

ISTANBUL 27th HIGH CRIMINAL COURT
Indictment no: 2018/1492
Case no: 2018/89
Between:

Republic of Turkey

Public Prosecutor's Office of Istanbul

Prosecution

- and -

İsminaz Temel

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 Ömer Çakırgöz, lawyer representing İsminaz Temel to advise on the compatibility of the charges brought against her with international and European law and standards on the right to freedom of expression. We understand that this opinion will be relied upon by the defendant in the case currently pending before the Istanbul 27th High Criminal Court.
2. ARTICLE 19 is an international human rights 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.
3. ARTICLE 19 has specific expertise in the area of counter-terrorism legislation that affects freedom of expression. For example, in 1995, it coordinated development of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, which authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression. Those Principles were welcomed and circulated by the UN Rapporteur on Freedom of Expression, and have been widely cited, including by courts, academics, NGOs and government officials. UN bodies continue to transmit these Principles to governments when requested to provide advice concerning the drafting of laws, regulations or policy concerning the

classification of information.¹ Further, ARTICLE 19 has on previous occasions submitted expert opinions in Turkish criminal proceedings.

4. In ARTICLE 19's view, as Turkey has ratified the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), the Turkish courts in the present case are required to take into account international and European human rights law.
5. This opinion analyses the case as it pertains to the exercise of the right to freedom of expression. This is without prejudice to the consideration of how these same facts may also violate other human rights, including the right to liberty (Article 5 ECHR), the right to a fair trial (Article 6 ECHR), the right to freedom of thought, conscience and religion (Article 9 ECHR), the right to freedom of assembly and association (Article 11 ECHR), and the principle of legality (Article 7 ECHR).
6. ARTICLE 19 submits that the criminal prosecution of Isminaz Temel violates her right to freedom of expression. The following elements are adduced in support of this submission:
 - Part A contains salient points concerning the evidence;
 - Part B analyses the pertinent case law of the European Court of Human Rights (European Court) concerning restrictions on the right to freedom of expression, including jurisprudence on the criteria that such restrictions must be prescribed by law and necessary in a democratic society;
 - Part C is an overview of recent criticism of Article 314 and related provisions of the Turkish Criminal Code and the Anti-Terrorism Law by the United Nations, Council of Europe and European Union; and,
 - Part D puts forward ARTICLE 19's observations in relation to the criminal prosecution of Temel in light of the jurisprudence of the European Court of Human Rights and other relevant materials cited in the previous parts.

A. The indictment and evidence in the case

7. Isminaz Temel is a reporter and editor for the socialist Etkin News Agency ('ETHA'). Temel is a member of the Socialist Women's Assemblies, the women's branch of a legal political organisation, the Socialist Party of the Oppressed (ESP). On 19 October 2017, Temel was arrested and detained by law enforcement officers together with one of her colleagues, Havva Cuştan, and several lawyers in a series of raids that took place in Istanbul. She was [later] charged with membership of a terrorist organisation (Marxist-Leninist Communist Party – MLKP) under articles 314/2, 63/1, 54/1, 58/9 and 53/1 of the Criminal Code and article 5/1 of the Anti-Terrorism Law. On 25 October 2017, the Istanbul First Criminal Court of Peace directed that the defendant be remanded in custody pending trial.² She was released in April 2019 but is subject to a travel ban. Her trial is set to take place on 3 September 2019. If convicted, Temel faces between 10 to 15 years in prison.
8. In February 2019, a translation of the indictment for these charges (hereafter 'the first indictment') was made available to ARTICLE 19.³ The evidence adduced by the prosecution services against Temel concerning these charges consists of the following:
 - a. Two witness statements, including an anonymous one, stating that they know Temel as "the person in charge within the women's structure Socialist Women's Assembly (SKM) under the terrorist organisation Marxist-Leninist Communist Party (MLKP)"; and, that Temel "works as

¹ ARTICLE 19, *Johannesburg Principles on national security, freedom of expression and access to information*, 1995, available at: <https://www.article19.org/resources/johannesburg-principles-national-security-freedom-expression-access-information/>.

² *Decision 2017/395*, 25 October 2017.

³ This expert opinion is based on an unofficial translation of the materials from Turkish. ARTICLE 19 takes no responsibility for errors in the analysis below from inaccuracy or erroneous translation.

a correspondent for ETHA news agency, which is the media organ for the terrorist organisation Marxist-Leninist Communist Party (MLKP), and makes propaganda for the terrorist organisation MLKP; and she actively serves in SKM”;

- b. Photographs taken by law enforcement and intelligence services, and newspaper articles published by ETHA, allegedly showing Temel’s presence, support for and participation in “various crimes, particularly making propaganda for the terrorist organisation, by regularly and continuously engaging in the organisation’s activities and obeying the instructions of the organisation”. The prosecution also claims that “in their actions and activities that require continuity, variety, and intensity, the suspects [including Temel] went beyond just being sympathisers and established organic ties with the organisation, and engaged in activities like forming substructures and grassroots and urban activities directed at urban work and rear guard support, which require intensity, continuity, and variety; and they actively took part in funeral and commemoration ceremonies throughout the country organised for the members of the terrorist organisation MLKP, while they were operating on behalf of the organisation.”
9. On or about 9 July 2019, ARTICLE 19 was made aware of a second indictment on charges of propaganda in support of a terrorist organisation under Article 7/2 of the Anti-Terror Law No. 3713 and Article 53 of the Turkish Criminal Code (‘TCC’).⁴ In essence, the applicant is accused of propaganda in support of a terrorist organisation as publisher of a book entitled ‘the Immortal Song of the Immortal Woman’. The author of the book, Yeliz Erbay, was a member of the Armed Forces of the Poor and Oppressed (FESK). She was killed during a police operation in Istanbul on 22 December 2015. According to the prosecution, the book makes reference to the structure of the MLKP and other terrorist activities; it also contains pictures of a woman with the organisation’s flags across several pages.
 10. The evidence adduced in support of the charges is as follows:
 - a. A seizure decision of the Istanbul 12th Criminal Court of Peace dated 10 January 2018;
 - b. A copy of the book entitled ‘the Immortal Song of the Immortal Woman’;
 - c. A Security Branch Office’s note and report dated 10 January 2018;
 - d. A registry extract and criminal record of the defendant.
 11. On or about 9 July 2019, ARTICLE 19 was also made aware that the Istanbul 27th High Criminal Court had decided on 15 May 2018 to merge this indictment with the first.
 12. At the outset, ARTICLE 19 notes that the use of anonymous witness testimony, as in the present case, significantly undermines the right to a fair trial, particularly the equality of arms principle. The Council of Europe’s Commissioner for Human Rights (Commissioner for Human Rights) noted as much in a 2012 report following his visit to Turkey.⁵ In particular, he was concerned about the admissibility of anonymous testimony in circumstances where it bore no connection to substantial points in the indictment or the use of hearsay testimonies that weakened the position of the defence.⁶
 13. Second, ARTICLE 19 has reviewed the evidence in support of the first indictment, and notes that the adduced elements consist solely of acts of expression. The mere attendance of certain memorial services and demonstrations should not amount to incitement to violence or hatred. ARTICLE 19

⁴ ARTICLE 19’s expert opinion is based on an unofficial translation of the materials from Turkish. We take no responsibility for errors in the analysis below from any inaccuracies or errors in the translation.

⁵ Council of Europe Commissioner for Human Rights, *Report following his visit to Turkey*, CommDH(2012)2, 10 January 2012, para. 85-86.

⁶ *Ibid.*

further notes Temel's assertion that she was attending the respective events as a journalist, with her camera and notebook, to report on the news. In ARTICLE 19's assessment, the evidence lacks specificity supporting the charges of membership in a terrorist organisation.

14. The European Court has considered many applications related to the Turkish criminal code provisions on membership of, and aiding and abetting of, an armed organisation.⁷In particular, the Court has found an interference with the right to freedom of expression when the only evidence that led to the criminal convictions of the applicant was forms of expression.⁸ In *Yılmaz and Kılıç*, for instance, the Court noted that the applicant had taken part in protests that had not descended into violence, with one exception (attempts at lighting a fire) but the applicants had not been involved. Although some of the slogans had a violent connotation, the evidence in the file did not establish that the applicants had shouted them. Having regard to all the circumstances of the case, including the nature and severity of the sanctions, the Court found that there had been a violation of Article 10.⁹
15. Third, ARTICLE 19 notes that the reports of the examination of the digital materials in relation to the first indictment is not yet available to defence counsel. This is concerning since under international human rights standards, the right to a fair trial comprises the right to adequate facilities to prepare a defence, requiring timely access to relevant information for the accused and their counsel including inculpatory materials on which the prosecution intends to rely as well as information that may lead to the exoneration of the accused.¹⁰
16. Finally, ARTICLE 19 notes that the prosecution have produced little evidence in support of the second indictment on charges of propaganda in support of a terrorist organisation on account of the publication of the book 'the Immortal Song of the Immortal Woman'. In the absence of extracts from the book, ARTICLE 19 is unable to analyse these charges. We note, however, that the defendant's belated indictment on these charges points to a politically motivated prosecution amounting to a harassment campaign against the defendant. In any event, these new charges are likely to raise issues under Article 18 of the European Convention together with Articles 5, 10 and 11 ECHR.

B. Pertinent European Court case law concerning restrictions on the right to freedom of expression

17. Under international law, the right to freedom of expression is not an absolute right. It may be legitimately restricted by the State in certain circumstances. A three-part test sets out the conditions against which any proposed restriction must be scrutinised:¹¹
 - The restriction must be provided by law: 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;

⁷ See, *inter alia*, European Court, *Sirin v Turkey* (admissibility decision), App. No. 47328/99, 27 April 2004; *Kılıç v Turkey* (admissibility decision), App. No. 40498/98, 8 July 2003; *Siz v Turkey* (admissibility decision), App. No. 895/02, 26 May 2005; *Turan v Turkey* (admissibility decision), App. No. 879/02, 27 January 2005; *Arslan v Turkey* (admissibility decision), App. No. 31320/02, 1 June 2006; *Kızılöz v Turkey* (admissibility decision), App. No. 32962/96, 11 January 2000.

⁸ European Court, *Yılmaz and Kılıç v Turkey*, App. No. 68514/01, 17 July 2018, para. 58.

⁹ *Ibid.*, para. 64-69.

¹⁰ See, *inter alia*, UN Human Rights Committee, General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32, 23 August 2007, para. 33; European Court, *Foucher v France*, App. No. 22209/93, 18 March 1997, para. 36-38; *Dowsett v UK*, App. No. 39482/98, 24 June 2003, para. 41.

¹¹ See, generally, UN Human Rights Committee, *General Comment 34 on Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34, 12 September 2011.

- The restriction must pursue a legitimate aim, exhaustively enumerated in Article 10(2) of the ECHR and Article 19(3) of the ICCPR, namely: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary;
- The restriction must be necessary in a democratic society, entailing it must be necessary and proportional; this first aspect entails an assessment of whether the proposed limitation satisfied a “pressing social need” and whether the measure is the least restrictive to achieve the aim.

18. Assessing an impugned measure requires a careful consideration of the particular facts of the case, and should start from the point that it is incumbent upon the State to justify any restriction on freedom of expression.¹²

a) “Prescribed by law”

19. The requirement that an interference is prescribed by law requires, first, that the impugned measure should have some basis in domestic law; and second, that the law in question is accessible to the person concerned who must be able to foresee its consequences, and that it is compatible with the rule of law.¹³ The European Court has consistently emphasised that a rule is foreseeable when it affords a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction to any party’s detriment.¹⁴ Further, the “law” is the provision in force as the competent authorities have interpreted it.¹⁵

20. On several occasions, the European Court has dealt with Turkish cases that concerned criminal prosecutions following the attendance of religious commemoration services of (alleged) terrorists, finding that the interference with the right to freedom of religion and the right to freedom of assembly and association of the applicants was not prescribed by law, in violation of the Convention.

21. In *Güler and Uğur v Turkey*, the European Court examined whether a conviction for propaganda in favour of a terrorist organisation (under Article 7/2 of the Anti-Terrorism law) had entailed a violation of Article 9 ECHR (right to freedom of thought, conscience and religion). The applicants had participated in a religious ceremony organised on the premises of a political party in memory of three individuals, members of an illegal organisation, who had been killed by the security forces. The Court considered that the question whether or not the deceased had been members of an illegal organisation was of little significance. Moreover, the mere fact that the ceremony in question was organised on the premises of a political party in which symbols of a terrorist organisation were displayed did not deprive the participants of the protection guaranteed by Article 9 of the Convention.¹⁶ The Court further noted that the criminal act of which the applicants were accused was merely their participation in the commemorative service, and that it had not been shown that they had played a role in choosing the venue or had been responsible for the presence of symbols

¹² See, *inter alia*, European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para. 41.

¹³ See, *inter alia*, European Court, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, App. No. 17224/11, 27 June 2017; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland*, App. No. 931/13, 27 June 2017; *De Tommaso v Italy*, App. No. 43395/09, 23 February 2017; *Fernández Martínez v Spain*, App. No. 56030/07, 12 June 2014, para. 117; *Cumhuriyet Vakfi and Others v Turkey*, App. No. 28255/07, 8 October 2013; *Ahmet Yıldırım v Turkey*, App. No. 3111/10, 18 December 2012; *Sanoma Uitgevers BV v the Netherlands*, App. No. 38224/03, 14 September 2010, para. 82; *Association Ekin Association v France*, App. No. 39288/98, 17 July 2001.

¹⁴ See, *inter alia*, European Court, *Centro Europa 7 S.R.L. and Di Stefano v Italy*, App. No. 38433/09, 7 June 2012, para. 143; *Mesut Yurtsever and others v Turkey*, App. Nos. 14946/08 and 11 others, 20 January 2015, para. 103; *Bakir and others v Turkey*, App. No. 46713/10, 3 December 2018, para. 54.

¹⁵ European Court, *Leyla Şahin v Turkey*, App. No. 44774/98, 10 November 2005, para. 88.

¹⁶ European Court, *Güler and Uğur v Turkey*, App. No. 31706/10 and 33088/10, 2 December 2014, para. 41-42.

of an illegal organisation on the premises. The Court held that the interference in the case “was not ‘prescribed by law’ in the sense that it did not meet the requirements of clarity and foreseeability, since it had not been possible to foresee that mere participation in a religious service would fall within the scope of Article 7/2 of [the Anti-Terrorism Law].” Accordingly, it found a violation of the applicants’ right to freedom of religion.¹⁷

22. In *Işıkırık*, the European Court considered the compatibility of a conviction for having attended a funeral service and a demonstration with the right to freedom of assembly. The applicant had been charged with disseminating propaganda in support of the PKK and with membership of an illegal organisation under section 7(2) of Anti-Terror Law and Article 314(2) of the Criminal Code, on the basis of Articles 220(6) and 314(3) of the Criminal Code. The evidence consisted of video recordings of the funeral and the demonstration, in which the applicant was seen in the crowd applauding and making a “V” sign.¹⁸ First, the Court considered that the interpretation of Article 11 in this case had to be examined in light of Article 10.¹⁹ Next, the Court rejected the Government’s argument that Article 11 was not engaged on the ground that illegal slogans and acts of violence had taken place during the funeral and demonstration at issue. In particular, the Court noted that the indictment did not contain any charge against the applicant on account of alleged acts of violence.²⁰ The Court then examined whether the applicant’s conviction had a sufficient basis in law. The Court concluded that the application of Article 314 (2) of the Criminal Code combined with Article 220 (6) was not sufficiently foreseeable. In particular, the Court found that on account of the applicant’s conviction, “there remained no distinction between the applicant, a peaceful demonstrator, and an individual who had committed offences within the structure of the PKK. Such extensive interpretation of a legal norm cannot be justified when it has the effect of equating mere exercise of fundamental freedoms with membership of an illegal armed organisation in the absence of any concrete evidence of such membership.” Further, also in light of the “strikingly severe and grossly disproportionate” sanction (a prison sentence of six years and three months), the Court found that this application of the law “would inevitably have a chilling effect on the exercise of the rights to freedom of expression and assembly”, not only for those already found criminally liable but also other members of the public at large. The Court concluded that the law was not “foreseeable” and hence, that the interference was not prescribed by law and that there had been a violation of Article 11.²¹

b) “Necessary in a democratic society”

23. In order for an interference with the right to freedom of expression that was prescribed by law and pursued a legitimate aim to be compliant with the obligations under the European Convention, it must be necessary in a democratic society. To assess this, the European Court looks at the impugned interference in light of the case as a whole, and in particular whether the interference was proportionate to the legitimate aims pursued; whether the reasons adduced by the national authorities are relevant and sufficient; and, at the nature and severity of the penalties imposed.²²

24. It is well established in the case law of the European Court that in its rulings, the Court takes into account the background of the cases before it, especially the problems linked to the prevention of terrorism.²³ In relation to Turkey in particular, the Court has long recognised the extent and gravity

¹⁷ *Ibid.*, para. 55. Also see *Altun and others v Turkey*, App. No. 54093/10, 10 July 2018.

¹⁸ European Court, *Işıkırık v Turkey*, App. No. 41226/09, 9 April 2018, para. 13.

¹⁹ *Ibid.*, para. 42-43.

²⁰ *Ibid.*, para. 47.

²¹ *Ibid.*, para. 68-70. Also see *İmret v Turkey (No. 2)*, App. No. 57316/10, 10 July 2018; *Bakir and others, op. cit.*

²² See, *inter alia*, *Fressoz and Roire v France*, App. No. 29183/95, 21 January 1999; and, *Yarar v Turkey*, App. No. 57258/00, 19 December 2006.

²³ See, *inter alia*, European Court, *Lawless v Ireland (No. 3)*, App. No. 332/57, 1 July 1961; and, *Ireland v United Kingdom*, App. No. 5310/71, 18 January 1978.

of terrorism in the country.²⁴ Nevertheless, the Court has equally held that its general principles concerning the necessity of an interference with freedom of expression²⁵ apply equally to measures taken by domestic authorities to maintain national security and public safety as part of the fight against terrorism. With due regard to the circumstances of each case, it must be ascertained whether a fair balance has been struck between a democratic society's legitimate right to protect itself against the activities of terrorist organisations and an individual's right to freedom of expression.²⁶

25. In this regard, it must be recalled that Article 10 protects not only the substance of ideas and information expressed, but also the form in which they are conveyed.²⁷ Moreover, also expression that offends, shocks or disturbs is protected: "such are the demands of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'."²⁸
26. The European Court has consistently held that "where the views expressed do not constitute incitement – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist acts in pursuit of their supporters' goals and can be interpreted as likely to encourage violence by instilling deep-seated and irrational hatred towards specified individuals – the Contracting States cannot restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10(2), namely the protection of territorial integrity or national security or the prevention of disorder or crime."²⁹ Moreover, an assessment of the expression should take into account content and context. For instance, *Gül and others* concerned participation in lawful demonstrations, during which the applicants shouted slogans, some of which – taken literally – had a violent tone. Nevertheless, the Court found that given these were well-known, stereotyped leftist slogans and the circumstances of their uttering, these could not be interpreted as a call for violence.³⁰
27. Another principal characteristic of democracy identified by the European Court is "the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned."³¹
28. Further, account must be taken of the essential role played by the press for ensuring the proper functioning of democracy.³² The European Court considers it "incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas, the public has a right to receive them. Freedom of the press

²⁴ See, *inter alia*, European Court, *Aksoy v Turkey*, App. No. 21987/93, 18 December 1996; *Incal v Turkey*, App. No. 22678/93, 9 June 1998; *Şahin Alpay v Turkey*, App. No. 16538/17, 20 March 2018.

²⁵ See, *inter alia*, European Court, *Handyside v United Kingdom*, App. No. 5493/72, 7 December 1976; *Stoll v Switzerland*, App. No. 69698/01, 10 December 2007, para. 101; *Morice v France*, App. No. 29369/10, 23 April 2015, para. 124.

²⁶ See, *inter alia*, European Court, *Zana v Turkey*, App. No. 18954/91, 25 November 1997, para. 55.

²⁷ See, *inter alia*, European Court, *Karataş v Turkey*, App. No. 23168/94, 8 July 1999, para. 49.

²⁸ See, *inter alia*, European Court, *Sürek and Özdemir v Turkey*, Nos. 23927/94 and 24277/94, 8 July 1999, para. 57.

²⁹ See, *inter alia*, European Court, *Sürek v Turkey (No. 4)*, App. No. 24762/94, 8 July 1999, para. 60; *Şık*, App. No. 53413/11, 8 July 2014, para. 85.

³⁰ European Court, *Gül and others v Turkey*, App. No. 4870/02, 8 September 2010, para. 41. Also see, *inter alia*, *Yılmaz and Kılıç v Turkey*, *op. cit.*; *Bahçeci and Turan v Turkey*, App. No. 33340/03, 16 June 2009.

³¹ See, *inter alia*, European Court, *United Communist Party of Turkey and others v Turkey*, App. No. 19392/92, 30 January 1998, para. 57; *DTP and others v Turkey*, App. No. 3840/10 and 6 others, 12 January 2016, para. 74.

³² See, *inter alia*, European Court, *Lingens v Austria*, *op. cit.*, para. 41; *Fressoz and Roire v France*, *op. cit.*, para. 45.

affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.”³³

29. Lastly, the nature and severity of the penalty are also factors to be taken into account when assessing the proportionality of the interference.³⁴ The imposition of a prison sentence for a press offence will be compatible with journalists’ right to freedom of expression only in the most exceptional of circumstances, notably when other fundamental rights have been seriously impaired, for instance in cases of “hate speech” or incitement to violence.³⁵

c) *Imputed membership of the Marxist-Leninist Communist Party*

30. In the case of *Bakir and others*, the European Court heard a complaint alleging a violation of the rights to freedom of expression and to assembly, stemming from convictions for aiding and abetting the Marxist-Leninist Communist Party (MLKP). In the indictment, charging the applicants for membership of an illegal organisation under Article 220(7) and Article 314 of the Criminal Code, the prosecutor noted that they had participated in two demonstrations, which had been authorised by the governor’s office. Further, the prosecution also noted, on the basis of video footage provided by the police, that the applicants had carried banners on behalf of the Socialist Platform of the Oppressed (ESP) and the Socialist Youth Association (SGD). In convicting the applicants, the domestic court noted that while these entities were legal, their activities were in line with those of MLKP, observing that members of ESP and SGD consider members of MLKP as martyrs and organise commemorative ceremonies for them, and that declarations issued by the MLKP on the Internet were consistent with the aims of the ESP and SGD. Accordingly, the domestic court considered that ESP and SGD appeared in the legal domain on behalf of the MLKP and had an organic relationship with it.³⁶ Given this relationship, the fact that the applicants were present at a legally organised demonstration, worn clothes and signs with ESP written on them and had had red ribbons attached to their arms was considered by the domestic court to constitute sufficient evidence to conclude that as members of legal organisations, the applicants had aided the MLKP, for which they could be punished as actual members.³⁷ The European Court found that “on account of their conviction, on the basis of acts which fell within the scope of Articles 10 and 11, no distinction was made between the applicants and individuals who had committed offences within the structure of the MLKP. Such extensive interpretation of a legal norm cannot be justified when it has the effect of equating the mere exercise of fundamental freedoms with membership of an illegal organisation in the absence of any concrete evidence of such membership.”³⁸ In light of this consideration, among others, the Court concluded that the law was not “foreseeable”, as it did not afford legal protection against arbitrary interference with the right to freedom of association and assembly, and found a violation of Article 11.³⁹

C. Other relevant international material

On the notion of ‘journalism’

³³ European Court, *Özgür Gündem v Turkey*, App. No. 23144/93, 16 March 2000, para. 58. Also see, *inter alia*, *Sürek and Özdemir v Turkey*, *op. cit.*, para. 58; *Sürek v Turkey (No. 1)*, App. No. 26682/95, 8 July 1999, para. 59; and, *Şener v Turkey*, App. No. 26680/95, 18 July 2000, para. 41.

³⁴ See, *inter alia*, European Court, *Ceylan v Turkey*, App. No. 23556/94, 8 July 1999, para. 37.

³⁵ See, *inter alia*, European Court, *Mahmudov and Agazade v Azerbaijan*, 18 December 2008, App. No. 35877/04, para. 50.

³⁶ European Court, *Bakir and others v Turkey*, *op. cit.*, para. 7 and 15.

³⁷ *Ibid.*, para. 65.

³⁸ *Ibid.*, para. 67.

³⁹ *Ibid.*, para. 69.

31. The Council of Europe has long recognised that journalism is an activity rather than a profession. In 2000, the Council of Europe's Committee of Ministers defined a journalist as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication".⁴⁰ The Committee of Ministers further considered that the right to freedom of expression implies free access to the journalistic profession, i.e. the absence of the requirement of an official admission by state organs or administrations.⁴¹ While the Court itself has not specified the requirements for being considered a journalist under Article 10 ECHR, it found in *Butkevich v Russia* that it had "no reason to doubt that the applicant, acting as a journalist, intended to collect information and photographic material relating to the public event and to impart them to the public via means of mass communication".⁴² The Court thus relies on the standards developed by the Council of Europe in this area.

On terrorism

32. Article 314 and related provisions of the Turkish Criminal Code and the Anti-Terrorism Law have been extensively criticised by the United Nations, Council of Europe and European Union.⁴³

33. In its Concluding Observations on Turkey's initial report on the implementation of the ICCPR, the UN Human Rights Committee expressed its concern

[T]hat human rights defenders and media professionals continue to be subjected to convictions for the exercise of their profession, in particular through ... the excessive application of article ... 314 ... of the Criminal Code, thereby discouraging the expression of critical positions or critical media reporting on matters of valid public interest, adversely affecting freedom of expression in the State party.⁴⁴

Subsequently, the Human Rights Committee, *inter alia*, recommended that Turkey should "bring relevant provisions of the Criminal Code into line with [Article 19 of the ICCPR] and apply any restrictions within the strict terms of this provision."⁴⁵ The Committee also expressed concern over the Anti-Terrorism Law, in particular the vagueness of the definition of a terrorist act and "the high number of cases in which human rights defenders, lawyers, journalists and even children are charged ... for the free expression of their opinions and ideas." The Committee recommended that Turkey bring its legislation and the implementation thereof in line with the Covenant, including by ensuring that its application is limited to offenses that are "indisputably terrorist offences".⁴⁶ The

⁴⁰ See Appendix to Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

⁴¹ See Principle 11 (b) of Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension, which requires that, even in situations of conflict and tension, "the exercise of journalism and journalistic freedoms is not made dependent on accreditation". Similarly, Resolution No. 2 on journalistic freedoms and human rights by the 4th European Ministerial Conference on Mass Media Policy (Prague, 1994) stipulates in Principle 3 (a) that "unrestricted access to the journalistic profession" enables journalism to contribute to the maintenance and development of genuine democracy.

⁴² See *Butkevich v. Russia* (no. 5865/07), 13 February 2018, at para. 131

⁴³ Further also see, *inter alia*, Human Rights Watch, *Protesting as a Terrorist Offence: The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, 1 November 2010, available at: <https://www.hrw.org/report/2010/11/01/protesting-terrorist-offense/arbitrary-use-terrorism-laws-prosecute-and>; Amnesty International, *Turkey: Decriminalise dissent: Time to deliver on the right to freedom of expression*, EUR 44/001/2013, 27 March 2013, available at: <https://www.amnesty.org/en/documents/EUR44/001/2013/en/>.

⁴⁴ UN Human Rights Committee, *Concluding Observations on the initial report of Turkey*, UN Doc CCPR/C/TUR/CO/1, 13 November 2012, para. 24.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, para. 16.

Committee also expressed concern about the vagueness and lack of clarity of the definition of “illegal organisation” and its negative impact on the right to freedom of association.⁴⁷

34. The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur) has noted that the Criminal Code, the Code of Criminal Procedure and the Anti-Terrorism Law limit constitutional guarantees for the right to free speech.⁴⁸ In his assessment, “counter-terrorism and national security provisions in Turkish legislation are used to restrict freedom of expression through overly broad and vague language that allows for subjective interpretation without adequate judicial oversight.”⁴⁹ The Special Rapporteur also criticised the state of emergency decrees adopted in the aftermath of the attempted coup of July 2016, saying these grant discretionary powers to derogate from human rights obligations without providing adequate channels for judicial review and appeal.⁵⁰ He urged the Turkish Government “to immediately release the journalists ... who are detained pursuant to counter-terrorism legislation and emergency decrees. Nobody should be held in detention, investigated or prosecuted for expressing opinions that do not constitute an actual incitement to hatred or violence consistent with article 19(3) and article 20 [ICCPR].”⁵¹ Further, national legislation on countering terrorism “ought to be brought into line with international standards. In particular, the Special Rapporteur urges the Government to review urgently the antiterrorism law so as to ensure that counterterrorism measures are compatible with article 19(3) [ICCPR].”⁵²
35. In 2016, the European Commission for Democracy through Law (‘Venice Commission’) of the Council of Europe issued a detailed opinion on the conformity of certain provisions of the Criminal Code and their application in practice, including article 314, with European human rights standards. By way of preliminary remark, the Venice Commission recalled that “States are under an obligation to create a *favourable environment* where different and alternative ideas can flourish, allowing people to express themselves and to participate in public debate without fear. This obligation also imposes on States the obligation to refrain from taking measures which can have a *chilling effect* on society in general by discouraging the legitimate exercise of free speech due to the threat of legal sanctions.”⁵³
36. In relation to article 314 of the Turkish Criminal Code, the Venice Commission noted that while the Criminal Code does not contain a definition of an armed organisation or group, there is a rich case law of the Court of Cassation in which it developed criteria for establishing membership in an armed organisation, taking into account the “continuity, diversity and intensity” of the different acts of the accused in order to assess whether they had any “organic relationship” with the organisation or whether the acts may be considered as committed knowingly and wilfully within the “hierarchical structure” of the organisation. The Venice Commission contrasts these findings with the fact that “according to non-governmental sources, in the application of Article 314, the domestic courts, in many cases, decide on the membership of a person in an armed organisation on the basis of very weak evidence, which would raise questions as to the ‘foreseeability’ of the application of Article 314.”⁵⁴ Furthermore, with reference also to the case law of the European Court of Human Rights, the Venice Commission “reiterates that conviction on the basis of weak evidence in the application of Article 314 may create problems in the field of Article 7 ECHR ... In the cases where the only evidence which lead the domestic courts to convict the defendant for being a member of

⁴⁷ *Ibid.*, para. 19.

⁴⁸ UN Special Rapporteur on freedom of expression, *Report on his mission to Turkey*, UN Doc A/HRC/35/22/Add.3, 21 June 2017, para. 14.

⁴⁹ *Ibid.*, para. 17.

⁵⁰ *Ibid.*, para. 28.

⁵¹ *Ibid.*, para. 77.

⁵² *Ibid.*, para. 84.

⁵³ European Commission for Democracy through Law, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, CDL-AD(2016)002, 15 March 2016, para. 27.

⁵⁴ *Ibid.*, para. 102.

an armed organisation, are forms of expression ... reliance on weak evidence may also give rise to problems concerning the 'foreseeability' of the interference into the right to freedom of expression of the defendant."⁵⁵ Accordingly, the Commission recommended that the established criteria in the case law of the Court of Cassation should be applied strictly, and that the expression of an opinion should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation.⁵⁶

37. The Parliamentary Assembly of the Council of Europe, in light of the Venice Commission's opinion, has invited Turkey to "ensure a strict interpretation of Article 314 ... so as to limit it to cases which do not involve the exercise of the rights to freedom of expression and assembly, in compliance with the established criterion in the case law of the Court of Cassation."⁵⁷
38. The Commissioner for Human Rights in his 2017 memorandum on freedom of expression and media freedom in Turkey, which was published after the attempted coup in July 2016 but relates also to a country visit that took place shortly before, warns of backsliding in the respect for the right to freedom of expression "in an increasingly turbulent and difficult context".⁵⁸ Noting that statutory reform has not adequately addressed the problems with many provisions of the Criminal Code and Anti-Terrorism Law, the Commissioner also observed a hardening of the authorities' stance, which already manifested a "high level of intolerance towards legitimate criticism" to begin with. Further, "and perhaps more importantly, the application by Turkish prosecutors and courts of the statutory framework has followed an increasingly negative trend, counterbalancing and reversing some positive efforts, spearheaded notably by the Turkish Constitutional Court, to achieve a more ECHR-compliant interpretation of the Turkish legislation."⁵⁹
39. The Commissioner for Human Rights has long expressed concern about lack of respect for the right to free speech in Turkey. For instance, in a 2011 report he noted that "various amendments to the Turkish Criminal Code ... have not been sufficient to effectively ensure freedom of expression",⁶⁰ albeit without explicit reference to Article 314. When in December 2014 Turkish police arrested 23 people in a raid on opposition media for alleged membership in a terrorist organisation among other things,⁶¹ the Commissioner for Human Rights expressed deep concern, stating that "media freedom has been a long-standing problem in Turkey and such measures carry a high risk of cancelling out the progress Turkey has painstakingly achieved in recent years. They send a new chilling message to journalists and dissenting voices in Turkey, who have been under intense pressure, including facing violence and reprisals."⁶²
40. In relation to Turkey's anti-terrorism legislation, the Human Rights Commissioner has expressed concern "about the definition of some offences concerning terrorism and membership of a criminal

⁵⁵ *Ibid.*, para. 105.

⁵⁶ *Ibid.*, para. 106-107.

⁵⁷ Parliamentary Assembly of the Council of Europe (PACE), Resolution 2121 (2016) on the functioning of democratic institutions in Turkey, 22 June 2016, para. 28. Also see PACE, Resolution 2141 (2017) on attacks against journalists and media freedom in Europe, 24 January 2017; and PACE, Resolution 2156 (2017) on the functioning of democratic institutions in Turkey, 25 April 2017.

⁵⁸ Commissioner for Human Rights, *Memorandum on freedom of expression and media freedom in Turkey*. CommDH(2017)5, 15 February 2017, para. 12.

⁵⁹ *Ibid.*, para. 15-19 and 43-44.

⁶⁰ Commissioner for Human Rights, *Report following his visit to Turkey from 27 to 29 April 2011*, CommDH(2011)25, 12 July 2011, p. 2.

⁶¹ See, for example, The Guardian, 'Turkish police arrest 23 in raids on opposition media', 14 December 2014, available at: <https://www.theguardian.com/world/2014/dec/14/turkish-police-raid-opposition-media>.

⁶² Commissioner for Human Rights, 'Commissioner concerned about arrest of journalists in Turkey', 15 December 2014, available at: <https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-arrest-of-journalists-in-turkey?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey>.

organisation and their wide interpretation by courts”. He considered that full respect for human rights must be at the centre of the fight against terrorism and that “prosecutors and judges need to be further sensitised to the case-law of the European Court concerning in particular the frontier between terrorist acts and acts falling under the scope of the rights to freedom of thought, expression, association and assembly.”⁶³ The Commissioner underlined the importance of public confidence in the justice system, which he stated “means that any allegation of terrorist activity must be established with convincing evidence and beyond reasonable doubt.” Further, he noted that “it is crucial to bear in mind that violence or the threat to use violence is an essential component of an act of terrorism, and that restrictions on human rights in the fight against terrorism ‘must be defined as precisely as possible and be necessary and proportionate to the aim pursued’.”⁶⁴

41. Lastly, it should be noted that the problematic application of Article 314 takes place against a background that the European Commission in its most recent Progress Report on Turkey in the context of EU enlargement has characterised as “serious backsliding” in the area of freedom of expression since the attempted coup of July 2016.⁶⁵ The United Nations, Council of Europe, Organisation for Security and Cooperation in Europe and civil society organisations have recently expressed similar concerns about an unprecedented assault on freedom of expression and on the media in Turkey.⁶⁶

D. Observations on the compatibility of the prosecution of Temel with the right to freedom of expression

42. In light of jurisprudence of the European Court of Human Rights analysed above and the other relevant international materials cited, ARTICLE 19 submits the following observations to the Istanbul 27th High Criminal Court in relation to the criminal prosecution of Temel case with the indictment number 2018/1492 and merits no 2018/89. As noted above, ARTICLE 19 does not propose to analyse indictment no. 2018/17866 containing the new charges of publishing propaganda in support of a terrorist organisation in the absence of a copy and translation of relevant passages from the book at issue.
43. First, ARTICLE 19 observes that the prosecution relies on evidence that constitutes solely acts of expression, some of which were made in the exercise of Temel’s profession as a journalist and some of which could be considered political speech in the context of her role in a legal political organisation. Against the background of backsliding concerning freedom of expression and the crackdown on independent media and dissenting voices since the attempted coup in July 2016, the criminal prosecution of Temel appears to be politically motivated.
44. Second, in light of the weakness of the evidence and the nature of the alleged acts to which it pertains, including in particular the attendance of memorial services and demonstrations, ARTICLE 19 submits that the European Court’s case law analysed in paragraphs 19-30 of this submission applies, *mutatis mutandis*, in the case at hand:

⁶³ Commissioner for Human Rights, *Report following his visit to Turkey from 10 to 14 October 2011*, CommDH(2012)2, 10 January 2012, p. 3.

⁶⁴ *Ibid.*, para. 68-69.

⁶⁵ *Commission staff working document: Turkey 2018 report*, SWD(2018) 153 final, 17 April 2018, pp. 22-51 (in particular pp. 35-37).

⁶⁶ See, *inter alia*, UN Special Rapporteur on freedom of expression and OSCE Representative on Freedom of the Media, ‘Turkey: Life sentences for journalists are ‘unprecedented assault on free speech’, say UN and OSCE experts’, 16 February 2018, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22670&LangID=E>; Commissioner for Human Rights, *Memorandum on freedom of expression and media freedom in Turkey*, CommDH(2017)5, 15 February 2017, para. 12.

- Although the European Court has previously noted that the application of Article 314 contained a number of safeguards when read in light of the Court of Cassation’s case-law,⁶⁷ ARTICLE 19 considers that the present case illustrates that these guarantees are insufficient. In our view, the evidence adduced in Temel’s case is only loosely connected to the safeguards set out in the Court of Cassation’s case-law. In practice, the application of Article 314 differs very little from the application of Article 220 (6) of the Criminal Code that the Court has previously criticised.⁶⁸ We also refer this Court to the findings of the Venice Commission regarding the application of Article 314.⁶⁹
- Importantly, the criminal prosecution of Temel for membership of the MLKP for the acts concerned leaves no distinction between the mere exercise by her of her fundamental freedoms including the right to freedom of expression as a journalist and as a member of a legal political organisation on the one hand, and membership of an illegal armed organisation on the other. In this regard, we note that the prosecution have not adduced any credible reasons to question the defendant’s testimony that she attended the funeral as a journalist. On the contrary, the evidence (i.e. several photographs) shows that the defendant was taking photographs of various public events, including a funeral (an event that would have been at least partially public). She is not wearing any of the insignia carried by other participants or carrying any flags. In other words, the evidence strongly indicates that the defendant was collecting information for journalistic purposes.
- In light of the above, ARTICLE 19 submits that the application of Article 314 does not afford a sufficient measure of protection against arbitrary interference by the public authorities, or against the extensive application of a restriction to any party’s detriment. Accordingly, we consider that the criminal prosecution of Temel is based on a legal provision that lacks foreseeability and constitutes therefore an interference that is not prescribed by law within the meaning of the European Convention on Human Rights.

45. Third, considering the impugned acts and with reference to the European Court’s case law analysed in paragraphs 23 – 30, ARTICLE 19 considers the restriction of Temel’s right to freedom of expression is not necessary in a democratic society:

- The acts concerned do not constitute incitement and accordingly, should not be restricted even when considered in the context of the serious problem posed by terrorism in Turkey. The negative impact of the restriction is further exacerbated considering Temel’s roles as a journalist and as a member of a legal political organisation;
- The nature and severity of the possible sanctions are manifestly disproportionate.

46. In light of the above considerations, ARTICLE 19 submits that the criminal prosecution of Temel violates her right to freedom of expression.



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30 July 2019

⁶⁷ See *Işıkırık*, op. cit. at paras. 66-67. This includes an examination of the continuity, diversity and intensity of the impugned acts and whether they were committed within the hierarchical structure of an armed organisation.

⁶⁸ See *Işıkırık*, *ibid.*

⁶⁹ See para. 36 above of this Opinion.