

**IN THE VAN 5th ASSIZE COURT**

**Case No:** 2021/48 Merits

**Indictment No:** 2021/170

**Between: -**

**Republic of Turkey**

**Van Chief Public Prosecutor's Office**

**Prosecution**

**- and -**

**Adnan Bilen, Cemil Uğur, Nazan Sala, Şehriban Abi, Zeynep Durgut**

**Defendants**

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**EXPERT OPINION BY ARTICLE 19**

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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 Erselan Aktan, the lawyer representing the Defendants Cemil Uğur, Nazan Sala and Şehriban Abi, to advise on the compatibility of the charges against all Defendants with international and European standards on freedom of expression. We understand that this opinion will be relied upon by the Defendants and their representatives in their next hearing before the Van 5<sup>th</sup> Assize Court.
2. In this expert opinion, ARTICLE 19 addresses:
  - The facts and arguments of the parties in the case, relevant for the subsequent analysis;
  - Key international and European standards on freedom of expression and terrorism offences, that the Court should take into account when deciding the case;
  - The compatibility with those standards of the offences of (i) membership of a terrorist organisation under Article 314(2) of the Turkish Penal Code, Law No. 5237 in respect of all Defendants; and (ii) disseminating terrorist propaganda under Article 7(2) of the Turkish Counter-Terrorism Law, Law No. 3713 in respect of the Defendant Nazan Sala only;
  - The assessment of the nature of the case, brought against the Defendants by the Van Chief Public Prosecutor's Office, against international and European freedom of expression standards.
3. ARTICLE 19 concludes that the provisions under which all Defendants and Nazan Sala separately have been charged, namely Article 314(2) of the Turkish Penal Code, Law No. 5237 and Article 7(2) of Law No. 3713 on Counter-Terrorism, 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 international and European human rights law, we consider that the Prosecution's failure to exercise its discretion consistently with the requirements of freedom of expression means that the charges levelled against the Defendants are unlawful under international and European human rights law. If the Defendants were to be convicted, their convictions would equally constitute an unnecessary interference with the right to freedom of expression.

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

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),<sup>1</sup> the analysis of the terrorism offences contained in the penal codes of countries such as the United Kingdom,<sup>2</sup> Tunisia<sup>3</sup> and Russia<sup>4</sup> and interventions in several high profile national

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<sup>1</sup> ARTICLE 19, [Johannesburg Principles: National Security, Freedom of Expression and Access to Information](#), 1996.

<sup>2</sup> ARTICLE 19, [UK: Counter Terrorism and Border Security Bill could criminalise expression and opinions](#), 09 October 2018.

<sup>3</sup> ARTICLE 19, [Tunisia: Counter-terror law endangers rights](#), 31 July 2015.

<sup>4</sup> ARTICLE 19, [Rights in extremism: Russia's anti-extremism practices from an international perspective](#), 23 September 2019.

security cases.<sup>5</sup> In May 2016, ARTICLE 19 delivered training for Turkish judges on 'International Standards for Promoting Freedom of Expression while Countering Terrorism' at an international workshop in Antalya for the Turkish High-Level Courts organised by the Council of Europe and the European Union.

### **Facts and arguments of the parties in the case**

5. From 13 September 2020, Mezopotamya News Agency (MA) uncovered and reported on claims that Servet Turgut and Osman Şiban were thrown off a military helicopter on 11 September 2020. Turgut and Şiban were detained between Çatak district of Van and Beytüşşebap district of Şırnak, during a military operation and were reportedly then taken into a helicopter. Turgut died on the 30 September, after 20 days in a coma, and Şiban survived with injuries.
6. The Defendants are all journalists. They revealed to the public the details of Şiban and Turgut's detention and their resurfacing in a coma in a hospital.<sup>6</sup> Journalist Cemil Uğur (MA reporter), Adnan Bilen (MA reporter), Şehriban Abi (JinNews reporter) and Nazan Sala (former MA editor) were taken into custody on 6 October 2020, and on 9 October they were arrested on the grounds of previous investigations.<sup>7</sup> On 11 February 2021, the Van Chief Public Prosecutor's Office issued an indictment against them. Additionally, Zeynep Durgut (MA reporter formerly working for JinNews) was briefly arrested and later released pending trial as part of the same investigation.

### **The Prosecution's Case**

7. The indictment charged all the Defendants with "membership of a terrorist organization" under Article 314(2) of the Turkish Criminal Code, citing their reports and materials found in their homes, *inter alia*, as evidence. The Prosecution claims that the Defendants are members of the PKK/KCK Kurdish terrorist separatist organisation and form a part of the PKK's Press Committee, allegedly the "institution that is responsible for carrying out and maintaining the terrorist organisation's propaganda and agitation activities as well as the organisation and execution of all ideological works of the PKK/KCK terrorist organisation." The prosecution further charged Nazan Sala with disseminating propaganda in favour of a terrorist organisation. The Defendants were also charged under Articles 58(9), 53(1), 63 and 54(1) of Law No. 5237 and Article 5(1) of Law No. 3713 (for all separately) and Article 7(2) of Law No. 3713 (1st and 2nd provisions), and Articles 43(1) and 53(1) of Law No. 5237 (for the suspect Nazan Sala).
8. The indictment states that there have been several judicial decisions to block access to the Jinnews website and that similarly, according to the source search undertaken by security officers, it was found that the internet pages created by the MA had been blocked due to containing "terrorist organisation propaganda content". It also notes that the Defendants' homes were searched and they were taken into custody on suspicion that they operated within the press/broadcasting structure of the PKK terrorist organisation and were considered to be involved in news and activities according to instructions received from the organisation. The following evidence was put forward against each Defendant:
  - **Adnan Bilen:** Digital files containing the image of Abdullah Öcalan, the leader of the PKK armed terrorist organisation and the image of a piece of cloth symbolising the PKK terrorist organisation were found. No criminal element could be detected in the seized agenda. It was understood that as a result of his social media posts, Adnan Bilen was found guilty of

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<sup>5</sup> ARTICLE 19, [UK: ARTICLE 19 intervenes in Miranda Case](#), 16 December 2015.

<sup>6</sup> Ahmet Şık and Yılmaz Ruhi Demir, How did the perpetrators' lie turn into "the truth" to hide state's lynching, October 2020.

<sup>7</sup> *Ibid.*

disseminating the propaganda of a terrorist organisation by the decision of the 2nd Assize Court in Van. However, the announcement of the verdict was deferred. It was determined that he introduced himself as a journalist from the MA while interviewing to make news. It was concluded that Bilen was taking part in the hierarchical structure of the PKK organisation and carrying out activities on behalf of the organisation, and had committed the crime of being a member of an armed terrorist organisation.

- **Nazan Sala:** When searching Sala's home newspapers Özgür Gündem and Azadiya Welat, affiliated to the PKK organisation and closed down by the Emergency Decree-Law No. 676 in 2016, were found. On 13 August 2016, she shared video content of terrorist organisation members with long-barreled weapons on Facebook and the video had expressions such as "YPG, YPG, SDF, Rojava, Kurdistan" included in the description part. Sala also shared the following post on Facebook on 7 June 2015 "The AKP hit the bottom in Kurdistan, the rate of votes received by the AKP in Diyarbakır, where bombs were detonated, is now 15 per cent that means the AKP can win only one member of parliament from Amed." Sala retweeted a photo of the terrorist organisation members' coffins and pictures and symbols of the organisation on Twitter. She also retweeted a photo with the caption, "Those who are not human, refute humanity, 13 funerals have not been given to their families for 9 days", containing the symbols of the terrorist organisation and so-called flags. Sala introduced herself as a journalist from the MA while interviewing to make news and Ferdi Sertkal who was also being investigated, organised the distribution of the Yeni Yasam newspaper in Van province, and Nazan Sala would give Ferdi Sertkal the contact details of the individuals who would like to be a subscriber to the newspaper.<sup>8</sup> She was, therefore, part of the hierarchical structure of the organisation and carrying out activities on behalf of the organisation; she had committed the crime of being a member of an armed terrorist organisation and also committed the crime of disseminating propaganda for the organisation through her several social media posts at various times.
- **Sehriban Abi:** A photograph was found at her home of suspected members of the terrorist organisation with two long-barreled guns in their hands, as well as a yellow-red-green cloth with a star motif on it, which is considered to symbolise the PKK/KCK terrorist organisation. It was understood that the three press cards, which were found during the search, belonged to the agency named Jinnews, and that Abi was working as a reporter. A book named Jineology was also found; about the establishment of the KJA, the women's umbrella organisation of the PKK terrorist organisation. In a notebook, handwritten notes were found of names and GSM numbers belonging to the families of individuals who were considered to have been arrested on the charge of being a member of the PKK/KCK terrorist organisation (they conducted activities within the scope of the ideology area). It was determined that the notes were taken about the Turkish Armed Forces' operation called Pence-Kartal [Claw-Eagle] and the operation carried out was described as genocide. In the examination of another notebook, it was determined that there were notes to be used in the interviews, JINHA was a Jin news agency, and was closed with Emergency Decree Laws in 2016. It was determined that Abi introduced herself as a journalist from the Jin News Agency while interviewing to make news. She was charged with taking part in the hierarchical structure of the organisation and carrying out activities on behalf of the organisation, and committing the crime of being a member of an armed terrorist organisation.
- **Cemil Ugur:** The Prosecution determined that the news in the newspaper *Yeni Yasam*, which was found in the house search, incited the public to hatred and enmity and disseminated

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<sup>8</sup> It should be noted that the Prosecutor's Office made an additional decision of non-prosecution regarding Ferdi Sertkal on the charge of being a member of an armed terrorist organisation.

propaganda-like news on the statements of TJA (Kurdish Free Women's Movement) members and their activities and the so-called isolation of Abdullah Ocalan. They considered that the book titled *Bedirhan Bir Cudi Soyencesi* [A Story about Cudi], which was found during the search contained statements that alleged genocide had been committed against the Kurdish and Armenian people. Cemil Ugur introduced himself as a journalist from the Mezopotamya News Agency while conducting interviews to make news; he had met Mahir Aktas, the brother of Ergin Aktas, who was still in prison for PKK/KCK terrorist organisation activities. Ugur was charged with taking part in the hierarchical structure of the organisation and carrying out activities on behalf of the organisation, and committing the crime of being a member of an armed terrorist organisation.

- **Zeynep Durgut:** Durgut was not caught during the search at her home. An arrest warrant was issued by the relevant authorities, and she was caught later – after which a body search was conducted. Digital materials were obtained from her including video files in which slogans were shouted in favour of the PKK/KCK terrorist organisation and its leader Abdullah Ocalan. It was understood that Durgut was working as a reporter in the Mezopotamya Agency. The Prosecution determined that she introduced herself as a journalist from Jin News when connecting to the live broadcast of the channel Sterk TV regarding the 8 March International Women's Day and that she conveyed information in provocative language about the associated celebrations and events in Turkey.

9. Reports based on the examination of the digital materials seized from the Defendants' press office, located in Serefiye Neighbourhood Hastane Avenue Goksoy Building K: 5 No. 21 Ipekyolu/Van, state that many materials were seized by the security officers during the search which constituted propaganda for the PKK/KCK armed terrorist organisation, the leader of the terrorist organisation Abdullah Ocalan and the members of the organisation, and portrays the organisation's actions as legitimate. This all ideologically encouraged participation in the organisation.

### ***The Defendants' arguments***

10. The Defendants assert that they have merely done their job as journalists in reporting on a matter of public interest in the area of Van, namely the Turkish security forces' suspected involvement in two local individuals being thrown from a helicopter. This report was corroborated by hospital medical reports and witness statements. They further aver that all the materials seized from their homes and office are journalistic sources and are not evidence of their support, let alone membership or promotion of the PKK or its alleged Press Committee. They stress that they are being prosecuted for conducting their journalistic profession. Furthermore, it is not their responsibility to make a final decision on editorial content and this should be taken up with their news organisations' head offices. They have worked for registered, tax-paying media agencies when producing their reports and have therefore not breached any laws.

## **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 right to freedom of expression is also protected in the Turkish Constitution (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 take into account 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.<sup>9</sup> The Human Rights Committee went on to note that nobody may be subject to the impairment of any rights under the ICCPR based on their actual, *perceived* or *supposed* opinions.<sup>10</sup> It also made clear that criminalising the holding of an opinion was incompatible with Article 19 para 1 of the ICCPR.<sup>11</sup>
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 so-called 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.<sup>12</sup>
  - **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;”<sup>13</sup> 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 should always take as a starting point that it is incumbent upon the State to justify any restriction on freedom of expression, including freedom of the press.<sup>14</sup>

#### ***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.<sup>15</sup> 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.<sup>16</sup> In

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<sup>9</sup> See Human Rights Committee, [General Comment No. 34](#), CCPR/C/GC/34, para 9.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> European Court, *The Sunday Times v UK*, [App. No. 6538/74](#), 26 April 1979, para 49.

<sup>13</sup> European Court, *The Observer & Guardian v the UK*, [App. No. 13585/88](#), 26 November 1991, para 59.

<sup>14</sup> European Court, *Lingens v Austria*, [App. No. 9815/82](#), 8 July 1986, para 41.

<sup>15</sup> UN Security Council Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, 14 September 2005.

<sup>16</sup> A model offence of incitement to terrorism was also provided in A/HRC/16/51, paras 29-32. See also Article 5 of the Council of Europe’s Convention on the Prevention of Terrorism on the “public provocation to commit acts of terrorism;” and

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.<sup>17</sup>

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.<sup>18</sup> 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 a criminal action and is *likely* to result in a criminal action.”<sup>19</sup> In practice, however, restrictions imposed on freedom of expression to give effect to these provisions are often abused.

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.<sup>20</sup> In this sense, the HR Committee has found that:

The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.<sup>21</sup>

### ***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-

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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.

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

<sup>18</sup> Johannesburg Principles, *op.cit.*, Principle 6.

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

<sup>20</sup> Johannesburg Principles, *op.cit.*, Principle 8.

<sup>21</sup> General Comment No. 34, *op.cit.*

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.<sup>22</sup>

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.<sup>23</sup> It 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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."<sup>27</sup> In this regard, the European Court has long stressed that Article 10 of the European Convention is "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."<sup>28</sup>
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 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.<sup>29</sup> 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.'<sup>30</sup>
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."<sup>31</sup> Notwithstanding, the nature of online communications calls for some special consideration as we discuss further below.

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<sup>22</sup> 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.

<sup>23</sup> See e.g., European Court, *Gözel et Özer v. Turkey*, [App. Nos 43453/04](#) and 31098/05, 6 July 2010 and *Ali Gürbüz, op. cit.*

<sup>24</sup> *Ibid.*; see also *Nedim Şener v. Turkey*, [App. No. 38270/11](#), 8 July 2014, para 115.

<sup>25</sup> *Gözel et Özer v. Turkey, op.cit.*

<sup>26</sup> European Court, *Mehmet Hasan Altan v Turkey*, [App. No. 13237/17](#), 20 March 2018, para 211.

<sup>27</sup> 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.

<sup>28</sup> European Court, *Handyside v the United Kingdom*, Series A No. 24, [App. No. 5493/72](#), 7 December 1976, para 49.

<sup>29</sup> 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.

<sup>30</sup> European Court, *Mart and others v Turkey*, [App. No 57031/10](#), 19 March 2019, para 32.

<sup>31</sup> *Nedim Şener v. Turkey, op.cit.*, para 122.



### **European case-law on journalism on Kurdish issues**

23. The European Court has delivered judgments in several relevant cases. In one such case, it found that the use of the term “Kurdistan” in a context which implies that it should be or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity may be highly provocative to the authorities. However, the public has the right to be informed of different perspectives on the situation in southeast Turkey, irrespective of how unpalatable those perspectives appear to the authorities. The European Court was not convinced that even against the background of serious disturbances in the region, expressions that appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation. In this case, several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and derogatory terms. However, the European Court found that they could not be reasonably regarded as advocating or inciting the use of violence. Having regard to the severity of the penalties, it concluded that the restrictions imposed on the newspaper’s freedom of expression disclosed in these cases were disproportionate to the aim pursued and cannot be justified as “necessary in a democratic society.”<sup>32</sup>
24. The European Court has examined several cases involving the conflict in Southeast Turkey and Article 7(2) of 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. In those cases, the European Court noted that the expressions “the leader of the Kurdish people,” “guerrilla” or references to a “national liberation struggle” did not in and of themselves amount to incitement to violence within the meaning of the Convention.<sup>33</sup> Equally, the European Court has found that the slogans “May those hands which aim to damage peace be broken” and “Long live Öcalan” did not contain any elements of violence or incitement to violence.<sup>34</sup>
25. That being said, under the European Court’s case law, States enjoy a wider margin of appreciation in restricting a journalist’s expression where it incites violence towards State officials or a certain part of society.<sup>35</sup>
26. In the rare cases in which the European Court found no violation of Article 10 of the European Convention,<sup>36</sup> the Court considered that the speech at issue, which sought to stigmatise the other side of the Southeast conflict by using words such as “the fascist Turkish army” or “the hired killers of imperialism” alongside references to “massacres,” “brutalities” and “slaughter,” amounted to “an appeal to bloody revenge by stirring up base emotions and hardening already

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<sup>32</sup> European Court, *Özgür Gündem v. Turkey*, [App. No 23144/93](#), 16 March 2000, para 70.

<sup>33</sup> European Court, *Belge v Turkey*, [App. No. 50171/09](#), para. 34, 06 December 2016; equally, an interview published in a monthly review in which the members of the PKK had been referred to as “guerrilla” did not amount to incitement to violence: *Erdoğan and Ince v. Turkey* [GC], [App. Nos. 25067/94 and 25068/94](#), ECHR 1999-IV, para 52; see also *Gerger v. Turkey* [GC], [App. No. 24919/94](#), 8 July 1999, para 50 (in which the Court held that the applicant’s speech, which referred to the members of the PKK as “guerrilla”, had constituted political criticism of the Turkish authorities and not an incitement to violence, armed resistance or an uprising); *Bahçeci and Turan*, [App. No. 33340/03](#), 16 June 2009, para 30; and *Savgın v. Turkey*, [App. No. 13304/03](#), 2 February 2010, para 45 (in which the Court considered that text messages and slogans which referred to Abdullah Öcalan as the president had not incited to violence; *Faruk Temel*, [App. No. 16853/05](#), 1 February 2011, para 62 (in which the Court found that referring to Abdullah Öcalan as “esteemed” (sayın) during a speech did not incite to violence); and *Öner and Türk v. Turkey*, [App. No. 51962/12](#), 31 March 2015, para 24 (in which the Court held that the applicant’s speech, in which he described Abdullah Öcalan as the “Kurdish leader” did not constitute incitement to violence); *Sürek v. Turkey* (no. 3), [App. No. 24735/94](#), 8 July 1999, para 40.

<sup>34</sup> European Court, *Bahçeci and Turan*, *op.cit.*, para 30.

<sup>35</sup> European Court, *Hocaogullari v. Turkey*, [App. No. 77109/01](#), 7 March 2006, para 36.

<sup>36</sup> These consist mostly of a series of cases dating from 1999, see in particular *Sürek v. Turkey* (no. 1), [App. no. 26682/95](#), 8 July 1999, paras 62-63.

embedded prejudices which ha[d] manifested themselves in deadly violence.”<sup>37</sup> Also relevant were the “serious disturbances [that] have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region” and the fact that the speech at issue cited the names of particular individuals, exposing them to a possible risk of physical violence.<sup>38</sup> Equally, the European Court has found that the expression “[w]e want to wage a total liberation struggle” expressed a “call for the use of armed force as a means to achieve national independence of Kurdistan.”<sup>39</sup> In the Court’s view, this communicated the message to readers that “recourse to violence was a necessary and justified measure of self-defence in the face of the aggressor.”<sup>40</sup> Again, the context of “serious disturbances” in the region was an important factor.

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

27. ARTICLE 19 submits that the main substantive Turkish Law provisions at issue, in this case, are Article 314(2) of the Turkish Criminal Code which criminalises membership of a terrorist organisation, under which all Defendants were charged and Article 7(2) of the Counter-Terrorism Law criminalising the dissemination of propaganda in favour of a terrorist organisation under which the Defendant Nazan Sala was also charged.
28. Furthermore, it appears that a number of the Defendants were arrested for not being in possession of an official Turkish journalists’ yellow card. In this respect, ARTICLE 19 recalls that international and regional human rights bodies have long recognised that journalism is an activity rather than a profession. For instance:
  - 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”.<sup>41</sup> 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.<sup>42</sup>
  - While the European 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.”<sup>43</sup> The Court thus relies on the standards developed by the Council of Europe in this area.

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<sup>37</sup> *Ibid.*

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

<sup>39</sup> See *Sürek v. Turkey (no. 3)*, *op.cit.*, paras 40-41.

<sup>40</sup> *Ibid.*

<sup>41</sup> See Appendix to Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

<sup>42</sup> 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.

<sup>43</sup> See *Butkevich v. Russia*, App. No. 5865/07, 13 February 2018, para 131.

- Similarly, the UN Human Rights Committee has asserted that journalism is “a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.”<sup>44</sup> It found that state systems of registration or licensing of journalists are incompatible with the protections awarded by Article 19 para 3 of the ICCPR.

### **Article 314(2) of the Turkish Criminal Code**

29. ARTICLE 19 observes that Article 314 and related provisions of the Turkish Criminal Code and the Counter-Terrorism Law have been extensively criticised by international and regional human rights bodies as well as civil society.<sup>45</sup> 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 critical media reporting on matters of valid public interest, adversely affecting freedom of expression” in the country.<sup>46</sup> 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”<sup>47</sup> while ensuring “that its application is limited to offences that are indisputably terrorist offences.”<sup>48</sup> 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.<sup>49</sup>
- 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.<sup>50</sup> 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 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 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.”<sup>51</sup> The Venice Commission also commented that weak evidence in the application of Article 314 may violate Article 7 of the European Convention.<sup>52</sup> 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

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<sup>44</sup> See General comment No. 34, *op.cit.*, para 44.

<sup>45</sup> 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.

<sup>46</sup> UN Human Rights Committee, Concluding Observations on the initial report of Turkey, UN Doc CCPR/C/TUR/CO/1, 13 November 2012, para 24.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, para 16.

<sup>49</sup> *Ibid.*, para 19.

<sup>50</sup> 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.

<sup>51</sup> *Ibid.*, para 102.

<sup>52</sup> *Ibid.*, para 105.

an opinion should not be the only evidence before the domestic courts to decide on the membership of the defendant in an armed organisation.<sup>53</sup>

- 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."<sup>54</sup>
  - 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",<sup>55</sup> 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,<sup>56</sup> 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."<sup>57</sup> 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'."<sup>58</sup>
30. 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.<sup>59</sup> 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.<sup>60</sup>

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<sup>53</sup> *Ibid.*, para 106-107.

<sup>54</sup> 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.

<sup>55</sup> Commissioner for Human Rights, [Report following his visit to Turkey from 27 to 29 April 2011](#), CommDH(2011)25, 12 July 2011, p. 2.

<sup>56</sup> See e.g., The Guardian, [Turkish police arrest 23 in raids on opposition media](#), 14 December 2014.

<sup>57</sup> Commissioner for Human Rights, [Commissioner concerned about arrest of journalists in Turkey](#), 15 December 2014.

<sup>58</sup> *Ibid.*, paras 68-69.

<sup>59</sup> Commission staff working document: Turkey 2018 report, SWD(2018) 153 final, 17 April 2018, pp. 22-51 (in particular pp. 35-37).

<sup>60</sup> See e.g., UN Special Rapporteur on freedom of expression and OSCE Representative on Freedom of the Media, 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.

### **Article 7(2) of the Counter-Terrorism Law**

31. In ARTICLE 19's view, the provisions of Article 7(2) of the Counter-Terrorism Law, which forms the basis of the second charge against the Defendant Nazan Sala, also fail to comply with the international and European freedom of expression standards set out above. In particular, they fail to meet the requirements of legality, which is the first prong of the three-part test for restrictions on freedom of expression.
32. The provisions are vague and overbroad. The term 'propaganda for terrorist organisation' is not defined and even the definition of 'terrorism' in Article 1 of the Counter-Terrorism Law is exceedingly vague. These provisions are thus clearly inconsistent with the detailed recommendations of the UN Special Rapporteur on Counter-Terrorism outlined above. In particular, both the UN Special Rapporteur and the Human Rights Committee have highlighted that the use of similar terms should be avoided or at a minimum clearly defined, lest they lead to unnecessary or disproportionate interferences with freedom of expression. The Venice Commission has expressed a similar view:

Another category of offences that raises significant human rights concerns are "new" crimes for speech that is seen to encourage, directly or indirectly, terrorism. Restrictions have expanded from existing prohibitions on incitement to much broader and less defined areas such as "apology", "praising"; "glorification or indirect encouragement" or "public justification" of terrorism. These "new" offences often criminalise the dissemination, publication and possession of material which are considered to fall foul of the incitement provisions. These provisions generally tend towards a weakening of the causal link that is normally required in law between the original speech (or other form of expression) and the danger that criminal acts may be committed. Such offences are particularly worrisome when applied to the media. The [European Convention] provides for strong protection of freedom of expression (Article 10) while allowing States to protect national security. According to the Strasbourg case-law, under Article 10 [of the European Convention] incitement can only be prohibited in limited circumstances, which are highly context based. As recommended in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, "Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined."<sup>61</sup>
33. ARTICLE 19 also notes that these provisions have been already subject of criticism, in particular from the Council of Europe Commissioner for Human Rights. In her 2020 report on Turkey, she observed that the Turkish Criminal Code, Code of Criminal Procedure and Counter-Terrorism Law required a complete overhaul.<sup>62</sup> Whilst noting an amendment to Article 7 of the Counter-Terrorism Law that would exclude expressions that do not exceed the limits of reporting or criticism from its scope, the Commissioner considered that "this amendment is unlikely to have a significant impact on the excessive use of this provision by the Turkish judiciary."<sup>63</sup>
34. In light of the above, ARTICLE 19 submits that the Court ought to exercise the most anxious scrutiny of how Article 7(2) of the Counter-Terrorism Law has been applied by the Prosecution in the indictment in respect of Nazan Sala.

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<sup>61</sup> Venice Commission, Report on Counter-Terrorism and Human Rights, Study no. 500/2008, CDL-AD(2010)022, 05 July 2010, para 33.

<sup>62</sup> Commissioner for Human Rights of the Council of Europe, [Report following her visit to Turkey from 1 to 5 July 2019](#), CommDH(2020)1, 19 February 2019, para 110.

<sup>63</sup> *Ibid.*, para 111.

## The charges against the Defendants under international and regional standards

35. 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 Defendants specifically. The Defendants are journalists (regardless of whether they are in possession of an active yellow card for the reasons outlined above). They all have no previous criminal convictions. It is clear from the facts of the case that the Defendants have been arrested and charged for terrorist offences as a result of their journalistic activity and the journalistic sources seized from their homes and office. They all have worked for registered media companies in Turkey and have reported on issues of local public concern.
36. A thorough analysis of the materials and evidence proffered against each individual Defendant shows no justification for deeming them to be members of the PKK organisation, be it its Press Committee or otherwise. The Defendants have been charged for possessing photographs, videos, newspapers, books and notes which relate to the PKK and their associated narrative, or for interviewing individuals considered to be affiliated with the PKK. A journalist would presumably need to be informed on a matter of public interest in order to report on it and the Prosecution has not offered enough evidence to support their claim that these journalists are actually members of a terrorist organisation.
37. Moreover, none of the journalistic posts could be argued to amount to incitement to violence. The Defendants should not be held accountable for the mere possession in their homes of books and newspapers that may be critical of the Turkish security forces and government or seen to be pro-Kurdish. It should be reiterated at the outset that European human rights case law makes clear that conveying support for Kurdish separatism and criticising the conduct of the Turkish security forces, even in derogatory terms, is not enough to justify the finding of incitement to violence. In this regard, ARTICLE 19 notes that the European Court has emphasised that in determining whether speech amounts to incitement to violence within the meaning of the European Convention, it should be examined as a whole and whether it has had an adverse effect on public order.<sup>64</sup> In a similar vein, meeting with and interviewing individuals for the purposes of news reports forms part of a journalist's activity, regardless of how disagreeable the subject matter might be.
38. Moreover, ARTICLE 19 submits that the Court should have regard to the elements that are specific to the online environment. In the vast majority of cases, simply sharing posts or tweets should not – without more – be considered indicative of sufficient intent to incite the commission of terrorist acts. This is because, more often than not, sharing content merely indicates that some value is attributed to a post without necessarily signalling endorsement, let alone incitement to take a particular course of action.
39. More generally, in cases involving alleged 'terrorist' content, ARTICLE 19 submits that measures aimed at seeking the removal of the material at issue are likely to be more proportionate than seeking a criminal conviction. In other words, particularly in cases involving less serious conduct, it may well be more proportionate for content to be taken down on the basis that it is unlawful or in breach of community standards rather than pursuing it before the courts.

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<sup>64</sup> *Belge v Turkey, op.cit.*, para 34.

## **Conclusions**

40. In light of the foregoing, ARTICLE 19 concludes that the charges brought against the Defendants and the legislation on which these charges are based fail to comply with Turkey's obligations under international human rights law, in particular the right to freedom of expression. As such, they amount to an unlawful restriction on the right to freedom of expression under Article 19 (3) of the ICCPR and Article 10 (2) of the European Convention. It follows that, should the Defendants be convicted, their convictions would equally constitute an unnecessary interference with the right to freedom of expression.

**JUDr Barbora Bukovska**

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