**13th Heavy Penal Court Istanbul**

Case No. 2016/250

**Republic of Turkey**
*Plaintiff*

***v.***

**Erol Önderoğlu, Rasime Şebnem Korur and Ahmet Nesin**
*Defendants*

---

**THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19**

**IN SUPPORT OF DEFENDANTS AND ACQUITTAL**

---

**ARTICLE 19**
Free Word Centre
60 Farringdon Road
London EC1R 3GA
United Kingdom
Tel: +44 207 324 2500
Fax: +44 207 490 0566
Web: www.article19.org

13 March 2017

## I. INTRODUCTION

This amicus brief is submitted by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) to assist the 13th Heavy Penal Court Istanbul in its consideration in the case of Erol Önderoğlu, Rasime Şebnem Korur and Ahmet Nesin that is currently pending with the Court. While the indictments also list İnan Kızılkaya as a defendant, we understand that he has since been removed from this case.

ARTICLE 19 is concerned with the legitimacy of charges laid by the Turkish law enforcement against the defendants in this case for exercising their rights to freedom of expression. We submit that the case amounts to unlawful restrictions on the right to freedom of expression and the provisions of the Penal Code and the Anti-Terror Law - under which the defendants are charged – are not compatible with international and regional human rights standards.

Under Article 10 of the European Convention on Human Rights ("European Convention") and Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"), Turkey is obliged to ensure that restrictions on freedom of expression, and particular on the freedom of the media, comply with a three-part permissible limitations test: they must be a) in accordance with the law, b) in pursuit of a legitimate aim, and c) necessary in a democratic society. ARTICLE 19 finds that the relevant provisions of the Penal Code and the Anti-Terror Law fail comprehensively to satisfy this test. Subsequently, we submit that the charges against them violate international human rights standards and jurisprudence related to freedom of expression. In any event, the charges levelled at the defendants are not founded, as they relate to legitimate reportage that the Turkish public has an interest in receiving.

## II. INTEREST OF ARTICLE 19

ARTICLE 19 is an international non-governmental organization which advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and the implementation of such standards in domestic legal systems. The ARTICLE 19 Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organization publishes a number of legal analyses each year, intervenes in domestic and regional human rights cases, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation.

From 31 August to 2 September, ARTICLE 19 led an international delegation of civil society organisations to Istanbul to demonstrate solidarity with writers, journalists, and media outlets in Turkey. The mission included representatives from Danish PEN, the European Federation of Journalists, German PEN, Index on Censorship, My Media, the Norwegian Press Association, the Norwegian Union of Journalists, Norwegian PEN, PEN International, Reporters Without Borders, and Wales PEN Cymru. This amicus curiae brief draws on interviews and observations made during the mission, as well as ARTICLE 19's extensive legal analysis and expertise.

## III. Applicable international and regional human rights law and standards

International human rights law forms part of Turkish law. Turkey is a party to both the ICCPR and the European Convention, and the rights enshrined in such instruments are also elaborated in the Turkish Constitution. In addition, the Constitution guarantees the right of everyone to apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms contained in the European Convention has been violated by public authorities (Article 148).

Of particular relevance to the present case, the right to freedom of expression is guaranteed by Article 26 of the Constitution, as well as Article 19 of the ICCPR[1] and Article 10 of the European Convention[2].

Freedom of expression is thus not an absolute right, but rather one which can be legitimately restricted by the State provided certain conditions are met. Such conditions comprise a three-part test against which any proposed limitation of freedom of expression must be scrutinized:

- **Is the limitation in accordance with the law?** This means that it must be contained in a law which is a publicly available and accessible, formulated with sufficient precision to enable citizens to understand the implications of the law and regulate their contact accordingly.[3]

- **Does the limitation pursue a legitimate aim?** Legitimate aims are those which are exhaustively enumerated in Article 10, paragraph 2 and Article 19, paragraph 3 of the ICCPR (see above).

- **Is the limitation necessary in a democratic society?** This requirement encapsulates the dual principles of necessity and proportionality. It demands an assessment of, first, whether the proposed limitation is necessary: whether it is indispensable in and adequate to achieving the legitimate aim. That is, did the limitation satisfy a "pressing social need"? Second, it must be established whether the limitation was proportionate: were the means used to achieve the aim proportional to that aim?[4]

---

[1] Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

[2] Article 10 of the European Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[3] European Court of Human Rights ("European Court"), *The Sunday Times v United Kingdom*, 26 April 1979, Application No. 6538/74.

[4] European Court, *The Observer and Guardian v United Kingdom*, 26 November 1991, Application No. 13585/88.

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 the fundamental and critical importance of freedom of expression – and, of particular relevance to this case, freedom of the media – to the healthy functioning of a democratic society,[5] and its role in facilitating the enjoyment of all other rights guaranteed by international human rights law.

Further, Article 20 paragraph 2 of the ICCPR also explicitly prohibits "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." In 2013, the High Commissioner for Human Rights ("OHCHR") released the Rabat Plan of Action which represents an important step in clarifying state obligations to prohibit incitement to violence, discrimination and hostility, while providing coherent protection to the rights to freedom of expression and freedom of religion. [6]

These provisions are particularly important in circumstances in which the legitimate aim sought to be achieved relates to maintaining national security and public order as part of the fight against terrorism. Restrictions on expression levied in the name of countering terrorism have historically been abused, and courts have sought to promote an appropriate balance between the need to ensure security and the right to freedom of expression by requiring a close nexus between the speech sought to be sanctioned and the risk of harm to security. That is, appropriate measures to prohibit and prevent incitement to terrorism may be legitimately taken by States – indeed they are required as part of UN Security Council Resolution 1624[7] – but in order to comport with international human rights obligations, **any restriction for the purpose of national security, including preventing terrorism, must only relate to expression that intentionally, directly and imminently incites to violence.**

Therefore, laws which criminalise expression on the grounds that it amounts to incitement of terrorism will only be "necessary in a democratic society" if they are constructed and construed narrowly. *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,[8] which authoritatively interpret international human rights law in the context of national security-related restrictions on freedom of expression, stipulate that an act of expression should be criminalised on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence (Principle 6). The UN Secretary-General has supported this interpretation, stating that "laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action."[9]

Further, the former Special Rapporteur on human rights and counter terrorism has elaborated upon the threshold that laws relating to incitement to terrorism must meet in order to comply with international human rights law, stipulating that laws

- must be limited to the incitement 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;

---

[5] European Court, *Lingens v Austria*, 8 July 1986, Application No. 9815/82.
[6] OHCHR, The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, February 2013, available at http://bit.ly/1zk6n2S.
[7] UN Security Council Resolution 1624 (2005); available at http://bit.ly/1SMOH9r.
[8] *The* Johannesburg Principles on National Security, Freedom of Expression and Access to Information London, ARTICLE 19, 1996; available at http://bit.ly/2h8NStO.
[9] A/63/337, para 62.

- must be prescribed by law in precise language, and avoid vague terms such as "glorifying" or "promoting" terrorism;
- must include an actual (objective) risk that the act incited will be committed;
- should expressly refer to intent to communicate a message and intent for this message to incite the commission of a terrorist act; and
- should preserve the application of legal defences or principles leading to the exclusion of criminal liability by referring to "unlawful" incitement to terrorism.[10]

With respect to laws criminalising the "praising" or "glorifying" of terrorism, the UN Human Rights Committee ("HR Committee") has highlighted that such offences must be clearly defined to ensure that they do not lead to unnecessary or disproportionate interferences with freedom of expression.[11] **Furthermore, laws prohibiting the praising, glorification, or any other expression concerning terrorism or any form of violence will not be compliant with human rights standards unless the law stipulates that the relevant conduct must have been clearly intended to directly incite such violence.** Expression which only transmits information from or about an organization that a government has declared threatens national security must not be restricted.[12]

## IV. The analysis of applicable legislation in the present case

The defendants in the present case are charged with three primary offences – two under the Penal Code, and one under the Anti-Terror Law – as well as a number of ancillary offences in the Penal Code and Press Code. Below, we analyse the primary offence provisions against the human rights standards articulated in previous section.

### *Penal Code offences*

The two relevant Penal Code offences fall within Chapter III of the Penal Code, entitled Offences Against the Public. Part 5, which contains the relevant offences, is entitled Offences Against the Public Peace. The relevant provisions are:

> **Provocation to Commit an Offence**
> **Article 214 (1)**
> Any person who publicly provokes the commission of an offence shall be sentenced to a penalty of imprisonment for a term of six months to five years.
>
> **Praising an Offence and Offender**
> **Article 215 (1)**
> Any person who publicly praises an offence or a person on account of an offence he has committed shall be sentenced to a penalty of imprisonment for a term of up to two years if any explicit and imminent danger to the public order occurs therefore.

[10] A model offence of incitement to terrorism was also provided in A/HRC/16/51, paras 29-32. See also Article 5 of the Council of Europe's Convention on the Prevention of Terrorism on the "public provocation to commit acts of terrorism;" and OSCE, "Preventing Terrorism and Countering Violent Extremism and Radicalization that lead to terrorism," *op. cit.,* p. 42.
[11] HRC, General Comment 34, CCPR/C/GC/34, para 46.
[12] Johannesburg Principles, *op.cit.,* Principle 8.

The term "offence" is not defined in the Penal Code; as such, it is implicit that the "offence" - referred to in Articles 214 and 215 - includes any offence enumerated in the Code. However, given that the relevant provisions appear within a Part entitled Offences Against the Public Peace, the same Part which prescribes offences relating to the establishment of terrorist organisations, it can be inferred that the primary intention of Articles 214 and 215 is to criminalise the provocation to and praising of a terrorism-related offence.

"Provoking" or "incitement" and "praising" are both terms which are undefined by the Penal Code. However, "incitement" is ordinarily defined as "the action of provoking unlawful behaviour;" while "Praising" is defined ordinarily as "expressing warm approval or admiration of."

Both provisions plainly fail to meet the requirement of human rights law regarding limitations permitted by Article 10 of the European Convention and Article 19 of ICCPR. Although they are contained in publicly accessible legislation, the use of vague terms that are not defined by the Code, such as "praise," "explicit and imminent danger" and "public order" renders the provisions overly broad and prone to misapplication and abuse. The lack of clearly defined language impedes the ability of individuals to foresee when their acts of expression may be subject to penalization under the provisions.

Furthermore, the provisions fail to satisfy the third requirement of the permissible limitations test, namely that laws must be strictly necessary and proportionate to the aim pursued. Principle 6 of the Johannesburg Principals clearly stipulates the following elements that such laws must contain in order to satisfy the principles of necessity and proportionality:

- The act is intended to incite imminent violence;
- The act 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.

Article 214 fails to meet these requirements on a number of fronts: It does not restrict the offence to the provocation of offences involving violence. There is no *mens rea* requirement in the provision; it does not require the offender to have had the intention to incite violence. It does not even stipulate that the provoked offence had to eventuate in order for there to have been an unlawful act. Nor does it contain a temporal element; there is no requirement that the violent offence occurred directly and immediately as a result of the public provocation.

Article 215 is equally unsatisfactory. Although the provision requires a connection between the giving of public praise and an "explicit and imminent danger to the public order", it still lacks a requirement that *mens rea* be demonstrated. International law clearly requires that laws prohibiting the praising, glorification, or any other expression concerning terrorism or any form of violence will not be compliant with human rights standards unless the law stipulates that the relevant conduct must have been clearly intended to directly incite such conduct. Given the potentially broad interpretation of the term "praising", and the lack of requirement for the demonstration of intent, Article 215 can be easily misconstrued to criminalise expression which only transmits information from or about an offence or offender, contrary to Principle 8 of the Johannesburg Principles.

***Anti-Terror Act provision***

The provision of the Anti-Terror Act under which the defendants have been charged prescribes:

**Article 7(2)** [13]
Any person making propaganda for, legitimating or praising the methods of a terrorist organization, which comprise force, violence or threat, or for inciting these methods to be used, shall be punished with imprisonment from one to five years. If this crime is committed through means of press and media, the penalty shall be aggravated by one half. In addition, editors of press or publishing media that have not participated in the perpetration of the crime shall also be punished with a judicial fine at the rate of one thousand to five thousand days.

As with the Penal Code, ARTICLE 19 finds that the Anti-Terror Act fails to further define or specify what is meant by "making propaganda for, legitimizing or praising," leaving the provision open to being broadly applied to a range of actions not properly within the scope of the offence. Article 7(2) also fails to contain the essential requirement that the offender intended to incite the violence "legitimised" or "praised"; that is, that the act of expression had some direct and imminent link to the violent act, which was intentional. This omission renders the provision insufficient for the purpose of the necessity and proportionality requirements of Article 10 of the European Convention and Article 19 of the ICCPR.

## V. ARTICLE 19's submissions to the Court re the case of the defendants

In the case of defendants, ARTICLE 19 submits the following:

1. **The provisions under which the defendants are charged do not satisfy the requirements of Article 10 of the European Convention and Article 19 of the ICCPR.**

   Articles 214 and 215 of the Penal Code and Article 7(2) of the Anti-Terror Act contravene the requirements of the international law, namely Article 10 of the European Convention. The provisions fail to contain safeguards and qualifications necessary to ensure they are applied proportionally; in particular, they lack *mens rea* requirements and do not require a direct and imminent connection between the act of expression and a violent act. Moreover, broad terms such as "provoking", "praising" and "propaganda" are so broadly defined that they allow for the prosecution of journalists based merely on the coverage of terrorist activities or offences.

   ARTICLE 19 believes that the Court should consider the compatibility of these provisions with international law and best practices (such as Principles 6 and 8 of the Johannesburg Principles) when deciding the case. In our view, enforcing such provisions would thus result in a violation of Turkey's obligations under Article 10 of the European Convention and Article 19 of ICCPR.

2. **In any event, the actions of the defendants do not contravene the provisions of the Penal Code and Anti-Terror Act under which they are charged.**

   The charges against the defendants rest upon the publication of material that the government asserts contains the following "crime elements":
   - Publication of an article entitled "The War Is Devastating" and "JÖH Revolt against Akar" that describe violent conflicts in Nisebin, including heavy casualties and criticism of the relevant authorities;

[13] Anti-terrorism law, available in Turkish at http://bit.ly/2hWE2eI.

- Publication of an article entitled "The Split between JÖH and PÖH in Nisebin Grows," describing local resistance against state forces and referring to state forcing engaged in "genocidal attacks;"
- Describing the resistance of YPS/YPS-Jin in Şirnex, in an article entitled "Tank, Cannon or Howitzer cannot pass Şirnex;
- Publication of an evaluation of the ongoing clashes in Nusaybin by a KCK General Presidency Council member and related pictures, in an article entitled "The enemy of Nusaybin (town in south east turkey) has been flattened", in which "the enemy" refers to the Turkish government;
- Publication of a declaration by HPG on the clashes that took place in Çaldıran and the related picture;
- Publication of a story portraying a woman fighter after her death in an armed clash, in the Daily's supplement entitled Bınevş;
- Publication of a story in Bınevş, describing actions in Syria by armed groups and persons engaged with PYD;
- Publication of a story on capture of Mehmet Tunc, entitled "We are proud of you;"
- Publication of an article about killing of a senior member of YPG/IPJ who was killed in an armed conflict;
- Publication of an article entitled "The Struggle will lead to Victory" describing the actions of YPs, accompanied with photographs of the members of the YPS holding weapons.

ARTICLE 19 concludes that the published material amounts to legitimate reportage of the conflict in the south-east of Turkey, and does not amount to provoking, praising or legitimizing violent activity for the purpose of the provisions of the Penal Code or the Anti-Terror Act. It also does not amount to "incitement of violence" that could be legitimately restricted under the international law.

We recall that the European Court has previously addressed many cases of unlawful penalization of journalists and members of the media by Turkey for their reporting on the Kurdish situation. The European Court has repeatedly found that reporting on the South-eastern conflict is in the public interest and should not be restricted by Turkey where it does amount to intentional and direct incitement to violence. In the case of *Özgür Gündem v Turkey*,[14] the European Court stated that:

> 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 Court is 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. While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and derogatory terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence.[15]

As for the allegations that the actions of the defendants amounted to incitement to violence, ARTICLE 19 notes that under international law, incitement to violence can be prohibited, however the restrictions must meet the three-part test and also meet the key elements of Article 20 para 2 of the ICCPR. The prohibition in Article 20 para 2 of the ICCPR include:

[14] European Court, Judgement of 16 March 2000, Application no. 23144/93.
[15] *Ibid.,* para [70].

- *Conduct of the speaker*: the speaker must address a public audience and their expression include:
  - Advocacy;
  - of hatred targeting a protected group based on protected characteristics;
  - constituting incitement to, *inter alia,* violence;
- *Intent of the speaker*: while the speaker must specifically intend to engage in advocacy of violence and intend for or have knowledge of the likelihood of the audience being incited to violence;
- *A likely and imminent danger* of the audience actually being incited to violence. ARTICLE 19 suggests that the Court should consider that the Rabat Plan of Action outlines a six part "severity threshold" test to assist the measuring whether the danger of incitement justify restriction.[16]

In addition, ARTICLE 19 also recalls that under international law, states' prohibitions of incitement to terrorism acts must also comply with the three-part test set in Article 19 para 3 of the ICCPR. The Johannesburg Principles provide that expression may be limited as a threat to national security only if the state can demonstrate that

- The expression is intended to incite imminent violence;
- It is likely to incite such violence;
- There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[17]

We believe that the Court must consider these standards when assessing the case. In our opinion, the material published by *Özgür Gündem,* with respect to which the defendants face the present charges, is legitimate reporting that the public has an interest in receiving. It therefore does not contravene the respective provisions of the Penal Code and Anti-Terror Act.

3. **Failure to dismiss the charges against the defendants will endorse the Turkish government's campaign of harassment against the civil society, human rights defenders and the media**

The charges against the defendants are part of a broader programme of harassment against the media, human rights defenders and civil society in Turkey.

Concerns about the violations of the rights of human rights defenders in Turkey and the situation in the South East of the country have been also raised by the Council of Europe Commissioner for Human Rights[18] and by the OHCHR.[19]

The actions of the defendants in the present case were documenting the violations of human rights in the region and expressing solidarity with victims, and mirror the conclusions of the international human rights bodies.

---

[16] Rabat Plan of Action, *op.cit.*
[17] Johannesburg Principles, *op.cit.*, Principle 6.
[18] Nils Muižnieks, Human Rights in Turkey, Euronews, 10 March 2017, available at http://bit.ly/2mVXDBo.
[19] OHCHR, UN report details massive destruction and serious rights violations since July 2015 in southeast Turkey, 10 March 2017; available at http://bit.ly/2mocx0n.

Hence, we believe that if the Court found the defendants guilty, this would not only violate their right to freedom of expression but also deprive people in Turkey of access to information. We believe that the case, and the above mentioned measures against human rights defenders, civil society, journalists and media workers obstruct the right of people in Turkey to receive information about current events and to hold the government to account. Moreover, they are in contravention of Turkey's responsibilities under human rights law.

## VII. Conclusions

In light of the foregoing, ARTICLE 19 respectfully submits that the charges against the defendants and the legislation on which these charges are based do not comply with Turkey's obligations under international human rights law, in particular the right to freedom of expression. ARTICLE 19 suggests that the Court take the relevant standards into account when considering the case currently brought before it.

JUDr Barbora Bukovska

Senior Director for Law and Policy
**ARTICLE 19: Global Campaign for Free Expression**