çıkar yol Erdoğan'sız hükümet") from

[40] See *mutatis mutandis*, *Işıkırık v. Turkey,* App. No. 41226/09, 14 November 2017; or *Nedim Şener v. Turkey*, App. no. 38270/11, 8 July 2014, para. 115.

[41] Whilst our opinion focuses on the case of Şahin Alpay, our understanding is that the same principles are applicable to the prosecutions brought against Ali Bulaç, a writer, and Orhan Kemal Cengiz, a writer and lawyer who has acted for Zaman at the constitutional court.

[42] While the indictment refers to National Security Council meetings between 26 February 2014 and 26 May 2016 where the Gülenist movement was acknowledged as a threat to national security and public order, under Turkish law, courts are the authority in distinguishing which organizations constitute a terrorist organization under the Turkish Penal Code Article 220. The Gülen movement was recognised as a terrorist organization by a court for the first time in a judgment of the Erzincan Heavy Penal Court on 16 June 2016.

29 March 2014. In all of these articles, the author offers his analysis of relevant affairs and his commentary.

33. Other statements mentioned in the indictment and attributed to the defendant read as follows:

- "The appointments to the Police and the amendments to the Judicial Police Regulation are a tool for the government to cover up what might be the biggest corruption investigation of the history of the Republic."
- "President Abdullah Gül should not be silent about what is going on."

34. The prosecution's case is that these articles or statements, which were critical of President Erdoğan, promoted the Gülen movement's ideology, which eventually led to the failed coup of July 2016, and went beyond the limits of legitimate freedom of expression. The prosecution seeks to establish that the defendant's articles covering allegations of corrupt practices in the AKP party in 2013-2014 and criticism of some of Erdoğan's policies are evidence that he consistently wrote in accordance with the editorial policy of *Zaman* newspaper, which was linked to the Gülen movement and carried out propaganda against the government.

35. ARTICLE 19 has reviewed unofficial translations of the articles outlined in paragraph 32 above and considers that they amount to the legitimate expression of opinions on political events. In our view, it is apparent from the indictment that these articles or statements do not contain any language that could remotely 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 at paragraphs 19-23 above. In particular, we consider that there is no possible causal link between the defendant's news articles and the failed coup of July 2016. In any event, we note that the defendant has been charged with offences, which refer to the "use of force or violence". In our view, the publication of news articles or opinion pieces plainly does not amount to the "use of force or violence". As such, the charges brought against the defendant are clearly unfounded and inconsistent with the case-law of the Turkish courts themselves.[43]

36. We further recall that political speech benefits from particularly high protection under international and European human rights law.[44] Accordingly, any restriction on this type of expression must be interpreted particularly narrowly. In this case, the prosecution appears to equate criticism of government policies with membership of a terrorist organisation, simply by virtue of the fact that they were published by a newspaper with a connection to the Gülen movement. In this regard, we invite the trial court to take into account the decision of the European Court of Human Rights in *Gözel et Özer v. Turkey* (applications no. 43453/04 et 31098/05), 6 July 2010. In that case, the European Court considered that virtually automatic convictions of the media for the

[43] See for example, the decision by T.C.YARGITAY 16. CEZA DAIRESI on 14 July 2017, E. 2017/1443, K. 2017/4758; available at http://bit.ly/2jVFgx4 and http://bit.ly/2jVFgx4.

[44] See e.g. *Karatas v Turkey*, App. no. 23168/94, 8 July 1999, at 50.

publication of texts by banned organisations breached Article 10 of the Convention. In our view, this a fortiori applies to the publication of articles by a newspaper in circumstances where the Gülen movement was not even recognized as a proscribed organization by the Turkish courts at the time of the publication of the articles in question. Moreover, we note that as a matter of principle, criticism of the government does not automatically amount to an endorsement of the policies of the opposition or groups proscribed as terrorist organisations in Turkey.

37. Finally, we draw this Court's attention to the European Court's decision in *Ilgar Mammadov v Azerbaijan*.[45] In that case, the Court conducted a detailed examination of the way in which the domestic courts had examined the evidence in the trial of a well-known Azerbaijani politician on charges of "mass disorder", amongst others. It concluded that there had been a breach of the right to a fair trial. In particular, the Court considered that the domestic courts' reliance on public statements in support of his conviction was arbitrary in circumstances where the applicant's statements constituted perfectly legitimate expression. In the present case, the prosecution's case appears to be based entirely on statements of opinion on political matters of evident public interest. As such, we believe that the evidence presented before the Court simply does not sustain the exceedingly vague charges brought against the defendant.

38. In short, ARTICLE 19 believes that the charges brought against the defendant are unfounded and amount to an arbitrary interference with their right to freedom of expression.

The charges against the defendant amount to a campaign of harassment

39. ARTICLE 19 further considers that the charges levelled against the defendant 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 ICCPR and Article 18 ECHR in conjunction with Article 10 ECHR.

40. Since the failed coup against President Erdoğan in July 2016, several international bodies, including the Council of Europe Commissioner for Human Rights[46] and the UN special rapporteur on freedom of expression,[47] have voiced their alarm at the state of media freedom in Turkey.

41. As noted above, the defendant merely published opinion pieces commenting on the political situation in Turkey. Whilst his views may have been critical of the government, they plainly did not incite to violence or hatred within the meaning of European jurisprudence or international standards on freedom of expression in this area.

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[45] *Ilgar Mammadov v Azerbaijan (No.2)*, App. No. 919/15, 16 November 2017, paras 233 and 234.

[46] Nils Muižnieks, Human Rights in Turkey, Euronews, 10 March 2017, available at http://bit.ly/2mVXDBo; or the third-party intervention in 10 Turkish cases, 19 October 2017; available at http://bit.ly/2hPotr0.

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

42. We further reiterate the European Court'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".[48]

43. That the defendant may receive up to three aggravated life sentences 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.

44. Our conclusion is unchanged by Turkey's derogations from the ICCPR and notice of intention of derogation from the ECHR. As set out at paragraphs 24 to 26 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 defendant.

Conclusion

45. In light of the foregoing, ARTICLE 19 concludes that the charges brought against the defendant 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) of the ICCPR and Article 10 (2) of the ECHR. We further consider that the charges against the defendant amount to a campaign of harassment in breach of Article 5 ICCPR and Article 18 in conjunction with Article 10 ECHR.

23 November 2017

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[48] See *Nedim Şener v. Turkey,* op.cit, para. 122.