IN THE 23rd ASSIZE COURT in ISTANBUL

Case No: 2020/114 Merits
Indictment No: 2020/3241

Between: -

Republic of Turkey
Istanbul Chief Public Prosecutor's Office

Prosecution

- and –

Buse Söğütlü

Defendant

EXPERT OPINION BY ARTICLE 19

London

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Introduction and summary

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation promoting and protecting the right to freedom of expression globally, in accordance with Article 67(6) of the Turkish Code of Criminal Procedure (Law No. 5271). We have been asked by the lawyers representing the Defendant to advise on the compatibility of the charges against her with international and European standards on freedom of expression. We understand that the Defendant and her representatives will rely on this opinion at the next hearing before the Court.

2. In this expert opinion, ARTICLE 19 addresses:
   - The facts and arguments of the parties in the case that are relevant for the analysis of the charges;
   - Key international and European standards on freedom of expression and terrorism offences, as well as criticism of the judiciary that the Court should consider when deciding the case;
   - The compatibility with those standards of the offences of disclosing or publishing the identity of officials on anti-terrorist duties or identifying counterterrorism officials as targets under Article 6(1) of the Counter-Terrorism Law, Law No. 3713; and membership of a terrorist organisation under Article 314(2) of the Turkish Criminal Code, Law No. 5237;
   - The assessment of the nature of the case brought against the Defendant by the Istanbul Public Prosecutor's Office against international and European freedom of expression standards.

3. ARTICLE 19 concludes that the provisions under which the Defendant has been charged do not comply with international and European standards on freedom of expression. Even if they were to be considered as providing a 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 Defendant are unlawful under international and European human rights law. If the Defendant were to be convicted, her conviction would equally constitute an unnecessary interference with the right to freedom of expression.

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

4. This expert opinion draws on ARTICLE 19's extensive legal analysis and expertise. Over the years, ARTICLE 19 has produced several standard-setting documents and policy briefs based on international and comparative law and best practices, including on freedom of expression and national security. ARTICLE 19 also regularly intervenes in domestic and regional human rights court cases and comments on legislative proposals as well as existing laws that affect the right to freedom of expression. ARTICLE 19 has specific expertise in the area of counter-terrorism legislation that affects freedom of expression. This includes producing the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles),[1] the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom,[2] Tunisia[3] and Russia[4] and interventions in several high profile national security cases.[5] In May 2016, ARTICLE 19 delivered training for Turkish judges on 'International Standards for Promoting Freedom of Expression while Countering Terrorism' at an international

[1] ARTICLE 19, Johannesburg Principles: National Security, Freedom of Expression and Access to Information, 1996.
[2] ARTICLE 19, UK: Counter Terrorism and Border Security Bill could criminalise expression and opinions, 09 October 2018.
[3] ARTICLE 19, Tunisia: Counter-terror law endangers rights, 31 July 2015.
[4] ARTICLE 19, Rights in extremis: Russia's anti-extremism practices from an international perspective, 23 September 2019.
[5] ARTICLE 19, UK: ARTICLE 19 intervenes in Miranda Case, 16 December 2015.

workshop in Antalya for the Turkish High-Level Courts organised by the Council of Europe and the European Union.

Facts and arguments of the parties in the case

5. The Defendant, Buse Söğütlü, is a journalist with no previous criminal convictions. She is a reporter for the Gazete Yolculuk newspaper.

The Prosecution's Case

6. On 23 March 2020 the Anti-Terror and Organised Crimes Investigation Bureau, under the Istanbul Chief Public Prosecutor's Office issued an indictment against the Defendant, charging her with the offences of: (i) disclosing or publishing the identity of an official on counterterrorism duties or identifying counterterrorism officials as targets under Article 6(1) of the Counter-Terrorism Law, Law No. 3713; and (ii) membership of a terrorist organisation under Article 314(2) of the Turkish Criminal Code, Law No. 5237.

7. The indictment states that the victim is the President of the 37th Assize Court in Istanbul (which is in charge of terrorist prosecutions); the case where lawyers who are members of CHD and People's Law Office are being prosecuted for membership of the DHKP-C [the Revolutionary People's Liberation Party/Front] are being tried by the court where the victim serves as President. The defendants of that case were lawyers who are members of the CHD [Contemporary Lawyers' Association] and Halkin Hukuk Burosu [People's Law Office].

8. The case originated from the Defendant's Twitter social media post of 18 March 2019, via her Twitter account https://twitter.com/busesogutlu, criticising judge Akın Gürlek of Istanbul 37th Assize Court. The impugned tweet stated the following:

> If Hitler came out of his grave and (…) sat in Akın Gürlek's chair, more or less, he would use the same phrases as well. Professional ethics and all else aside, a person should have the gravity of his seat.

9. The Provincial Security Directorate of Istanbul carried out the investigation upon the Istanbul Chief Public Prosecutor Office's oral instruction dated 22 March 2019.[6] The Prosecution states that the Defendant had shared news content in which the victim's name had been mentioned on the "Yolculuk Newspaper" website.[7] It alleges that through the Twitter post, the Defendant made "the aforementioned judge the target of the armed terrorist organisation DHKP-C and other marginal leftist organisations". The Prosecution requested that the Defendant be punished under Article 6(1) of the Counter-Terrorism Law, No. 3713; Article 314(2) and Article 53(1) of the Turkish Criminal Code, Law No. 5237; and that in accordance with Article 63 of the Turkish Criminal Code, the period that she was held under police custody be deducted from her sentence.

The Defendant's Case

10. The Defendant denies the charges although she accepts that she posted the tweet in question. She emphasises that she is a journalist, that she has also worked in the field of law, and that she has watched all the hearings of the case which formed the subject of her tweet as a journalist. She stresses that the tweet in question was within the scope of freedom of expression; and should be evaluated within the scope of freedom of expression. Furthermore, she claims that she was

[6] Akın Gürlek is a judge that ruled for heavy prison sentences in several lawsuits, including ones closely followed by the public, *inter alia*, the case against the Contemporary Lawyers Association (CHD) and the trial of main opposition CHP Istanbul Chair, Canan Kaftancioglu.

[7] See https://www.yolculukhaber.net/

acting in her capacity as a journalist by drawing the public's attention to the fact that due procedure provisions had not been followed in the trials in which Mr Akin Gurlek was the judge; where due process rights had been restricted and defence lawyers had even been ordered out of the courtroom.[8]

Applicable international and regional standards

The right to freedom of expression

11. 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 (European Convention). The rights enshrined in these instruments, including the right to freedom of expression under Article 19 of the ICCPR and Article 10 of the European Convention, form part of Turkish law. The Turkish Constitution also protects the right to freedom of expression (Article 26). The Constitution also provides that international agreements that duly come into effect have the force of law; in case of a conflict between international agreements and domestic laws, the provisions of international agreements shall prevail (Article 90). Hence, the Turkish courts are required to consider the international and European standards on freedom of expression in the context of national security in their decision-making.

12. Importantly, Article 19 para 1 of the ICCPR protects the right to hold opinions without interference. In its General Comment no. 34, the UN Human Rights Committee (Human Rights Committee) stressed that this is a right that permits no restriction or exception.[9] The Human Rights Committee went on to note that nobody may be subject to the impairment of any rights under the ICCPR on the basis of their actual, *perceived* or *supposed* opinions.[10] It also made clear that criminalising the holding of an opinion was incompatible with Article 19 para 1 of the ICCPR.[11]

13. Under international and European human rights law, the right to freedom of expression (but not the right to hold opinions) is not an absolute right. However, any restrictions on the right must be scrutinised under a three-part test, requiring that:

    - **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 individuals to regulate their conduct accordingly.[12]

    - **The restriction must pursue a legitimate aim,** exhaustively enumerated in Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR. This includes the protection of national security.

    - **The restriction must be necessary in a democratic society and proportionate to the aim sought:** This demands an assessment of, first, whether the proposed limitation satisfies a "pressing social need;"[13] and, second, it must be established whether the measures at issue are the least restrictive to achieve the aim. Assessing the proportionality of an impugned measure requires careful consideration of the particular facts of the case. The assessment

[8] The Defendant indicated that she had been referring to the following remarks of a judge in Nazi Germany: "There is no judicial independence in the face of National Socialism. Before every judgment you hand down, you ask yourself this: What judgment would Fuhrer give if he were in my shoes? See Bianet, Journalist on trial 'with the lights on,' 14 October 2020.
[9] See Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, para 9.
[10] *Ibid*.
[11] *Ibid*.
[12] European Court, *The Sunday Times v UK*, App. No. 6538/74, 26 April 1979, para 49.
[13] European Court, *The Observer & Guardian v the UK*, App. No. 13585/88, 26 November 1991, para 59.

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.[14]

Freedom of expression and national security

14. As noted above, under Article 19 para 3 of the ICCPR and Article 10 para 2 of the European Convention, 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 of legality, necessity and proportionality.

15. Under international law, States are also required to prohibit incitement to terrorism.[15] The UN Special Rapporteur on Counterterrorism has elaborated upon the threshold that laws relating to incitement to terrorism must meet in order to comply with international human rights law.[16] In particular, he has highlighted that for the offence of incitement to terrorism to comply with international human rights law, it:

    - Must be limited to incitement to 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 that this message incites 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.[17]

16. In addition, the Johannesburg Principles, 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.[18] 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."[19] In practice, however, restrictions imposed on freedom of expression to give effect to these provisions are often abused.

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

[15] UN Security Council Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, on 14 September 2005.

[16] 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: a community-policing approach, 2014, p. 42; see also General Comment No. 34, *op.cit.*, para 46.

[17] See UN Special Rapporteur on Counter-Terrorism, Ben Emmerson, A/HRC/31/65, para 24.

[18] Johannesburg Principles, *op.cit.,* Principle 6.

[19] The protection of human rights and fundamental freedoms while countering terrorism, Report of the Secretary-General, A/63/337, 28 August 2008. para 62.

17. By contrast, expression that only transmits information from or about an organisation that a government has declared threatens national security must not be restricted.[20] 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.[21]

European case-law on national security and freedom of expression

18. The European Court of Human Rights (European Court) has considered several cases in which the Turkish authorities have prosecuted and convicted individuals, journalists, protesters, members of the opposition and human rights defenders under the Criminal Code and the Counter-Terrorism Law in its various iterations. In the vast majority of cases, the European Court concluded that there had been a violation of Article 10 of the European Convention.[22]

19. In particular, the European Court has consistently found violations of the right to freedom of expression in cases where newspapers and journalists were prosecuted for having published statements by proscribed organisations that did not otherwise incite the commission of terrorist offences.[23] It has been found that such a practice could have the effect of partly censoring the work of media professionals and reducing their ability to put forward views which have their place in a public debate. [24] Similarly, the fact that statements or interviews contain views strongly disparaging of government policy cannot in itself justify an interference with a newspaper's freedom of expression.[25] More recently, the European Court held that:

> Criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda.[26]

20. This reflects the important principle that one of the principal characteristics of a democracy is "the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome."[27] In this regard, the European Court has long stressed that Article 10 of the European Convention:

> [I]s applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society.[28]

21. This does not relieve the press, terrorist organisations or anyone of scrutiny. In cases involving the publication of statements by proscribed organisations, the European Court examines whether the statements at issue can be said to amount to 'incitement to violence' or 'hate speech' within

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[20] Johannesburg Principles, *op.cit.,* Principle 8.
[21] General Comment No. 34, *op.cit*.
[22] See e.g., European Court, *Özer v. Turkey (no.3),* App. No. 69270/12, 11 February 2020; *Hatice Coban v. Turkey,* App. No. 36226/11, 20 October 2019; *Ali Gürbüz v. Turkey,* App. Nos. 52497/08 and 6 others, 12 March 2019.
[23] See, *inter alia*, European Court*, Gözel et Özer v. Turkey,* App. Nos 43453/04 and 31098/05, 6 July 2010 and *Ali Gürbüz*, *op. cit*.
[24] *Ibid*.; see also *Nedim Şener v. Turkey*, App. No. 38270/11, 8 July 2014, para 115.
[25] *Gözel et Özer v. Turkey, op.cit.*
[26] European Court*, Mehmet Hasan Altan v Turkey,* App. No. 13237/17, 20 March 2018, para 211.
[27] 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.
[28] European Court, *Handyside v the United Kingdom,* Series A No. 24, 7 December 1976, para 49.

the meaning of the European Convention. In doing so, the European Court focuses its analysis on the words being used, the intent of the speaker and the context in which they were published to determine whether the texts taken as a whole could be considered as inciting violence.[29] For instance, in *Mart and others v Turkey*, the Court considered whether the slogans, declarations and other writings at issue could – given their content, the context and their "capacity to harm" – be considered to incite violence, armed resistance or uprising, or whether they could be said to amount to 'hate speech.'[30]

22. More generally, the European Court also considers the "position of strength occupied by a government," which "commands it to show restraint in the use of criminal proceedings."[31] Notwithstanding, the nature of online communications calls for some special consideration as we discuss further below.

European Court case law on criticism of the judiciary

23. ARTICLE 19 reiterates that as the guarantor of justice, the judiciary must enjoy public confidence to be successful in carrying out its duties,[32] whilst the press retains its vital function as "public watchdog."[33] Hence, whenever measures or sanctions imposed by the state authorities can discourage participation of the press in debates over matters of legitimate public concern, the most careful scrutiny must be applied.[34]

24. The right to freedom of expression can be restricted "for maintaining the authority and impartiality of the judiciary" (Article 10 para 2 of the European Convention) and from the European Court's jurisprudence, it seems that in cases where judges are the target of critical comments a wider margin of appreciation is granted in instances involving the criticism of judges than when other public officials are the subject of critical comment.[35] However, this does not mean that States can restrict all forms of public discussion on matters pending before the courts.[36] Indeed, the media are entitled to report about and discuss matters related to the judiciary and trials (in the mainstream press, specialised journals and online) and the public also has a right to receive this information and opinions.[37]

25. Moreover, the functioning of the justice system falls within the public interest[38] and receives a high level of protection of freedom of expression. For example:

    - in *Morice v. France*,[39] concerning defamatory comments about judges in a high-profile case by a lawyer, the European Court reiterated that the phrase "authority of the judiciary"

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[29] See, e.g., European Court; *Sürek and Özdemir v. Turkey* [GC], App. Nos 23927/94 and 24277/94, 8 July 1999, para 61, unreported; or *mutatis mutandis, Perincek v Switzerland* [GC], App. No. 27510/08, 15 October 2015.
[30] European Court, *Mart and others v Turkey*, App. No 57031/10, 19 March 2019, para 32.
[31] *Nedim Şener v. Turkey, op.cit*, para 122.
[32] See Background paper for the Judicial Seminar 2018: The Authority of the Judiciary, p. 10.
[33] See, e.g., The European Court, *The Observer and Guardian v. the UK*, Series A no. 216, 26 November 1991, para 59; *Busuioc v. Moldova*, App. No. 61513/00, 21 December 2004, para 56.
[34] See, e.g., the European Court, *Lingens v. Austria,* 8 July 1986, Series A no. 103, para 44, *Bladet Tromsø and Stensaas v. Norway* [GC], App. No. 21980/93, ECHR 1999-III, para 64; *Thorgeir Thorgeirson v. Iceland*, Series A no. 239, 25 June 1992, para 68.
[35] M.Addo, Are Judges Beyond Criticism Under Article 10 of the European Convention on Human Rights?, April 1998. See also: The European Court, *Barfod v Denmark*, App No. 11508/85, 22 February 1989 or *Prager and Oberschlick v Austria*, App No. 15974/90, 26 April 1995.
[36] *Worm v. Austria,* 29 August 1997, Reports of Judgments and Decisions 1997-V, para 50.
[37] The European Court, *Bédat v. Switzerland* [GC], App. No. 56925/08, 29 March 2016, para 51.
[38] The European Court, *Morice v. France* [GC], App. No. 29369/10, ECHR 2015, para 28; and *July and SARL Libération v. France*, App. No. 20893/03, ECHR 2008 (extracts), para 67.
[39] *Morice v.* France, *ibid*.

includes the concept that the courts are the correct forum for the resolution of legal disputes and that there is public confidence in their ability to carry out that function. However, the European Court emphasised that lawyers should be able to highlight to the public any potential shortcomings in the justice system and that while it was necessary to maintain the authority of the judiciary and protect them from certain criticism, this should not prevent individuals from expressing "value judgements with a sufficient factual basis, on matters of public interest."

- in *Narodni List D.D. v. Croatia*,[40] concerning the criticism of judges by the press, the European Court found that, save in the case of gravely damaging and unfounded attacks, individuals could not be banned altogether from criticising the justice system. The article had covered a matter of public interest, namely the functioning of that system, and, although caustic, it had not been insulting. The way in which it had been written had not therefore been incompatible with the right to freedom of expression under the European Convention. The Court found it difficult to accept that the injury to the judge's reputation had been of such a level of seriousness as to have justified an award of that size. Moreover, the award of damages was excessive which could, in the Court's view, discourage open discussion on matters of public concern.

26. Furthermore, the European Court has made clear that a degree of hostility[41] and the potential seriousness of certain remarks[42] do not obviate the need for a high level of protection, given the existence of a matter of public interest.[43] Additionally, widespread media coverage of a case about which the impugned statements were made may be an indication of its contribution to a debate of public interest.[44]

27. Moreover, the European Court has recognised that – save in the case of gravely damaging attacks that are essentially unfounded – judges can be subject to personal criticism within permissible limits. When acting in their official capacity they can be subject to wider limits of acceptable criticism than ordinary citizens.[45] While it may prove necessary to protect the judiciary against gravely damaging attacks that are essentially unfounded, bearing in mind that judges are prevented from reacting by their duty of discretion,[46] this cannot have the effect of prohibiting individuals from expressing their views, through value judgments with a sufficient factual basis, on matters of public interest related to the functioning of the justice system, or of banning any criticism of the latter.[47]

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[40] The European Court *Narodni List D.D. v. Croatia*, App. No. 2782/12, 8 November 2018. The applicant, the publisher of a weekly magazine, had complained about a domestic court decision finding that it had defamed a county court judge and ordering it to pay over 6,000 euros in damages. The decision referred to an article the applicant had published criticising the judge. The article had referred to a search warrant as "illegal" and the headline was "Judge B. should be put in the pillory.

[41] The European Court*, E.K. v. Turkey*, App. No. 28496/95, 7 February 2002, paras 79-80.

[42] The European Court, *Thoma v. Luxembourg*, App. No. 38432/97, ECHR 2001-III, para 57.

[43] The European Court, *Paturel v. France*, App. No. 54968/00, 22 December 2005, para 42.

[44] *Bédat v. Switzerland* [GC], *op.cit.*, para 64 and *Morice v. France* [GC], *op.cit.*, para 151.

[45] *Morice v. France* [GC], *Ibid.*, para 131; *July and SARL Libération v. France*, *op.cit.*, para 74; *Aurelian Oprea v. Romania*, App. No. 12138/08, 19 January 2016, para 74; *Do Carmo de Portugal e Castro Câmara v. Portugal*, App. No. 53139/11, 4 October 2016, para 40.

[46] The European Court, *Wingerter v. Germany* (dec.), App. No. 43718/98*,* 21 March 2002.

[47] The European Court, *De Haes and Gijsels v. Belgium,* App. No. 19983/92, 24 February 1997, Reports of Judgments and Decisions *1997-I* and *Morice v. France* [GC], *op.cit.*

28. Recently, the European Court has begun to invoke a "political speech" argument and to perceive criticism of judges as a part of political debate[48] with wider limits for legitimate criticism[49]. Moreover, the Court has tended to distinguish between the various judicial officers within the judiciary itself. For example, judges of the constitutional courts (and particularly those that exercise abstract reviews of constitutionality) must withstand harsher criticism.[50]

Compliance of the applicable Turkish law provisions with international and regional standards

Article 6(1) of the Counter-Terrorism Law, Law No. 3713

29. Article 6(1) of Law No. 3713 provides as follows: "Those who announce that the crimes of a terrorist organization are aimed at certain persons, whether or not such persons are named, or who disclose or publish the identity of officials on anti-terrorist duties, or who identify such persons as targets shall be punished with imprisonment between one to three years." [emphasis added]

30. ARTICLE 19 notes that the application of these provisions (disclosure of the identity of civil servants participating in anti-terrorism operations) has been criticised by the Council of Europe's Committee of Ministers, for the failure to recognise the defence of truth and public interest.[51] The Committee recommended that:

> The content of the text at issue and the fact that the information is already in the public domain are further elements which the Turkish courts should systematically take into consideration in applying [Article 6(1)] of Law No. 3713.

Additionally, as regards to the provisions of Article 6 of Law No. 3713 generally, the Committee of Ministers has stated that, when the views expressed, however scathing they may be, "do not encourage violence, armed resistance, an uprising, hostility or hatred between citizens, or seem unlikely to do so, the Court believes that it is unjustified to restrict freedom of expression"… and criminal liability should be clearly confined to statements inciting to violence."[52]

Article 314(2) of the Turkish Criminal Code

31. ARTICLE 19 observes that Article 314 and related provisions of the Turkish Criminal Code and the Counter-Terrorism Law also have been extensively criticised by international and regional human rights bodies and by civil society.[53] In particular:

    - In its Concluding Observations on Turkey's initial report on the implementation of the ICCPR, the UN Human Rights Committee expressed its concern about the excessive application of these provisions, concluding that this discourages "the expression of critical positions or

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[48] See e.g. D.Kosar, Media and Criticism of Judges: Road to Perdition or Genuine Check Upon The Judiciary?, at http://www.iusetsocietas.cz/fileadmin/user_upload/Vitezne_prace/Kosar.pdf.

[49] *Kobenter and Standard Verlag GmbH v Austria,* no. 60899/00, 2 November 2006, §29 (iv). Cf. *Ormanni v Italy*, judgment of 17 July 2007, § 74.

[50] See The European Court, A*mihalachioaie v. Moldova, App.* No. 60115/00, 20 April 2004, para. 35.

[51] Information Documents - CM/Inf(99)28 15 May 2000, Violations of the freedom of expression in Turkey: General and individual measures, Implementation by Turkey of judgments of the European Court of Human Rights (Application of Article 46, paragraph 2, of the European Convention on Human Rights), Memorandum prepared by the Directorate General of Human Rights, Section C.2.

[52] *Ibid,* Section C.1 a. Introduction of the general criterion of "incitement to violence".

[53] Further also see, *inter alia*, Amnesty International, Turkey: Decriminalise dissent: Time to deliver on the right to freedom of expression, EUR 44/001/2013, 27 March 2013.

critical media reporting on matters of valid public interest, adversely affecting freedom of expression" in the country.[54] Subsequently, the Human Rights Committee, *inter alia*, recommended that Turkey amends these provisions to comply with the requirements of Article 19 of the ICCPR and applies "any restrictions within the strict terms of this provision"[55] while "ensuring that its application is limited to offences that are "indisputably terrorist offences."[56] The 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.[57]

- In 2016, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe issued a detailed opinion on the conformity of Article 314 with European human rights standards.[58] It 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 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 also noted that "in the application of Article 314, the domestic courts, in many cases, decide on the membership of a person in an armed organisation based on very weak evidence, which would raise questions as to the 'foreseeability' of the application of Article 314."[59] The Venice Commission also commented that weak evidence in the application of Article 314 may violate Article 7 of the European Convention."[60] 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.[61]

- 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."[62]

- In the 2011 report, the Commissioner for Human Rights noted that "various amendments to the Turkish Criminal Code … have not been sufficient to effectively ensure freedom of expression",[63] 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

[54] UN Human Rights Committee, Concluding Observations on the initial report of Turkey, UN Doc CCPR/C/TUR/CO/1, 13 November 2012, para 24.
[55] *Ibid.*
[56] *Ibid*., para 16.
[57] *Ibid*., para 19.
[58] 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.
[59] *Ibid*., para 102.
[60] *Ibid*., para. 105.
[61] *Ibid*., para. 106-107.
[62] 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.
[63] Commissioner for Human Rights, Report following his visit to Turkey from 27 to 29 April 2011, CommDH(2011)25, 12 July 2011, p. 2.

terrorist organisation among other things,[64] 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."[65] The Commissioner also has expressed concern "about the definition of some offences concerning terrorism and membership of a criminal organisation and their wide interpretation by courts." 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'."[66]

32. 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.[67] 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 the media in Turkey.[68]

The charges against the Defendant under international and regional standards

33. ARTICLE 19 has set out its concerns regarding the foreseeability and proportionality of the Turkish legal provisions at issue in this case. We will now address the charges and evidence against the Defendant specifically.

34. At the outset, we note that the Defendant is a journalist with no previous criminal convictions. Her tweet must be viewed against the relevant background. There had been extensive criticism and concern in the Turkish press regarding Akin Gurlek's courtroom manner and conduct. Notably, several articles were published in the media criticising Gurlek's disregard of the Constitutional Court's ruling that the rights of Enis Berberoğlu had been violated, as well as his handling of many other cases.[69]

35. It is indisputable that the protection of constitutional and procedural rights, particularly in the context of serious criminal charges, is a matter of public interest. The Defendant had closely observed judge Akin Gurlek's handling of the high-profile trial which formed the basis of her comments, and she was entitled to express her opinion and make value judgments on what she

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[64] See e.g., The Guardian, Turkish police arrest 23 in raids on opposition media, 14 December 2014.
[65] Commissioner for Human Rights, Commissioner concerned about arrest of journalists in Turkey, 15 December 2014.
[66] *Ibid*., para. 68-69.
[67] Commission staff working document: Turkey 2018 report, SWD(2018) 153 final, 17 April 2018, pp. 22-51 (in particular pp. 35-37).
[68] 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; Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, 15 February 2017, para 12.
[69] See DuvaR.english, Turkey's judicial board promotes judge who failed to implement Constitutional Court ruling, 28 September 2021; **Bianet, *op.cit.*,** and The Washington Post, Opinion: Erdogan's judges are making a mockery of justice, 3 November 2020.

perceived to be deficiencies in the execution of criminal justice. The Defendant had a right as a journalist and as a Turkish citizen to express these comments, and the Turkish public also had a right to be informed of any potential miscarriage of justice within their society.

36. As the international and regional freedom of expression bodies have confirmed, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[70] There is no evidence in this case that any of the Defendant's impugned comments or criticisms incited direct violence against judge Akin Gurlek or identified him in any way as a target for terrorist organisations as the indictment seeks to suggest. It appears that this provision has been used as a form of censure for criticising the judiciary.

37. The discussion of relevant international and European standards and case-law above makes clear that no matter how caustic or derogatory criticism of judges in the exercise of their official functions might be, restrictions and sanctions will be considered disproportionate unless the criticism is essentially unfounded. Given the background and widely shared legitimate concerns voiced by the Defendant as to whether the defendants in the case at issue were being afforded a fair trial, it cannot be said that the comments were essentially unfounded.

38. Furthermore, despite citing Article 314(2) of the Turkish Criminal Code in the indictment against the Defendant, the Prosecution has not provided any evidence that the Defendant is a member of a terrorist organisation. There has been extensive discourse at an international as well as at a European level of how this provision has been disproportionately used to silence opposition in Turkey; and the risk that convictions on the basis of weak evidence in the application of Article 314 may also create problems in the field of Article 7 of the European Convention.

39. In sum, ARTICLE 19 asserts that the applicable Turkish criminal legal provisions, in this case, have been misused in order to punish the Defendant for her criticism of judge Akin Gurlek's conduct in the relevant trial. It cannot be argued that she disclosed or published his identity as he had already been the subject of extensive criticism and debate in the press, nor could her comments have arguably incited a real risk of direct violence against him. Lastly, it has in no way been shown on what grounds the Defendant has been charged with membership of a terrorist organisation and this allegation is entirely unsubstantiated.

Conclusions

40. 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 European Convention. It follows that, should the Defendant be convicted, her conviction would equally constitute an unnecessary interference with the right to freedom of expression.

JUDr. Barbora Bukovska
Senior Director for Law and Policy
ARTICLE 19

[70] See, *De Haes and Gijsels v. Belgium*, 24 February 1997, Reports 1997-I, para 47.