

**IN THE BATMAN HIGH CRIMINAL COURT**

**Indictment no. 2017/726**

**Between: -**

**Republic of Turkey**

**Public Prosecutor's Office of Batman**

**Prosecution**

**- and -**

**Çayan Demirel**

**1<sup>st</sup> Defendant**

**Ertuğrul Mavioğlu**

**2<sup>nd</sup> Defendant**

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**EXPERT OPINION BY ARTICLE 19**

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**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 Meral Hanbayat, lawyer representing Mr Çayan Demirel ('the first defendant') and Rozerin Seda Kip, representing Mr Ertuğrul Mavioğlu ('the second 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 defendants in cases currently pending against them before the Batman 2<sup>nd</sup> High Criminal Court.
2. In this opinion, we conclude that the provision, under which the defendant has been charged, namely Article 7/2 of Law no. 3713 on Counter-Terrorism, does not comply with international and European standards on freedom of expression. Even if it were to be considered as providing as sufficient legal basis for the purposes of international and European human rights law, we consider that the prosecution's failure to exercise its discretion consistently with the requirements of freedom of expression means that the charges levelled against the defendants are unlawful under international and European human rights law. If the defendants were to be convicted, their convictions would equally constitute an unnecessary interference with the right to freedom of expression.

**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. ARTICLE 19 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 the right to protest. 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.

4. 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*,<sup>1</sup> the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom,<sup>2</sup> Tunisia<sup>3</sup> or Russia<sup>4</sup> 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.<sup>5</sup> In May 2016, ARTICLE 19 delivered a training for Turkish judges on 'International Standards for Promoting Freedom of Expression while Countering Terrorism' at an international workshop in Antalya for the Turkish High Level Courts organised by the Council of Europe and the European Union.
5. This expert opinion draws on ARTICLE 19's extensive legal analysis and expertise outlined above. In our view, as Turkey is a signatory to, and has ratified, the ICCPR and the ECHR, the Turkish courts in the present case are required to take into account international and European human rights law. In particular, they must duly observe international and European standards on the protection of the right to freedom of expression in the context of national security.

## Outline

6. In this expert opinion, ARTICLE 19 addresses: (i) the facts of the cases; (ii) key international and European standards on freedom of expression and terrorism offences; (iii) the compatibility of Article 7/2 of Law no. 3713 on Counter-Terrorism under which the defendants have been charged with those standards; and (iv) our assessment of the nature of the case brought against the defendants.

### I. Facts of the case

7. Mr Çayan Demirel, the first defendant, is a documentary film-maker, who has made films on historical incidents in Turkey. He has received several awards for Best Documentary Film in 2009 from the Golden Orange Film Festival, the Ankara Film Festival and the SIYAD Turkish Film Critics Association. Mr Ertuğrul Mavioğlu, the second defendant, is a journalist, author and

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<sup>1</sup> <https://www.article19.org/resources.php/resource/1803/en/johannesburg-principles-on-national-security,-freedom-of-expression-and-access-to-information>

<sup>2</sup> <https://www.article19.org/resources.php/resource/448/en/united-kingdom:-submission-on-terror-legislation-to-icj>

<sup>3</sup> <https://www.article19.org/resources.php/resource/38348/en/tunisia:-human-rights-and-counter-terrorism>

<sup>4</sup> <https://www.article19.org/resources.php/resource/692/en/russia:-amendments-to-extremism-legislation>

<sup>5</sup> <https://www.article19.org/resources.php/resource/38236/en/uk:-free-speech-groups-welcome-win-for-press-freedom-in-miranda-case>

documentary film- maker. He has worked as a journalist for over thirty years for multiple TV channels and newspapers, and has twice received an award for investigative journalism from the Progressive Journalists' Association of Turkey. He has also written three historical non-fiction books on the 1980 military coup, as well as a set of two books on the deep state in Turkey. Both defendants are the directors of the documentary at the heart of this case.

8. In 2013, the defendants directed a documentary about the daily life of guerrilla members of the PKK in the mountains of South East Turkey. The documentary shows PKK members playing games, cooking and eating food, walking in the mountains or training. It contains interviews where PKK members express their opinions about the role of women in society or explain why they joined the PKK. At the time of filming, the Turkish government and the PKK were going through a peace process. A ceasefire was in place. The title of the documentary, 'Bakur', corresponds to the north of the Kurdish region that lies within Turkish borders.
9. The purpose of the documentary, as presented in the trailer, is to *"invite its viewers to reflect on a war that has been continuing for decades and give an insightful look on its main subject, the PKK."* The trailer goes on to explain *"Bakur, which was shot during the summer and autumn of 2013, introduces us to women and men who have decided to join the armed struggle for "a better future for their people."* The trailer concludes by explaining that *"Bakur tells the story of how the PKK, a group that has been known as building its struggle mostly on national identity, turned to become a women's movement. The documentary challenges the audience to develop a different point of view as it sheds light on this mysterious world."*
10. On or about 05 May 2015, the newspapers Batman Demokrat, Batman Express, Batman Doğuş, Batman Haber and Tarafsız Haber announced that the documentary "Bakur" would be premiered at the Yılmaz Güney Theatre on 06 May 2015. According to the Batman Police Department, up to 120 people were expected to take part in this event. At that point, no objection appears to have been raised concerning the screening of the film and there was no indication that the documentary had otherwise been banned. This was later confirmed by a letter of the General Directorate of Copyright Affairs at the Ministry of Culture and Tourism in response to enquiries made by the Public Prosecutor's Office. However, the General Directorate of Copyright Affairs noted that "Bakur" had no registration certificate.
11. On or about 20 December 2017, the defendants were charged with disseminating terrorist propaganda in favour of a terrorist organisation under Article 7/2 of Law no. 3713 on Counter-Terrorism, as amended on 30 April 2013 by Law no. 6459. The prosecution's case is that the defendants in their documentary give "legitimacy to the terrorist organization PKK/KCK's methods of using force, violence or threats" and "praise the life and ideologies of the members of the terrorist organization PKK/KCK".
12. In support of their case, the indictment refers to:
  - "the armed appearances of the members of the terrorist organization PKK/KCK";
  - "stories of members about how they decided to join the organization in response to so-called oppression and to claim freedom";

- the designation by PKK members of their dead colleagues as ‘martyrs’.

The prosecution also refer to news stories stating that the Ministry of Culture had banned the documentary from the Istanbul Film Festival on the grounds that it did not have a Registration Certificate issued by the Ministry.

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

### *General principles*

13. 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.
14. 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).
15. 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.<sup>6</sup> 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.<sup>7</sup>
  - **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”.<sup>8</sup> Secondly, it must be established whether the measures at issue are the least restrictive to achieve the aim.
16. 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”.<sup>9</sup>

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<sup>6</sup> See Article 19 (3) ICCPR and Article 10 (2) ECHR.

<sup>7</sup> European Court, *The Sunday Times v United Kingdom*, App. No. 6538/74, 26 April 1979, para 49,

<sup>8</sup> European Court, *The Observer & Guardian v the UK*, App. No. 13585/88, 26 November 1991, para 59.

<sup>9</sup> European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para 41.

17. Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.<sup>10</sup>

*International standards on freedom of expression and national security*

18. 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.
19. Under international law, States are also required to prohibit incitement to terrorism.<sup>11</sup> In practice, restrictions imposed on freedom of expression to give effect to these provisions are often abused.
20. 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.<sup>12</sup>
21. 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.<sup>13</sup>
22. Furthermore, “incitement to terrorism” offences will only be necessary in a democratic society if they are constructed and construed narrowly. *The Johannesburg Principles on National Security, Freedom of Expression and*

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<sup>10</sup> 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>.

<sup>11</sup> UN Security Council Resolution 1624 (2005); available at <http://bit.ly/1SMOH9r>.

<sup>12</sup> 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.

<sup>13</sup> HRC, General Comment 34, CCPR/C/GC/34, para 46.

*Access to Information*,<sup>14</sup> 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.”<sup>15</sup>

23. By contrast, expression that only transmits information from or about an organization that a government has declared threatens national security must not be restricted.<sup>16</sup> 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*”.<sup>17</sup>

#### *ECHR case-law on national security and freedom of expression*

24. The European Court of Human Rights ('European Court') generally uses different terminology to examine cases involving alleged terrorist activity. Rather than “incitement to terrorism”,<sup>18</sup> the European Court relies on the concepts of “apology of violence”, “incitement to hostility” or “incitement to violence”.<sup>19</sup> This terminology, however, has a different meaning under Article 20(2) ICCPR. In particular, the threshold for speech to constitute “incitement to hostility or violence” under the ICCPR is a very high one and one that is generally higher than under the European Court’s case law.<sup>20</sup> Nonetheless, both the UN and the European Court stress the importance of context in each case, including the form and tone of the speech at issue, its impact and its author.
25. The European Court has examined several cases involving the conflict in South East Turkey and Article 7/2 of the Law on the Fight against Terrorism in Turkey in its various iterations. In the vast majority of cases, the European Court concluded that there had been a violation of Article 10 ECHR. In those cases, the European Court noted that the expressions “the leader of the Kurdish people”, “guerrilla” or references to a “national liberation struggle” did not in and of themselves amount to incitement to violence within the meaning of the Convention.<sup>21</sup> Equally, the European Court has found that the slogans “May

<sup>14</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information London, ARTICLE 19, 1996; available at <http://bit.ly/2h8NStO>.

<sup>15</sup> A/63/337, para 62.

<sup>16</sup> Johannesburg Principles, *op.cit.*, Principle 8.

<sup>17</sup> See CCPR/C/GC/34, *op cit.*

<sup>18</sup> The ECtHR refers to ‘condoning terrorism’. See *Leroy v France*, no. 36109/03, 2 October 2008.

<sup>19</sup> 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: [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf).

<sup>20</sup> See ARTICLE 19, *Hate Speech Explained: a Toolkit*, 2015: <https://www.article19.org/resources/hate-speech-explained-a-toolkit/>

<sup>21</sup> *Belge v Turkey*, no. 50171/09, para. 34, 06 December 2016; equally, an interview published in a monthly review in which the members of the PKK had been referred to as “guerrilla” did not amount to incitement to violence: *Erdogdu and Ince v. Turkey* [GC], nos. 25067/94 and 25068/94, § 52, ECHR 1999-IV; see also *Gerger v. Turkey* [GC], no. 24919/94, § 50, 8 July 1999, in which the Court held that

those hands which aim to damage peace be broken” and “Long live Öcalan” did not contain any elements of violence or incitement to violence.<sup>22</sup>

26. Likewise, the European Court has considered that statements or speeches by the leaders of the PKK concerning the consequences of a potential intervention of the Turkish army in Northern Iraq<sup>23</sup> or concerning the Turkish authorities’ policies regarding the Kurdish question<sup>24</sup> or PKK leaders’ comments on international women’s day did not amount to incitement to violence, armed resistance, uprising.<sup>25</sup> The European Court came to the same conclusion concerning an interview with one of the leaders of the PKK who expressed his organisation’s opinion.<sup>26</sup>
27. In the rare cases in which the European Court found no violation of Article 10 ECHR,<sup>27</sup> the Court considered that the speech at issue, which sought to stigmatise the other side of the South East conflict by using words such as “*the fascist Turkish army*” or “*the hired killers of imperialism*” alongside references to “*massacres*”, “*brutalities*” and “*slaughter*”, amounted to “*an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which ha[d] manifested themselves in deadly violence*”.<sup>28</sup> Also relevant were the “*serious disturbances [that] have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region*” (our emphasis) and the fact that the speech at issue cited the names of particular individuals, exposing them to a possible risk of physical violence.<sup>29</sup> Equally, the European Court has found that the expression “[w]e want to wage a total liberation struggle” expressed a “*call for the use of armed force as a means to achieve national independence of Kurdistan*”.<sup>30</sup> In the court’s view, this communicated the message to readers that “*recourse to violence was a necessary and justified measure of self-defence in the face of the aggressor*”.<sup>31</sup> Again, the context of “serious disturbances” in the region was an important factor.
28. In cases involving the dissemination of “incitement to violence” or terrorism by the press, the Court’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*

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the applicant’s speech, which referred to the members of the PKK as “guerrilla”, had constituted political criticism of the Turkish authorities and not an incitement to violence, armed resistance or an uprising; *Bahçeci and Turan*, no. [33340/03](#), § 30, 16 June 2009, and *Savgın v. Turkey*, no. [13304/03](#), § 45, 2 February 2010, in which the Court considered that text messages and slogans which referred to Abdullah Öcalan as the president had not incited to violence; *Faruk Temel*, no. [16853/05](#), § 62, 1 February 2011, § 62, in which the Court found that referring to Abdullah Öcalan as “esteemed” (sayın) during a speech did not incite to violence; and *Öner and Türk v. Turkey*, no. [51962/12](#), § 24, 31 March 2015, in which the Court held that the applicant’s speech, in which he described Abdullah Öcalan as the “Kurdish leader” did not constitute incitement to violence. See also *Sürek v. Turkey (no. 3)*, no. [24735/94](#), para. 40, 8 July 1999

<sup>22</sup> see *Bahçeci and Turan*, *op.cit.*, § 30.

<sup>23</sup> *Yıldız and Taş (no 1)*, no. [77641/01](#), §§ 7 and 32, 19 December 2006

<sup>24</sup> *Yıldız and Taş (no 4)*, no. [3847/02](#), §§ 6 and 35, 19 December 2006

<sup>25</sup> *Kanat and Bozan*, no. [13799/04](#), §§ 7 and 18, 21 octobre 2008

<sup>26</sup> See *Demirel and Ateş*, [10037/03](#) and [14813/03](#), §§ 6, 17 et 38, 12 avril 2007 and *Karakoyun and Turan v Turkey*, no. [18482/03](#), §§ 9 and 28, 11 December 2007 and *Çapan v Turkey*, no. [71978/01](#), §§ 8 and 41, 25 July 2006.

<sup>27</sup> These consists mostly of a series of cases dating from 1999, see in particular *Sürek v. Turkey (no. 1)*, no. [26682/95](#), paras 62-63, 8 July 1999.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> See *Sürek v. Turkey (no. 3)*, cited above at paras 40-41.

<sup>31</sup> *Ibid.*

*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*".<sup>32</sup> For this reason, the European 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.<sup>33</sup>

29. Similarly, the 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.<sup>34</sup> 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.<sup>35</sup>
30. This does not relieve the press or terrorist organisations from the European Court's scrutiny however. As noted above, the European 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.<sup>36</sup> This does not mean, however, that the press is required to provide an analysis of interviews or statements provided by the terrorist organisations they interview.<sup>37</sup> Nor are they required to analyse their context.<sup>38</sup>
31. The European Court also 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".<sup>39</sup>

### **III. The applicable Turkish law provisions fails to meet the legality requirement under international and regional standards on freedom of expression**

32. In the present case, the defendant has been charged with disseminating terrorist propaganda in favour of a terrorist organisation under Article 7/2 of Law no. 3713 on the Fight against Terrorism in Turkey, amended on 30 April 2013 by Law no. 6459, which reads as follows:

Any person who disseminates propaganda in favour of a terrorist organisation by justifying, praising or encouraging the use of methods constituting coercion, violence or threats shall be liable to a term of imprisonment of one to five years.
33. Reference is also made in the indictment to Article 53 of the Turkish Criminal Code No 5237, which provides for 'deprivation of certain rights'. However, this article is concerned with procedural issues, which fall outside ARTICLE19's expertise. Therefore, we do not analyse this provision in this opinion.
34. In ARTICLE 19's view, the provision, which forms the basis of the defendant's indictment, fails to comply with the legality requirement under international and

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<sup>32</sup> See *Lingens v Austria*, op.cit.

<sup>33</sup> See *Özgür Gündem v. Turkey*, no. [23144/93](#), 16 March 2000, para.60 and 63.

<sup>34</sup> See *Gözel et Özer v. Turkey*, App. No. 43453/04 et 31098/05, 6 July 2010

<sup>35</sup> *Nedim Şener v. Turkey*, no. 38270/11, para. 115, 8 July 2014

<sup>36</sup> See, for example, *Sürek and Özdemir v. Turkey* [GC], nos. [23927/94](#) and [24277/94](#), para. 61, 8 July 1999, unreported

<sup>37</sup> See *Gözel and Özer v Turkey*, no. 43453/04 31098/05, para. 61, 06 July 2010.

<sup>38</sup> *Ibid.*

<sup>39</sup> See *Nedim Şener v. Turkey*, op.cit, para. 122.



European human rights law as set out above. In particular, the term ‘terrorist propaganda’ is not defined in the Law on the Fight against Terrorism in Turkey and in any event is exceedingly vague:

- According to the Oxford English Dictionary, ‘propaganda’ means ‘*Information, especially of a biased or misleading nature, used to promote a political cause or point of view.*’ In other words, whether or not enshrined in law, propaganda is a term, which is by definition extremely broad in scope. The definition provided in the Bill of Indictment is even wider. The prosecution suggest that propaganda means “an effort to promote, introduce and spread a doctrine, thought or belief by written or oral means”. According to this definition, just about any politician, minister of religion, teacher or anyone engaged in the dissemination of ideas could be described as “propagandist”.
- The Law on the Fight against Terrorism in Turkey defines ‘terrorism’ in overbroad terms. Article 1 of the Law provides:

Any criminal action conducted by one or more persons belonging to an organisation with the aim of changing the attributes of the Republic as specified in the Constitution, the political, legal, social, secular or economic system, damaging the indivisible unity of the State with its territory and nation, jeopardizing the existence of the Turkish State and the Republic, enfeebling, destroying or seizing the State authority, eliminating basic rights and freedoms, damaging the internal and external security of the State, the public order or general health, is defined as terrorism.

In other words, the definition of terrorism, coupled with ‘propaganda’ is so broad as to cover the mere publication of views in support of government opposition, calls for political, legal, social or economic reform or change in government.

35. This provision is also clearly inconsistent with the detailed recommendations of the UN Special Rapporteur on Counter-Terrorism outlined above. In particular, both the UN Special Rapporteur and the UN Human Rights Committee have highlighted that the use of the terms “praising” or “glorifying” terrorism should be avoided or at a minimum clearly defined, lest they lead to unnecessary or disproportionate interferences with freedom of expression.

36. Similarly, the Venice Commission has found:<sup>40</sup>

33. Another category of offences that raises significant human rights concerns are “new” crimes for speech that is seen to encourage, directly or indirectly, terrorism. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as “apology”, “praising”; “glorification or indirect encouragement” or “public justification” of terrorism. These “new” offences often criminalise the dissemination, publication and possession of material which are considered to fall foul of the incitement provisions. These provisions generally tend towards a weakening of the causal link that is normally required in law between the original speech (or other form of expression) and the danger that criminal acts may be committed. Such offences are particularly worrisome when applied to the media. The ECHR provides for strong protection of freedom of expression (Article 10) while allowing States to protect national security. According to the Strasbourg case-law, under article 10 ECHR incitement can only be prohibited in limited circumstances, which are highly context based. As recommended in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, “Member States should not

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<sup>40</sup> See Venice Commission, *Report on Counter-Terrorism and Human Rights*, Study no. 500/2008, CDL-AD(2010)022, 05 July 2010.

use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined”.

37. Although the European Court has so far declined to rule on the legality of Article 7/2,<sup>41</sup> it found in *Belge v Turkey*,<sup>42</sup> that “the offence proscribed by section 7(2) [after 18 July 2006], that is “disseminating propaganda in favour of a terrorist organisation”, and its interpretation by the Diyarbakır Assize Court do not appear to be entirely clear.” The European Court has also found a violation of Article 10 ECHR in a large number of cases involving Article 7/2 of the Law on the Fight against Terrorism in Turkey in circumstances where the authorities, whether the courts or prosecution, had failed to interpret that provision sufficiently narrowly so as not to interfere unnecessarily with the right to freedom of expression.
38. 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) ICCPR and Article 10 (2) ECHR.

#### **IV. The charges against the defendant amount to an unnecessary restriction of his right to freedom of expression under international and regional human rights law**

39. Even if, contrary to our opinion above, Article 7/2 of the Law on the Fight against Terrorism in Turkey is taken to constitute a sufficient legal basis for the purposes of prosecution and conviction, ARTICLE 19 believes that the actions of the defendants in the present case do not contravene the provisions of the Law under which he is charged.
40. ARTICLE 19 notes at the outset that the prosecution have made an effort to interpret Article 7/2 of the Law more narrowly than a literal interpretation of that provision would allow. In particular, the prosecution define the dissemination of terrorist propaganda as the promotion, encouragement or praise of the use of force, violence or threats by terrorist organisations.
41. Nonetheless, ARTICLE 19 considers that the prosecution have failed to adduce sufficient evidence to prove that the offence under Article 7/2 was made out. In particular, ARTICLE 19 considers that the documentary, including dialogues outlined in section I above, amounts to the legitimate reporting and expression of opinions on political events, namely the ongoing conflict in South East Turkey. In our view, it is apparent from the indictment that the documentary does not contain any language or expression that should be prohibited or otherwise sanctioned under international or European human rights law. The prosecution’s own Bill of indictment does not refer to any language that promotes or praises the use of “force, violence or threats”. Rather the indictment describes the documentary as “*dialogues that reflect the rural lifestyle of the members of the terrorist organization, their activities in rural areas, and the military and political ideology of the terrorist organization PKK/KCK*”. It goes on to note that the documentary “*records the views of Murat Karayılan, one of the top directors of the terrorist organization PKK/KCK, on the*

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<sup>41</sup> See e.g. *Gözel and Özer v. Turkey*, *op.cit.*, para 44, 6 July 2010; *Menteş v. Turkey* (no. 2), no. [33347/04](#), § 43, 25 January 2011; and *Faruk Temel v. Turkey*, no. [16853/05](#), para 49, 1 February 2011.

<sup>42</sup> *Belge v Turkey*, App. [50171/09](#), 6 December 2016, para. 29,

*ideology and goals of the terrorist organization PKK/KCK and showing members of the organization with their weapons in almost the entire film".* In this regard, ARTICLE 19 notes that the European Court has emphasised that in determining whether speech amounts to incitement to violence within the meaning of the Convention, it should be examined as a whole and whether it has had an adverse effect on public order.<sup>43</sup> In the present case, no evidence has been adduced as to any effect the screening may have produced since the prosecution decided not to interview those individuals who were in attendance at the screening. Moreover, we note that Turkey was still going through a peace process at the time when the documentary was directed and screened.

42. In examining the evidence before it, we would respectfully urge the trial court to consider the detailed standards on freedom of expression and national security outlined above. In particular, we note that freedom of the press benefits from particularly high protection under European and international human rights law. Although we recognise that the documentary does not present a holistic view of the conflict in South East Turkey, we note journalists are not required under the ECHR to provide information in an objective manner.<sup>44</sup>
43. As such, we believe that the charges brought against the defendants are unfounded and amount to an arbitrary interference with their right to freedom of expression.

### **Conclusion**

44. 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.

06 February 2018

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Senior Legal Officer

**ARTICLE 19: Global Campaign for Freedom of Expression**

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<sup>43</sup> See *Belge v Turkey*, *op.cit.*, para. 34.

<sup>44</sup> See *Gözel and Özer v Turkey*, *op.cit.*, para.61.