

IN THE MUS 2nd HIGH CRIMINAL COURT

Case No: 2019/450 E

Indictment nos: 2019/484 and 2020/125

Between: -

Republic of Turkey

Mus Chief Public Prosecutor's Office

Prosecution

- and -

Idris Sayilgan

Defendant

EXPERT OPINION BY ARTICLE 19

Introduction

1. This expert opinion has been prepared by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and information. We have been asked by Zelal Pelin Dogan from Media and Law Studies Association (MLSA), the lawyer representing Idris Sayilgan, a Turkish journalist of Kurdish origin, (the Defendant) to advise on the compatibility of the charges against him with international and European standards on freedom of expression. We understand that this opinion will be relied upon by the Defendant in his case before the Mus 2nd High Criminal Court.
2. In this expert opinion, ARTICLE 19 addresses:
 - The facts and arguments of the parties in the case;¹
 - Key international and European standards on freedom of expression and terrorism offences;
 - The compatibility of Article 7/2 of the Turkish Counter-Terrorism Law (Law no. 3713), together with Article 43/1 of the Turkish Criminal Code, under which the Defendant has been charged, with these standards. Although the Defendant was also charged with reference to Article 53 of the TCC, we do not examine this provision as it relates to the 'deprivation of certain rights' after sentencing. We will focus on the substantive criminal charges in this case; and
 - Our assessment of the nature of the case brought against the Defendant.
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 as they lack sufficient clarity and foreseeability. Additionally, even if the applicable legal provisions were to be considered as providing a sufficient legal basis for the purposes of international and

¹ These are based on a translation of two indictments against the Defendant, no. 2019/484, dated 5 July 2019 and no. 2020/125 dated 17 January 2020 issued by the Mus 2nd High Criminal Court and the hearing record in case no 2019/450 dated 8 January 2020.

European human rights law, ARTICLE 19 considers that the restriction of the Defendant's right to freedom of expression may not be necessary in a democratic society.

4. The Court must decide whether the Defendant's social media shares as a whole were a direct incitement to terrorist violence. If the Court finds this not to be the case, the Defendant's conviction would be a disproportionate interference with his right to freedom of expression, particularly important in the context of free press in a democratic society – and therefore unlawful under international and European human rights law.

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

5. This expert opinion draws on ARTICLE 19's extensive legal analysis and expertise. Over the years, ARTICLE 19 has produced a number of standard-setting documents and policy briefs based on international and comparative law and best practice, 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 and 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),² the analysis of the terrorism offences contained in the penal codes³ and interventions in a number of high profile national security cases.⁴ 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

The Prosecution's Case

6. The Prosecution has charged the Defendant with disseminating terrorist propaganda in contravention of Article 7/2 of the Counter-Terrorism Law and Article 43/1 of the Criminal Code. This is on the basis of a number of social media shares on the Defendant's Facebook account, which the Prosecution alleges served as propaganda glorifying and legitimising the PKK/KCK's acts of threats and violence, as well as those of the Syrian YPG/PYD branches. The Prosecution claims that the Defendant "made terrorist organisation propaganda by broadcasting" when posting glorifying content on multiple occasions and at different times through his Facebook account, which he allegedly opened on behalf of the terrorist organisation PKK/KCK.

The Defendant's Case

7. The Defendant denies the allegations against him. He states that he is a journalist and at the material time, he was working for the DIHA (Dicle) News Agency and he shared these posts as news. Some of the shares were the Defendant's own private shares and others were shared at the suggestion of the News Agency. The materials in question were photographs, *inter alia*, of an individual carrying a picture of the PKK leader Abdullah Ocalan; members of the YDG-H organization with PKK and YPG flags in the background; and photographs of a funeral

² ARTICLE 19, [Johannesburg Principles: National Security, Freedom of Expression and Access to Information](#), 1996.

³ See, e.g. ARTICLE 19, [UK: Counter Terrorism and Border Security Bill could criminalise expression and opinions](#), 09 October 2018; [Tunisia: Counter-terror law endangers rights](#), 31 July 2015 or [Rights in extremism: Russia's anti-extremism practices from an international perspective](#), 23 September 2019.

⁴ ARTICLE 19, [UK: ARTICLE 19 intervenes in Miranda Case](#), 16 December 2015.

ceremony of a PKK/YPG member; as well as accompanying commentary and articles. The Defendant denies that any of the posts incited or encouraged violence.

8. The Defendant further asserts that the Prosecution have disproportionately relied on certain of his social media posts in a misleading fashion. For example, he claims that although his Facebook post covering the march in Van on 15 February 2016 had approximately 12 photos, including some of the police and government forces, only the photograph of a person holding a picture of Abdullah Ocalan in his hands has been included in the indictment. Had all the photos been taken into account collectively, it would be clear that the sharing was for journalistic news-reporting purposes only and was not aimed at glorifying the PKK organisation in any way. There was an ongoing conflict at the time, and he was reporting on it as a matter of news in his capacity as a local journalist. The Defendant denies that he shared sole pictures of armed militants on his Facebook account and asserts that the Prosecution have misrepresented the material he shared.
9. Furthermore, the Defendant states that he has already been convicted of being a member of the PKK terrorist organisation by the Mus High Criminal Court on the basis of the same material for the propaganda charges now against him.

Applicable international and regional standards

The right to freedom of expression

10. 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.
11. 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.⁵ 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 his or her actual, *perceived* or *supposed* opinions.⁶ It also made clear that criminalising the holding of an opinion was incompatible with Article 19 para 1 of the ICCPR.⁷
12. 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.⁸

⁵ See Human Rights Committee, [General Comment 34](#), CCPR/C/GC/34, para 9.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ European Court, *The Sunday Times v UK*, App. No. 6538/74, 26 April 1979, para 49.

- **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;”⁹ 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 a careful consideration of the particular facts of the case. The assessment should always take as a starting point that it is incumbent upon the State to justify any restriction on freedom of expression, including freedom of the press.¹⁰

Freedom of expression and national security

13. 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.
14. Under international law, States are also required to prohibit incitement to terrorism.¹¹ 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.¹² 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; (e) should expressly refer to intent to communicate a message and intent that this message incite the commission of a terrorist act; and
 - Should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to “unlawful” incitement to terrorism.¹³
15. 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

⁹ European Court, *The Observer & Guardian v the UK*, App. No. 13585/88, 26 November 1991, para 59.

¹⁰ European Court, *Lingens v Austria*, App. No. 9815/82, 8 July 1986, para 41.

¹¹ UN Security Council Resolution 1624 (2005), adopted by the Security Council at its 5261st meeting, on 14 September 2005.

¹² 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.

¹³ See UN Special Rapporteur on Counter-Terrorism, Ben Emmerson, A/HRC/31/65, para 24.

occurrence of such violence.¹⁴ 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.”¹⁵ In practice, however, restrictions imposed on freedom of expression to give effect to these provisions are often abused.

16. By contrast, expression that only transmits information from or about an organization that a government has declared threatens national security must not be restricted.¹⁶ In this sense, the Human Rights 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.¹⁷

European case-law on national security and freedom of expression

17. 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.¹⁸

18. 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.¹⁹ It has 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.²⁰ 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.²¹ 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.²²

19. 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.”²³ In this regard, the European Court has long stressed that Article 10 of the European Convention

¹⁴ Johannesburg Principles, *op.cit.*, Principle 6.

¹⁵ The protection of human rights and fundamental freedoms while countering terrorism, Report of the Secretary-General, A/63/337, 28 August 2008, para 62.

¹⁶ Johannesburg Principles, *op.cit.*, Principle 8.

¹⁷ General Comment No. 34, *op.cit.*

¹⁸ 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.

¹⁹ 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.*

²⁰ *Ibid.*; see also *Nedim Şener v. Turkey*, App. No. 38270/11, 8 July 2014, para 115.

²¹ *Gözel et Özer v. Turkey, op.cit.*

²² European Court, *Mehmet Hasan Altan v Turkey*, App. No. 13237/17, 20 March 2018, para 211.

²³ 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.

[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."²⁴

20. This does not relieve the press, terrorist organisations or anyone of the 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 with a view to determining whether the texts taken as a whole could be considered as inciting violence.²⁵ 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.'²⁶
21. More generally, the European Court also takes into account the "position of strength occupied by a government," which "commands it to show restraint in the use of criminal proceedings."²⁷ Notwithstanding, the nature of online communications calls for some special consideration as we discuss further below.

European case-law on journalism on Kurdish issues

22. The European Court has delivered judgments in a number of 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 south-east 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 which appear to support the idea of a separate Kurdish entity must be regarded as inevitably exacerbating the situation. In the 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".²⁸
23. The European Court has examined several cases involving the conflict in South East 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.²⁹ Equally, the European Court has found that the slogans "May those hands

²⁴ European Court, *Handyside v the United Kingdom*, Series A no. 24, 7 December 1976, para 49.

²⁵ 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.

²⁶ European Court, *Mart and others v Turkey*, App. No 57031/10, 19 March 2019, para 32.

²⁷ *Nedim Şener v. Turkey*, op.cit, para 122.

²⁸ European Court, *Özgür Gündem v. Turkey*, App. No 23144/93, 16 March 2000, para 70.

²⁹ 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 İnce v. Turkey* [GC], App. Nos. 25067/94 and 25068/94, ECHR 1999-IV, para 52; see also *Genger v. Turkey* [GC], App. No. 24919/94, 8 July 1999, para 50 (in which the Court held that the applicant's speech, which

which aim to damage peace be broken” and “Long live Ocalan” did not contain any elements of violence or incitement to violence.³⁰

24. Likewise, the European Court has considered that statements or speeches by the leaders of the PKK concerning the consequences of a potential intervention of the Turkish army in Northern Iraq³¹ or concerning the Turkish authorities’ policies regarding the Kurdish question³² or PKK leaders’ comments on international women’s day did not amount to incitement to violence, armed resistance, or uprising³³. The European Court came to the same conclusion concerning an interview with one of the leaders of the PKK who expressed his organisation’s opinion³⁴.
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.³⁵
26. In the rare cases in which the European Court found no violation of Article 10 of the European Convention,³⁶ the Court considered that the speech at issue, which sought to stigmatise the other side of the South East conflict by using words such as “the fascist Turkish army” or “the hired killers of imperialism” alongside references to “massacres,” “brutalities” and “slaughter,” amounted to “an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which ha[d] manifested themselves in deadly violence.”³⁷ 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.³⁸ 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.”³⁹ 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.”⁴⁰ Again, the context of “serious disturbances” in the region was an important factor.

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 *Savgin 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.

³⁰ European Court, *Bahçeci and Turan*, *op.cit.*, para 30.

³¹ European Court, *Yıldız and Tas (no 1)*, App. No. 77641/01, 19 December 2006, paras 7 and 32.

³² European Court, *Yıldız and Tas (no 4)*, App. No. 3847/02, 19 December 2006, paras 6 and 35.

³³ European Court, *Kanat and Bozan*, App. No. 13799/04, 21 October 2008, paras 7 and 18.

³⁴ European Court, *Demirel and Ates*, App. Nos 10037/03 and 14813/03, 12 April 2007, paras 6, 17 and 38; *Karakoyun and Turan v Turkey*, App. No. 18482/03, 11 December 2007, paras 9 and 28; and *Capan v Turkey*, App. No. 71978/01, 25 July 2006, paras 8 and 41.

³⁵ European Court, *Hocaogullari v. Turkey*, App. No. 77109, 7 March 2006, para 36.

³⁶ 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.

³⁷ *Ibid.*

³⁸ *Ibid.*

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

⁴⁰ *Ibid.*

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

27. In ARTICLE 19's view, the provisions of Article 7/2 of the Counter-Terrorism Law,⁴¹ which forms the basis of the Defendant's conviction, fail to comply with international and European freedom of expression standards set 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.
28. The provisions are vague and overbroad. The term 'propaganda for terrorism organisation' is not defined and even the definition of 'terrorism' in Article 1 of the Counter-Terrorism Law exceedingly vague. Similarly, the terms "legitimise" and "promote" lack sufficient clarity and are not "foreseeable." The application of these provisions ultimately depend on the vantage point of the particular reader and are subjective. Thus, these provisions are 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."⁴²

29. 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

⁴¹ Article 7/2 of the Counter-Terrorism Law, Law no. 3713, reads as follows: "A person who makes propaganda for a terrorist organization in a way that legitimizes or promotes the methods of coercion, violence or threat used by the organization or encourages the resort to such methods, shall be punished by imprisonment from one year to five years. If this crime is committed by means of mass media, the penalty shall be increased by one half. In addition, editors-in-chief who have not participated in the perpetration of the crime shall be punished with a judicial fine from one thousand to five thousand days' rates. The following actions and behaviours shall be punished in accordance with this paragraph's sentences: ...

b) Not limited to public meetings and demonstrations, and in ways that reveal membership or support for a terror organisation:

- 1 - Carrying or hanging emblems, pictures and signs belonging to the organization,
- 2- Shouting slogans,
- 3 - Broadcasting with sound equipment,
- 4 - Wearing uniforms that bear the emblems, pictures and signs of the terrorist organisation."

⁴² Venice Commission, Report on Counter-Terrorism and Human Rights, Study no. 500/2008, CDL-AD(2010)022, 05 July 2010, para 33.

Counter-Terrorism Law required complete overhaul.⁴³ 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.”⁴⁴

30. In light of the above, ARTICLE 19 submits that it is highly doubtful that Article 7(2) of the Counter-Terrorism Law as it currently reads meets the legality requirement under Article 10 para 2 of the European Convention and Article 19 para 3 of the ICCPR.

Defendant’s charges under international and regional standards

31. Even if, contrary to our opinion above, Article 7/2 of the Counter-Terrorism Law is taken to constitute a sufficient legal basis for the purposes of prosecution and conviction, ARTICLE 19 believes that the question to be addressed by the Court is whether the material the Defendant shared on social media could be found to have directly incited terrorism or violence.
32. As asserted by the Defendant, he is a journalist who was sharing news at a time of great local conflict, sometimes as a result of his own decision and sometimes at the request of the news agency for which he was working. It is difficult to see how the sharing of a photograph in and of itself could be said to encourage the resort to terrorist methods as this would be a depiction of what took place and therefore a matter of news. ARTICLE 19 also recalls that the European Court, as discussed above, has confirmed on a number of occasions in the particular context of journalist coverage of the Kurdish issue in Turkey, that the public has a right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. This extends to the expression of support for Kurdish separatism and criticism of the actions of the Turkish security forces, even if couched in derogatory terms. Furthermore, reporting on the statements of PKK members has also been protected under Article 10 of the European Convention, unless the threshold for “incitement to violence” has been met.
33. The question to be answered is whether the commentary that was shared alongside the photographs could reasonably be considered to be a direct incitement to terrorist violence.
34. ARTICLE 19 has considered the shared material listed in the two indictments against the Defendant. It is clear from the European human rights case law discussed at length above that conveying pro Ocalan slogans or sharing photographs of the PKK and its associated entities would not be enough in itself to amount to incitement to violence. Neither would references to “the Kurdish freedom struggle” be enough to amount to incitement, according to relevant case-law. Freedom of the press benefits from particularly high protection under European and international human rights law. We further note that journalists are not required under the European Convention to provide information in an objective manner.⁴⁵
35. The Court must decide whether the social media shares as a whole had an adverse effect on public order and directly incited readers to violence and insurrection.⁴⁶ If the Court finds this not to be the case, the Defendant’s conviction would be a disproportionate interference with

⁴³ Commission 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.

⁴⁴ *Ibid.*, para 111.

⁴⁵ European Court, *Belge v Turkey*, App. No. 50171/09, 6 December 2016, para 34.

⁴⁶ European Court, *Gözel and Özer v. Turkey*, App. No. 43453/04 and 31098/05, 6 July 2010, para 61.

his well-established right to freedom of expression, particularly important in the context of free journalism in a democratic society – and therefore unlawful under international and European human rights law.

36. Moreover, ARTICLE 19 submits that the Turkish Courts should have regard to the following 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.
37. 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.

Conclusions

38. Based on the foregoing, ARTICLE 19 concludes that the provisions under which the Defendant was charged do not meet the requirement of legality under European and international human rights law.
39. However, even if Article 7 (2) were to be considered as providing a sufficient legal basis for the purposes of international and European human rights law, ARTICLE 19 considers that the restriction of the Defendant’s right to freedom of expression may not be necessary in a democratic society.
40. The question the Court must consider is whether the Defendant’s social media shares as a whole were a direct incitement to terrorist violence. If the Court finds this not to be the case, the Defendant’s conviction would be a disproportionate interference with his well-established right to freedom of expression, particularly important in the context of free journalism in a democratic society – and therefore unlawful under international and European human rights law.

In London, on 7 September 2020


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