THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF TURKEY **Application No:2017/36722**

AYSE CELIK

v

THE REPUBLIC OF TURKEY

TURKISH HUMAN RIGHTS LITIGATION SUPPORT PROJECT
EXPERT OPINION

I. Introduction

1- This expert opinion has been prepared by Professors Helen Duffy,[1] Philip Leach[2] and the legal team of Turkey Human Rights Litigation Support Project.[3] The expert opinion draws on the authors' extensive collective experience and expertise in human rights law, counter-terrorism and rule of law, and litigation before the European Court of Human Rights (ECtHR).

2- We have been asked by the lawyer, Mahsuni Karaman,representing the defendant in this case, Ms Ayşe Çelik, to advise on the compatibility of her prosecution and conviction with international and European human rights standards, in particular on freedom of expression. It is understood that this expert opinion will be relied upon by the defendant in the case currently pending against her before the Constitutional Court.

3- The case before the Court concerns a defendant who has been prosecuted, convicted and sentenced to a custodial sentence for the crime of disseminating propaganda in favour of a terrorist organisation under Article 7(2) of the Anti-Terror Law (Law no. 3713). Her offence consists of statements during a public call to a TV show which are set out in the background facts section (Section II below).

4- In this expert opinion, we examine international law standards relevant to the criminalisation and prosecution of crimes of expression. Section III sets out relevant European and international legal standards governing freedom of expression, and the exceptional circumstances in which restrictions of free expression may be justified, including through criminal law. It highlights also relevant overlapping principles of criminal law. Section IV highlights certain features of the crime of propagandising for

[1] Professor of Human Rights and Humanitarian Law at the University of Leiden, and Director of Human Rights in Practice.
[2] Professor of Human Rights Law, Middlesex University, London.
[3] Senem Gurol (Project Lawyer), Saniye Karakas (Co-Director and Lawyer) and Ayşe Bingöl Demir (Co-Director and Lawyer), constituting the team of the project. For further information about the project, see the website: https://www.mdx.ac.uk/our-research/research-groups/human-rights-litigation-support-group-for-turkey

a terrorist organisation under Article 7(2) of the Anti-Terror Law, international criticism of this legislation and its interpretation in the contemporary Turkish context.

5- The purpose of this opinion is to assist the Constitutional Court to ensure that the criminal law is applied in a manner consistent with the international human rights obligations of the Turkish State and generally accepted principles of criminal law.

II. II- Background Facts

6- On 8 January 2016, a popular television talk show called the "Beyaz Show", which is broadcast live every week, accepted a call from Ayşe Çelik, a teacher from Diyarbakir. She made the following statement:

> Are you aware of what is going on in the east, in the south-east of Turkey? Here, unborn children, mothers and people are being killed … What is being experienced here is conveyed very differently [by the media]. Do not keep silent. As a human being, have a sensitive approach. See, hear and lend us a hand. It is a pity, do not let those people, those children die; do not let the mothers cry anymore. People are struggling with starvation and thirst, babies and children too. Don't remain silent.[4]

7- The host of the programme, Beyaz Öztürk, thanked her and asked for applause from the audience. The audience clapped with enthusiasm.[5] However, her statement prompted a reaction on social media, and certain newspapers[6] accused the caller of "propagandising" for the Kurdistan Workers' Party (PKK). The Ministry of Education responded by stating that she was not a working teacher. A prosecutor opened an

[4] Ruken Suphandag, "Arbitrary Use of Anti-terrorism laws in Turkey: The case against the school teacher Ayse Celik" (23 April 2018), www.evrensel.net/daily/350718/arbitrary-use-of-anti-terrorism-laws-in-turkey-the-case-against-the-school-teacher-ayse-celik

[5] "Should the TV host be happy women and children are dying?" *Hurriyet Daily News* (12 January 2016) www.hurriyetdailynews.com/opinion/mehmet-y-yilmaz/should-the-tv-host-be-happy-women-and-children-are-dying-93726

[6] *Takvim* newspaper made accusations about the TV channel, the host of the programme and the defendant for making propaganda for the PKK: www.takvim.com.tr/guncel/2016/01/09/beyaz-showda-pkk-propagandasi; *Yeni Akit* newspaper made similar accusations against the defendant: www.yeniakit.com.tr/haber/beyaz-showda-bir-propaganda-daha-122012.html

investigation against both Ms Çelik and the television channel for "terrorist propaganda".[7] The channel airing the show, Kanal D, was fined by the Supreme Board of Radio and Television (RTÜK) for contravening broadcasting regulations.[8]

8- The Bakirkoy Public Prosecutor started an investigation against the defendant on the basis of charges of "making propaganda for a terrorist organisation". She was arrested on 11 January 2016 and released on the same day. The Bakirkoy Public Prosecutor filed an indictment against the defendant on 20 April 2016. She was accused of disseminating propaganda in support of the PKK under Article 7(2) of the Anti-Terror Law based on the speech set out above. The Public Prosecutor argued that she had used the same language as a terrorist organisation and presented the state's military operations against terrorist organisations as actions causing the death of innocent people, thus aiming to justify and legitimise the actions of a terrorist organisation. On 26 April 2017, the Bakirkoy 2nd Heavy Penal Court sentenced the defendant to one year and three months of imprisonment under Article 7(2) of Anti-Terror Law for disseminating propaganda in support of a terrorist organisation on the grounds that she presented the PKK's violent acts as legitimate.

9- On 2 June 2017, Ms Çelik appealed against this decision before the Istanbul District Court of Appeal, arguing that her conviction had constituted a violation of her right to freedom of expression, protected under Article 10 of the European Convention on Human Rights (ECHR). She asserted that her freedom of expression and freedom of thought were being infringed because it was not her words, but rather the inferred intention behind her speech, that was impugned by the judicial authorities. The Istanbul District Court of Appeal dismissed the appeal on 27 September 2017. The defendant submitted her individual application to the Constitutional Court on 27 October 2017.

[7] Laura Pitel, "Turkey in Crisis: Renewal of conflicts with Kurdish militants is accompanied by a highly toxic political and media climate" *The Independent* (19 January 2016), www.independent.co.uk/news/world/middle-east/turkey-in-crisis-renewal-of-conflict-with-kurdish-militants-is-accompanied-by-a-highly-toxic-a6821941.html

[8] http://www.diskbasinis.org/index.php/en/english/news/271-turkish-state-targets-citizens-right-to-obtain-the-news

III. III- International Standards Related to Freedom of Expression and Criminal Law

10- The prevention of terrorism is part of the positive human rights obligations of States to "ensure" respect for rights within their jurisdiction, as the ECtHR recalled in the recent *Beslan School Siege* case of 2017.[9] States are not only entitled, but in some circumstances obliged, to take measures to protect security and prevent terrorism. Further human rights provisions prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Article 20(2) International Covenant on Civil and Political Rights (ICCPR)), propagandising for war (Article 20(3) ICCPR), racial hatred (International Convention on the Elimination of All Forms of Racial Discrimination (CERD)), or hate speech.[10] Preventive measures are therefore required in a range of circumstances, including those which directly incite or contribute to violent acts of terrorism. However in the way that these obligations are discharged, States must ensure they respect and ensure respect for human rights and the rule of law, including freedom of expression.

11- The right to freedom of expression has a dual rationale: whilst being an essential social value for the healthy functioning of democracy,[11] it is also a prerequisite to guarantee "the exercise of all human rights", including the right to freedom of thought, conscience and religion,[12] and to develop one's personality and private life.

[9] ECtHR, Tagayeva and Others v Russia (Application no. 26562/07), Judgment of 13 April 2017. Russia was in violation for its failure to prevent (as well as to adequately respond to) identifiable threats of terrorism. On the debate around the extent and nature of the positive obligations, which may conflict with other rights, see Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" (OUP 2012) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214508

[10] An ECHR Fact sheet on hate speech jurisprudence can be found at www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf. Note that hate speech is, or should be, a narrow category, which can also be subject to abuse. See e.g. Nils Muižnieks, Council of Europe Commissioner for Human Rights, "Memorandum on freedom of expression and media freedom in Turkey" (15 February 2017), Doc no. CommDH(2017)5, paras. 119-120, reporting the abuse of the hate speech rationale by the Turkish state to justify measures against persons deemed to have insulted the religious views of the majority.

[11] ECtHR, *Handyside v the United Kingdom* (Application no. 5493/72), Judgment of 7 December 1976, para. 49: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."

[12] Human Rights Committe, General Comment no. 34 (12 September 2011), UN Doc. CCPR/C/GC/34, para. 2; Kevin Boyle and Sangeeta Shah, "Thought, expression, association and assembly" in Daniel Moeckli, Sangeeta

12- Freedom of expression is one of the fundamental rights guaranteed under Article 19 of the ICCPR and Article 10 of the ECHR. These international human rights treaties have been ratified by Turkey and incorporated into domestic law. In the case of a conflict between the provisions of these human rights treaties and domestic laws, the former prevails over the latter in accordance with Article 90 of the Constitution.[13]

13- It is well established that freedom of expression protects not only ideas and opinions that are considered to be harmless, but also those that may "offend, shock or disturb".[14] As the ECtHR has noted, such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society".[15]

14- However, freedom of expression is not an absolute right. As explored more fully below, certain restrictions can be justified, provided they are prescribed by law, strictly necessary and proportionate to a legitimate aim, and strictly construed.[16]

15- Incitement to violence has long and consistently been recognised as one of the exceptional circumstances which provide a legitimate basis to restrict free expression, and, in certain circumstances, a basis for individual criminal responsibility. As detailed below, this is reflected across a large body of jurisprudence of human rights courts, including a significant number of Turkish cases before the ECtHR.[17] It is also reflected in broader international practice. For example Security Council (SC) Resolution 1624,

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Shah, David Harris and Sandesh Sivakumaran (eds.), *International Human Rights Law* (2nd edn, OUP 2014), p. 217.

[13] Article 90 of the Constitution: "In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

[14] *Handyside v UK* (n 11), para. 49; ECtHR, *Dichand and Others v Austria* (Application no. 29271/95), Judgment of 26 February 2002, para. 52.

[15] ibid; ECtHR, *Gündüz v Turkey* (Application no. 35071/97), Judgment of 4 December 2003, paras. 40, 51.

[16] ECtHR, *Ceylan v Turkey* (Application no. 23556/94), Judgment of 8 July 1999, para. 32; ECtHR, *Zana v Turkey* (Application no. 18954/91), Judgment of 25 November 1997, para. 51.

[17] e.g. ECtHR, *Halis Doğan v Turkey* (no. 2) (Application no. 71984/01), Judgment of 25 July 2006; ECtHR, *Özgür Gündem v Turkey* (Application no. 23144/93), Judgment of 16 March 2000; *Sürek v Turkey* (no. 2) (Application no. 24122/94), Judgment of 8 July 1999; ECtHR, *Müdür Duman v Turkey* (Application No 15450/03), Judgment of 6 October 2015.

"called upon" states to "prohibit by law" incitement to terrorism.[18] The promotion of criminal law as an instrument to combat certain forms of expression has also been endorsed by regional standard-setting organs: the Council of Europe Convention on the Prevention of Terrorism[19] (CoE Convention) and the EU Directive on Combatting Terrorism[20] (EU Directive) have both prohibited the crime of provocation of terrorism, for example.

16- However, it is also clear that the lawfulness of prosecuting speech is subject to certain strict constraints. In relation to the crime of incitement reflected in SC Resolution 1624, The UN Secretary General's report expressed these limits in the following way:

> [L]aws 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.[21] (Emphasis added.)

17- Article 5 of the CoE Convention which introduced the crime of "provocation to commit a terrorist offence" also qualifies it as requiring the following elements:

> [T]he distribution, or otherwise making available, of a message to the public, *with the intent* to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, *causes a danger* that one or more such offences may be committed." [22] (emphasis added.)

18- Accordingly, there are three constituting elements of the crime of provocation which can be highlighted as follows: There must first be a) an act of communication to the

[18] UN Security Council Resolution 1624 (2005), UN Doc. S/43S/1624 (2005), paras. 1, 3.
[19] CETS no. 196, adopted on 16 May 2005, entered into force 1 June 2007. See: https://rm.coe.int/168008371c
[20] Council and Parliament Directive 2017/541 of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L0541&from=EN
[21] UN General Assembly, "The protection of human rights and fundamental freedoms while countering terrorism: Report of the Secretary General" (28 August 2008), UN Doc. A/63 Office of the United Nations High Commissioner for Human Rights, Factsheet on Human Rights, Terrorism and Counter-Terrorism (no. 32), p. 42, www.ohchr.org/Documents/Publications/Factsheet32EN.pdf
[22] (n 19)

public b) a subjective intention on the part of the person to incite terrorism and c) an objective danger that the person's conduct will incite terrorism.

19- In jurisdictions where laws have criminalised not only "direct" incitement of terrorism but also what may amount to "indirect" incitement of terrorism such as by "encouraging", "praising", "advocating" or "justifying" activities,[23] concern has arisen as to the compatibility of these laws and their application with fundamental safeguards established by human rights and criminal law.[24]

In the following parts these safeguards which serve as constraints to the criminalisation of speech consistently with human rights and rule of law are outlined. Although they overlap, this section addresses international human rights law (IHRL) and principles of criminal law in turn.

Constraining Principles under Human Rights Law

20- Crimes of expression need to be interpreted and applied consistently with human rights law, in particular, the restricting principles related to the right to freedom of expression. The basic test governing permissible restrictions on freedom of expression is enshrined in the treaties themselves,[25] which require that restrictions be prescribed by law, pursue a legitimate aim, and be necessary and proportionate to that aim.[26]

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[23] See e.g. ECtHR, *Ekin Association v France*, (Application no. 39288/98), Judgment of 17 July 2001, paras. 58-65; Muižnieks (n 10); UN Human Rights Committee, Concluding Observations on the United Kingdom (2008), UN Doc. CCPR/C GBR/CO/6. For examples of the use of such phrasing, see Bibi van Ginkel, "Incitement to Terrorism: A Matter of Prevention or Repression" (August 2011) ICCT Research Paper, Annex I, 38-42, 87-88; "Encouragement of Terrorism" – Terrorism Act 2006 (UK), www.legislation.gov.uk/ukpga/2006/11/contents s 1.

[24] For examples and more detail on issues discussed in this brief see Helen Duffy and Kate Pitcher, "Inciting Terrorism? Crimes of Expression and the Limits of the Law", forthcoming in Ben Goold and Liora Lazarus, *Security and Human Rights* (Hart Bloomsbury Publishing 2019) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156210. For criticism of terrorism laws more broadly, see Helen Duffy, *The War on Terror and the Framework of international Law* (2nd edn, CUP 2015), Chs. 2, 7B.

[25] Article 19 of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Right; Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples' Rights.

[26] For example, Article 10(2) ECHR makes clear that the interference must be "prescribed by law and … necessary in a democratic society, in the interests [inter alia] of national security, territorial integrity or public safety, for the prevention of disorder or crime, [or] for the protection of health or morals".

a- Meeting the "Prescribed by Law" Test

21- The ECHR requires that any restrictions on Convention rights must have a clear legal basis, and more broadly be compatible with the rule of law. The "prescribed by law" test ensures not only that the impugned measure has a legal basis in domestic law, but also that the law "is formulated with sufficient precision to enable the citizen to regulate his conduct and to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[27]

22- Due to the vagueness and potential breadth of terrorism-related offences, which have given rise to persistent concern on the international level, the "prescribed by law" test plays a significant role in preventing the arbitrary criminalisation of expression. Thomas Hammarberg, the former Commissioner for Human Rights of the Council of Europe, stresses that restrictions of human rights in the fight against terrorism "must be defined as precisely as possible as overly broad and vague language of the counter-terrorism offences allows for subjective interpretation".[28]

23- 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".[29] Similarly, the Human Rights Committee emphasises that offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.[30]

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[27] ECtHR, *Öztürk v Turkey* (Application no. 22479/93), Grand Chamber Judgment of 28 September 1999, para. 54.

[28] Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Report following his visit to Turkey (10 January 2012), Doc no. CommDH(2012)2, see: https://rm.coe.int/16806db70f;

[29] Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies, Guideline IV, para. 19.

[30] Human Rights Committee, General Comment no. 34 (n 12), para. 46.

24- In the same vein, the ECtHR reiterates that the quality of law criterion entails that the law should be accessible to the persons concerned and foreseeable as to its effects[31]. Recently, in *İmret v Turkey* (no. 2) and Bakir and Others v. Turkey the Court points out that a rule constituting the basis for criminal liability must be formulated with sufficient precision, and afford a measure of protection against arbitrary interference by public authorities and against the extensive application of rights restrictions.[32] In this regard, both the criminal provisions as well as their application have to be clear, precise and foreseeable to afford sufficient protection against any arbitrary use of legal discretion. The "prescribed by law" test, and particular stringent approach required in relation to the criminal law, reflects the fundamental principle of *nullum crimen sine lege* (enshrined in human rights treaties and discussed under principles of criminal law below).

b- A Legitimate Aim

25- The prevention of crime and the protection of national security or public order may constitute legitimate aims, capable of justifying restrictions on rights in the fight against terrorism in certain circumstances. While these categories are broad, they are not open-ended or indeterminate. It should be noted for example that the protection of the interests of "the State" as such, often reflected in Turkish law and practice, is not itself a sufficient legitimate aim recognised in human rights treaties.[33]

26- Although the legitimate aim criterion is often not primary the focus of attention by the ECtHR in reaching decisions, it is an important test.[34] It should be considered carefully to protect against overreach and misuse of terrorism and incitement laws for ulterior purposes. The test requires that the Constitutional Court consider whether

[31] ECtHR, *İmret v Turkey* (no. 2) (Application no. 57316/10), Judgment of 10 July 2018, para.42; Bakir and Others v. Turkey (Application no. 46713/10), 10 July 2018, para. 52.
[32] ibid., para. 53 and 54; ECtHR, *Malone v UK* (Application no. 8691/79), Judgment of 2 August 1984, para. 67.
[33] Muižnieks (n 10) paras. 50, 62.
[34] ECtHR, *Perincek v Switzerland* (Application no. 27510/08), Judgment of 15 October 2015, para.145; ECtHR, *İzmir Savaş Karşıtları Derneği and Others v Turkey* (Application no. 46257/99), Judgment of 2 March 2006, para. 35.

the relevant laws and their application in practice do in fact, in the particular case, pursue the aim asserted. The "legitimate aim" criterion requires distinctions to be drawn between restrictions that in reality do not have a meaningful link to terrorism prevention and those that do. The widespread and far-reaching nature of measures taken in the name of "counter-terrorism" today, and their broad reaching effect on the exercise and defence of human rights as highlighted below, strongly suggests that in practice counter-terrorism laws are not infrequently used in situations that do not pursue the legitimate aims set down in human rights conventions.

27- In this context, it is worth noting that Article 18 of the ECHR is also relevant to judicial consideration of the legitimacy of the aims underlying restrictions of rights. Article 18 specifies the obligation on States not to restrict rights under the Convention for any purpose other than that for which they have been prescribed. Where there is a risk that a State is using incitement and provocation of terrorism to prosecute dissent, this may also fall foul of Article 18.[35]

28- Where restrictions are in fact pursuant to legitimate public aims, they still have to be necessary and proportionate in a democratic society, which is the next element of the test – and one robustly applied by the ECtHR in the cases related to freedom of expression.

c- The Necessity and Proportionality Test

29- Any limitation on freedom of expression must be "necessary" – pursuant to a "pressing social need" – and proportionate to the specified legitimate aims.[36] The necessity test must not be misunderstood as a simple "balancing" test between freedom of expression and other interests such as countering terrorism and security. As the ECtHR has reiterated, "the choice is not between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions

[35] Article 18 of the ECHR, which provides the limitation on use of restrictions on rights, states: "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."
[36] *Handyside v UK* (n 11) para. 49.

which must be narrowly interpreted".[37] Accordingly, where a dispute arises, the burden of proving that any constraint on expression was permissible falls to the State.[38]

30- If expression is to be restricted on the ground that it poses a threat to national security, the danger posed should not be abstract or hypothetical. As the jurisprudence of the Inter-American and European human rights courts have made clear, it must for example involve at least "a reasonable risk of serious disturbance"[39] to the public order in a democratic society, rendering a restriction on freedom of expression justifiable.[40]

31- When deciding whether the restriction on freedom of expression is necessary, human rights courts and bodies assess the situation on a case by case basis. The assessment of necessity and proportionality of any restriction are acutely driven by each case's particular facts and context. The ECtHR "look[s] at the interference in the light of *the case as a whole* to determine whether the restriction is proportionate, *including the content of the impugned statements and the context in which they were made*".[41] (Emphasis added.) As a result, legal standards inevitably become somewhat intertwined with particular facts.[42] Nevertheless, a review of case-law reveals certain factors and principles that have been relevant to the ECtHR's assessment of whether restrictions have met the necessity and proportionality test. Factors, which have been deemed relevant to assessing necessity and proportionality are set out below, which may assist the Court in its determination of the present case.

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[37] ECtHR, *Sunday Times* v *UK* (no. 1) (Series A, no. 30), Judgment of 29 March 1979, para. 65.
[38] UN General Assembly, Promotion and protection of the right to freedom of opinion and expression (6 September 2016), UN Doc. A/71/373, para. 9, quoting Human Rights Committee, General Comment no. 34. (n 12), paras. 27, 21.
[39] Inter-Am CHR, *Francisco Uson Ramirez v Venezuela*, Inter-American Court of human Rights Series C no. 207, Judgment of 20 November 2009, para. 89.
[40] e.g. ECtHR, *Zana v Turkey* (Application no. 18954/91), Judgment of 25 November 1997; ECtHR, *Sürek v Turkey* (no.1) (Application no. 26682/95), Judgment of 8 July 1999; ECtHR, *Sürek v Turkey* (no. 3) (Application no. 24735/94), Judgment of 8 July 1999; ECtHR, *Medya FM Reha Radyo ve Đletişim Hizmetleri A v Turkey* (Application no. 32842/02) Decision on admissibility of 14 November 2006.
[41] *Ceylan v Turkey* (n 16), para. 32.
[42] For an example see ECtHR, *Leroy v France*, (Application no. 36109/03), Judgment of 2 October 2008, paras. 3-8.

The content and context – incitement to violence or hatred?

32- The question most consistently asked in the assessment of the necessity of interference is whether the content of the speech, in the particular context, incites violence or amounts to hate speech.[43] The main criteria justifying the restriction on freedom of expression accepted by the ECtHR are where there is a "call for violence" or "incitement to hatred".[44] The red line over which protected speech cannot pass therefore is when the statement constitutes a call for violence, armed insurrection or uprising, or infuses hatred likely to increase violence or jeopardise physical integrity.[45]

33- However a strict approach to what constitutes incitement to violence is also required. The case law of the ECtHR provides guidance on relevant distinctions, and what types of expressions do *not* amount to such incitement. In this regard, the Court has noted that "a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred".[46] Restrictions require more than the use of words such as "resistance", "struggle" or "liberation", or accusations of "state terrorism" or "genocide" in order to find incitement has occurred.[47] Similarly, expressing support for a leader of a "terrorist organisation" without further incitement to violence does not suffice.[48]

34- Moreover, the ECtHR has stated that neither the publication of a statement by a person who is a member of an illegal organisation[49] nor a harsh public criticism of

[43] e.g. ECtHR, *Halis Doğan v Turkey* (no. 2), (Application no. 71984/01), Judgment of 25 July 2006; ECtHR, *Fatullayev v Azerbaijan* (Application no. 40984/07), Judgment of 22 April 2010; *Şener v Turkey* (n 40) paras. 39, 41; *Özgür Gündem* v *Turkey* (n 17); *Sürek v Turkey* (no. 2) (n 17); *Müdür Duman v Turkey* (n 17).
[44] ECtHR, *Gözel and Özer v Turkey* (Application no. 43453/04), Judgment of 6 July 2010, paras. 56, 60.
[45] *Sürek v Turkey* (no.1) (n 40).
[46] ECtHR, *Sürek and Özdemir v Turkey* (Application nos. 23927/94 and 24277/94), Grand Chamber Judgment of 8 July 1999), para. 61.; ECtHR, *Erdogdu v Turkey* (Application no. 25723/94), Judgment of 15 June 2000; *Ceylan v Turkey* (n 16).
[47] *Ceylan v Turkey*, ibid., para. 34.
[48] ECtHR, *Yalçinkaya and others v Turkey* (Application no. 51497), Judgment of 24 June 2014 (French), para. 34. The criminal prosecution for expressing a "mark of respect" for a leader of a deemed terrorist organisation – in the absence of inciting violence or endorsing violent activities – constituted an unjustifiable limit on free expression.
[49] *Gözel and Özer v Turkey* (n 44).

government policies[50] would itself justify the restriction of freedom of expression. Emphasising the importance of media freedom in a democratic society, the ECtHR accepts that even those groups that support extremist ideas should be able to find ways to express themselves peacefully and for the public to be informed of them.[51]

35- Context is relevant to how the content of the speech should be understood. For example, in the case of *Sürek and Özdemir*, the ECtHR states that whether an expression constitutes "justification", "incitement" or "praising" terrorism, depends on the content of the statement as a whole as well as the context in which it is expressed.[52] In the determination of context, the Court may examine recent events, the amount of time lapsed between the occurrence of events that are the subject of the speech[53] and the history of violence in the area.[54] It may also be relevant to consider whether the expression took place in the context of legitimate broader debate surrounding current political affairs, the use of force and human rights impact.[55] The fact that during the period in question, several international actors, such as the UN High Commissioner and the Council of Europe Commissioner for Human Rights, also raised their concerns about the alleged human rights violations in the region and called on the authorities to allow independent observers and media to have access to those curfew-affected provinces in the region. Their statements were clearly not construed as propagandising.

[50] ECtHR, *Belek v Turkey* (Application nos. 36827/06, 36828/06, 36829/06), Judgment of 20 November 2012; ECtHR, *Demirel and others v Turkey* (Application no. 75512/01), Judgment of 12 July 2007.
[51] *Şener v Turkey* (n 40), para. 41; ECtHR, *Jersild v Denmark* (Application no. 15890/89), Judgment of 23 September 1994, para. 31.
[52] *Sürek and Özdemir v Turkey*, (n 46).
[53] For example, in *Lehideux and Isorni v France*, the Court ruled, referring to remarks made in a eulogy about a French Nazi collaborator, that "it [is] inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously". ECtHR, *Lehideux and Isorni v France* (Application no. 2466/94), Judgment of 23 September 1998, para 55.
[54] In *Leroy v France* (n 42), the fact that the cartoon was featured in a publication in the Basque region, an area particularly sensitive to national security threats, was a factor in holding it to be a threat to national security. Similarly, see ECtHR, *Purcell and Others v Ireland* (Application no. 15404/89) Decision on Admissibility of 16 April 1991.
[55] *Gözel and Özer v Turkey* (n 44); *Leroy v France* (n 42) paras. 37-39, 46-47; *Sürek and Özdemir v Turkey* (n 46) paras. 51, 57.

36- In short, understanding whether speech should be understood as genuine incitement to violence or hatred requires a holistic analysis by domestic courts, taking into account the content, tone, intention, context and impact of the expression. On the contrary, the automatic repression of speech by law that deprives the domestic courts of the ability to carry out a textual or contextual examination of whether restrictions are necessary and justified in the particular case, cannot be justified, as illustrated by the ECtHR judgment of *Gözel and Özer.*[56]

Special protection for certain types or forms of expression: political speech

37- In general, the ECtHR confers a wider margin of appreciation to national authorities in the protection of national security than in other contexts; however, this margin tends to narrow when political expression or expression on matters of public interest are at stake. The ECtHR emphasises that there is little scope under Article 10(2) of the Convention for restrictions on freedom of expression in the area of political speech or debate.[57]

38- Article 10 not only protects the right to express and disseminate ideas and views but also the right of the public to access such information.[58] Due to the importance of the flow of information and ideas, political expression enjoys a broad freedom in a democratic society, and its restriction requires special justification. Whilst the state authorities must take measures to protect national security or public order, in principle it should not impede the expression of political ideas, however unfavourable they are deemed to be, or interfere with individuals' right to access political information and opinions, given the centrality of such exchanges in a pluralistic democratic society.

[56] *Gözel and Özer v Turkey*, ibid. The courts must look at the objectives of the media, the right of the public, or "other dimensions of the surrounding context" before convicting. The automatic offences of publishing statements by banned groups, or possession of information, fell foul of this requirement.
[57] ECtHR, *Belge v Turkey* (Application no. 50171/09), Judgment of 6 December 2016, para.31.
[58] ECtHR, *Lingens v Austria*, (Application no. 9815/82), Judgment of 8 July 1986.

39- In resolving any tension that may arise, the ECtHR has distinguished the content of speech from its source. Hence, restrictions on the publication of statements (which did not advocate violence) could not be justified on the basis that they were made by a banned organisation; the Court has found violations of Article 10 of the ECHR in a series of such cases concerning Turkey.[59] Also of potential relevance to the present case is the ECtHR's finding that it is insufficient that the opinion expressed by individuals is *supported* or *shared by an illegal organisation*. As stated by two former and current European Commissioners for Human Rights, Thomas Hammarberg and Nils Muižnieks, whether expressions of opinion may have coincided with the aims or instructions of an illegal organisation cannot be the guiding criteria.[60] In the absence of a call for violence or hatred, expressions which may criticise the authorities' conduct,[61] discuss causes or sources of terrorism or unrest, or indeed support unorthodox or anti-democratic ideas – for example defending sharia – without calling for violence to establish it,[62] may enjoy the freedom of expression under Article 10.

The nature of interference: restraint in resort to criminal law

40- Criminal prosecution is a particularly direct and extreme form of interference with rights; given the implications for the individuals involved, as well as the chilling effect on others, stricter justifications are needed for resort to criminal law than other restrictions. In this respect, the European Court has noted that "the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings" in response to criticism.[63] The criminal law has thus often been described as an exceptional measure of *ultimo ratio* (last resort), which must be strictly justified in the circumstances of the case. As Judge Ramirez of the Inter-American Court of Human Rights (IACtHR) explains:

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[59] ECtHR, *Belek and Velioğlu v Turkey* (Application no, 44227/04), Judgment of 6 October 2015; *Gözel and Özer v Turkey* (n 44).
[60] Hammarberg (n 28), para.70; Muižnieks (n 10)
[61] ECtHR, *Gerger v Turkey* (Application no. 24919/94), Grand Chamber Judgment of 8 July 1999, para.50; *Şener v Turkey*, Application no. 26680/95 (n 40).
[62] *Gündüz v Turkey* (n 15).
[63] ECtHR, *Karatas v Turkey* (Application no. 23168/94), Judgment of 8 July 1999, para.50; *Ceylan v Turkey* (n 16), para. 34.

> [I]n a 'democratic environment': criminalization of behaviours and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then, and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable.[64]

41- In the strict necessity and proportionality equation, particularly weighty justifications are required for resort to criminal prosecution and punishment on the basis of expression. Where some restriction is justified, consideration must be given to less intrusive alternatives that may meet the legitimate aim pursued.

The nature and severity of the penalties

42- In turn, even where criminal law exceptionally may be justified, the degree of punishment imposed will be a crucial factor influencing assessments of proportionality.[65] For example, in the case of *Leroy v France* concerning a cartoon published shortly after 11 September 2001 in which collapsing buildings carried the caption "We have all dreamt of it … Hamas did it", one of the determining factors in the ECtHR's decision that, on balance, there was no violation of Article 10, was the modest fine of 1,500 Euro imposed.[66] Deprivation of liberty should not be the norm, and requires particular justification in accordance with the severity of the crime in question, as reflected in ECHR jurisprudence.[67] The appropriateness of custodial sentences should be based on a holistic assessment of all the facts and circumstances of the particular case, including the personal circumstances of the defendant.

43- Indeed, the Court has made clear that when it comes to non-violent forms of expression, they should not in principle be made subject to the threat of imposition of

[64] IACtHR, *Ulloa v Costa Rica*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C no. 107 (2 July 2004). See more broadly, Natasa Mavronicola, "Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context" (2015) Human Rights Law Review 721.
[65] *Ceylan v Turkey* (n 16) para. 49; *Şener v Turkey* (n. 40), para.39.
[66] *Leroy v France*, (n 42).
[67] See e.g. ECtHR, *Murat Vural v Turkey* (Application no. 9540/07), Judgment of 21 October 2014, para. 66.

a custodial sentence.[68] Thus, while serious concerns arise as to interference with political expression at all, more serious concerns arise from resort to criminal law, which are compounded yet further where a custodial sentence is imposed.

IV. IV. Restricting Principles under Criminal law

44- Criminal law is generally responsive in nature but it can aim to prevent and deter future crimes including also terrorism. In many countries in recent years the public authorities have sought to expand criminal law to intervene before terrorist violence has materialised, for example when criminal plans are being developed and preparatory steps are underway. However, if criminal law is to be used as a tool for early intervention in the context of counter-terrorism, it is imperative that the main principles of criminal law are respected to ensure the establishment of individual criminal responsibility and punishment commensurate with criminal conduct and intent.

i- The "Harm Principle" and Remoteness

45- Criminal law is generally responsive to harm that has arisen as a result of the culpable conduct of the individual. For crimes of expression to be prosecuted, at a minimum there must be a clear link between the impugned speech and the real and intended risk of harm. Conversely, if there is no reasonable proximity between the person's expression and the claimed harm or risk that has arisen, the link will be too remote to justify individual responsibility.[69] Similarly, even in the broadly framed crime of provocation of terrorism in the CoE Convention, there is an explicit requirement that a statement must "cause a danger that an offence may be committed," and the EU

[68] Also e.g. ECtHR, *Mariya Alekhina and Others v. Russia*, (Application no. 38004/12), Judgment of 17 July 2018, para.227; *Yilmaz and Kiliç v Turkey* (Application no. 68514/01), Judgment of 17 July 2008, para. 67; *Gül and Others v Turkey* (Application no. 4870/02), Judgment of 8 June 2010, para. 43.
[69] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), p. 109.

Directive firms it up by specifying that a statement must "*manifestly* cause a danger that a terrorist act will be committed" (Emphasis added.).[70]

46- The same requirements arise where incitement of terrorism is enshrined in domestic law, including "indirect" forms such as justification or glorification. The link between the individual prosecuted and harm caused, or at least risked, must be established in reasonable proximity. It is inherent in the individual (as opposed to collective) nature of criminal responsibility and punishment that individuals can only be punished "for a harm that s/he has done or risked him or herself", rather than for speculative wrongs that may derive from the potential impact of dangerous ideas on others.[71]

ii- Material and Mental Elements of the Offence

47- The most basic requirements of criminal responsibility across legal systems is that the individual engage in *conduct* contributing to or directed towards harm or immediate risk to a protected value with the relevant *intent*. It is a basic principle that criminal law cannot punish thoughts, only conduct.[72] As noted above, the conduct should have a meaningful link to a resulting harm to a protected value.

48- In the case of "crimes of expression" where the conduct may simply be the speech itself, the relevant intent becomes particularly important. An individual may not be punished for sharing his or her thoughts, unless there is a harm that arises, such as an immediate risk that a crime will be committed as a result, and an intent to commit or contribute to those crimes.[73] In addition, where the conduct in question is speech deemed to constitute incitement to terrorism, a "double intent requirement" should

[70] European Commission, Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, Doc no. COM(2007)650 (6 November 2007), p. 450.
[71] Ashworth and Zedner (n 69) p. 112.
[72] The Roman Law principle *cogitationis poenam nemo patitur* translates as "nobody endures punishment for thought". *Justinian's Digest* (48.19.18).
[73] Ashworth and Zedner (n 69), pp. 109-110, questioning the consistency of the UK preparatory and pre-inchoate offences with the "remoteness" test.

be met – the perpetrator intended to engage in the criminal expression and intended that it lead to the commission of one or more criminal or terrorist offences.[74]

iii- Nullum Crimen Sine Lege and Basic "Rule of Law" Requirement

49- Certainty, precision and foreseeability are prerequisites for any criminal law, consistent with basic "rule of law" constraints. This is reflected across human rights law, including the ECHR and ICCPR, in the rule of "nullum crimen sine lege".[75] The principle of *lex certa* requires that criminal law must be sufficiently certain to allow those within a state's jurisdiction to understand the law's limits and modify their behaviour.

50- The need for careful review by domestic courts is made clear by ample jurisprudence and decisions of international courts and bodies on this issue, criticising broad definitions of terrorism for their lack of clarity and susceptibility to abuse.[76] In relation to crimes of expression, the work of international bodies reflects how this definitional deficit has been compounded by the lack of clarity in respect of what constitutes "propaganda", "indirect incitement", "provocation," or "encouragement" or "apology".[77]

51- It is a basic rule of law principle that criminal law must be strictly applied and restrictively interpreted. It cannot be interpreted by analogy and ambiguity should be resolved in favour of the accused.[78] Where laws provide for the criminalisation and punishment of conduct that is significantly broad, a rule of law problem may arise and influence other important safeguards in the criminal law including the presumption of

[74] Albin Eser, "Inidividual Criminal Responsibility", in Antonio Cassesse, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002), p. 797.
[75] Ashworth and Zedner, (n **Error! Bookmark not defined.**), pp. 113-114.
[76] Duffy (n 24).
[77] ibid.
[78] See e.g. ECtHR, *Başkaya and Okçuoğlu v Turkey* (Application nos. 23536/94 and 24408/94), Judgment of 8 July 1999, para. 36; ECtHR, *Capeau v Belgium* (Application no. 42914/98), Judgment of 13 January 2005, para. 25; Jeremy McBride, *Human rights and criminal procedure: The case law of the European Court of Human Rights* (Council of Europe Publishing 2009), p. 184, www.echr.coe.int/documents/pub_coe_criminal_procedure_2009_eng.pdf

innocence, rules on burden of proof, and the fairness of the criminal process.

V. V – The Law and its Application in Turkey

i- "Propaganda of Terrorist Organisation" under Article 7(2) of the Anti-Terror

52- The crime of propagandising for terrorism, applied in the present case, raises numerous concerns regarding consistency with the framework outlined in previous sections. Turkish legislation proscribes the crime of making propaganda in favour of a terrorist organisation under Article 7(2) of the Anti-Terror Law, which reads as follows: "Any person who disseminates propaganda in favour of a terrorist organisation *by justifying, praising or inciting the use of methods constituting coercion, violence or threats* shall be liable to a term of imprisonment of one to five years." (Emphasis added.)

53- With an amendment on 30 April 2013,[79] the qualifications underlined above as regards the physical elements of the crime were added to Article 7(2), limiting the crime of propaganda to statements made to justify, praise or incite the methods of violence used by a terrorist organisation. The goal of this amendment was to harmonise the scope of the offence with ECHR standards and prevent excessive limitations on the freedom of expression. As clearly indicated in the intention of the legislature, Article 7(2) must be applied in accordance with the principles of freedom of expression as understood by the ECtHR, as set out above.

54- However, as noted below, issues arise as regards the material and mental elements of the offence, the lack of clarity and foreseeability, and the excessive impact on freedom of expression.

[79] According to the reasoning of the amendment of Article 7(2) of the Anti-Terror Law, made by Law no. 6459 of 30 April 2013, the amendment which added certain qualifications in the offence is made in a view to making the scope of the offence "harmonized with ECHR standards" (Article 6) as the European Court of Human Rights finds that punishing individuals under Article 7 of the Anti-Terror Law due to their statements that do not contain any expression of encouragement to resort to violence or which do not qualify as incitement to armed rebellion is contrary to freedom of expression.

Problems related to the elements of the crime of propaganda under Article 7(2)

55- The criminalisation of the acts of "justifying" or "praising" terrorism or a terrorist organisation raise serious concerns regarding the scope and limits of the crimes. The "prescribed by law" test, and the constraints imposed by the principle of *nullum crimen sine lege*, require clarity, precision and foreseeability in the criminal law. So far as the crimes in question are unduly vague and their prosecution and punishment in the present case unforeseeable, they will fall foul of legal requirements. As the present case illustrates, serious uncertainty appears to surround what constitutes "propaganda", as opposed to the expression of thought and opinion on matters of public interest.

56- It is the responsibility of the courts to ensure that Article 7(2) is strictly interpreted and applied, in line with the fundamental principles and constraints of criminal and human rights law elaborated above. The provision must be interpreted so as to avoid a broad and unforeseeable scope of application of the article, and to ensure that the provision is strictly construed in favour of the accused.

57- The offence also raises questions regarding the appropriate scope of the mental and material elements of the offence, and implications for the principle of individual responsibility and the necessity and proportionality test. The physical elements (*actus reus*) of the crimes consist of "justifying", "praising" or "inciting" the use of coercion or violence by a terrorist organisation. A key question will be whether the content of the speech, understood in context, amounts to the expression of opinion on social and political matters, which is protected, or direct incitement to violence, which is not.

58- Propaganda of a terrorist organisation, as a crime of endangerment (*tehlike sucu*), criminalises the (ill-defined) act of propaganda, irrespective of the materialisation of harm, namely, the occurrence of an act of terrorism. A close causal link is required between the expression and the harm or risk – a key consideration in the assessment of the necessity of restrictions set out in relation to ECHR jurisprudence above. The

ECtHR takes into account the actual and real potential danger caused by the impugned expression when assessing the necessity of the interference with the freedom of expression in a democratic society. In the case law of the ECtHR, references are made to "potential impact",[80] "an impact on national security or public order" or "clear and imminent danger"[81] in the assessment of whether there was a "pressing social need" justifying the limitation of freedom of expression. The Office of the High Commissioner for Human Rights, the Inter-American Commission on Human Rights and the Special Rapporteur for Freedom of Expression of the OAS have also lent their weight to the international standards indicating that the necessity test requires "*a direct and immediate connection between the speech and the violence to justify restrictions on free speech*" (Emphasis added.)[82]

59- Article 7(2) of the Anti-Terror Law does not make any reference to the resulting harm, or even real danger that one or more offences may be committed as a result of the impugned statement. Without requiring even "credible danger" or a "reasonable risk of harm", any political statement could easily fall into the prohibited categories of expression under Article 7(2). This raises multiple concerns, including the remoteness of any plausible connection between defendants such as the one in this case, and the ultimate harm, namely, acts of terrorism, which puts in jeopardy the principle of individual culpability underpinning criminal law. The other condition for the criminalisation of expression is the requisite "intent" to cause criminal harm. As noted above, caution is required to ensure that perpetrators are punished commensurate with their criminal intent, which entails both a) intent to make the relevant statement and b) the intend to produce certain consequences. This is reflected for example in the CoE Convention and EU Directive, which refer to "with the intent to" incite the

[80] ECtHR, *Çamyar and Berktaş v Turkey*, (Application no. 41959/02), Judgment of 15 February 2011, para. 42.
[81] *Gül and Others v Turkey* (n 68), para. 42.
[82] The Inter-American Commission on Human Rights, its Special Rapporteurship for Freedom of Expression and the Office of the United Nations High Commissioner for Human Rights in Honduras express concern over adopted reforms in the Honduran penal code, retrogressive for human rights and freedom of expression (Joint press release: 23 February 2017), www.oas.org/en/iachr/expression/showarticle.asp?artID=1054&lID=1. See also the Joint Declaration on Freedom of Expression and Countering Violent Extremism adopted by the Rapporteurs on Freedom of Expression in 2016, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19915&LangID=E; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted 1 October 1995, UN Doc. E/CN.4/1996/39.

commission of a terrorist offence which may "cause a danger" that one or more such offences may be committed [83] However, this does not appear to be incorporated in the crime of propaganda under Article 7(2), which appears to require only the deliberate engagement of the perpetrator in the acts of justification, praise or incitement in the statement. The provision does not refer to a second layer of intent to incite the commission of a criminal act. The elements of the crime under Article 7(2) do not appear to meet the basic requirements of criminal law.

International Criticism of the interpretation and application of Art. 7(2) in Turkey

60- In recent years, the extensive application of anti-terror laws to criminalise the legitimate exercise of freedom of expression and assembly in Turkey has been subjected to severe criticisms by a number of international organisations on the grounds that they amount to violations of international human rights standards and the rule of law.[84] In its opinion on certain provisions of the Turkish Penal Code, the Venice Commission recommended that the elements of membership of an armed organisation under Article 314, which are used for prosecuting membership of a terrorist organisation, must be applied strictly.[85] The loose application of the constituting elements of crimes may contravene the principle of legality ("no punishment without law") in criminal law, and may have a severe impact on the right to freedom of expression of individuals.[86] In the same vein, the UN Human Rights Committee criticised the vagueness of the definition of a terrorist act in Turkish law.[87] The former Council of Europe Commissioner for Human Rights recommended that the Anti-Terror Law, and in particular Article 7(2) should be reviewed completely in order to make it ECHR-compliant.[88]

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[83] CoE Convention, Article 5: Public provocation to commit a terrorist offence; EU Directive, Title III, Article 5.
[84] Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, UN Doc. A/HRC/35/22/Add.3, adopted 7 June 2017; Muižnieks (n 10); Human Rights Watch, "Protesting as a Terrorist Offense" (1 November 2011), www.hrw.org/report/2010/11/01/protesting-terrorist-offense/arbitrary-use-terrorism-laws-prosecute-and
[85] Venice Commission, Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey (15 March 2016) Doc no., para. 106.
[86] ibid., para.107. CDL-AD(2016)002
[87] Human Rights Committee, Concluding observations on the initial report of Turkey adopted by the Committee at its 106th session (13 November 2012), UN Doc. CCPR/C/TUR/CO/1, para.16.
[88] Muižnieks (n 10) para. 124.

61- The recent examples of prosecution of academics,[89] investigative journalists[90] and parliamentarians as a result of overly broad application by judicial authorities of the crimes of propagandasing for or aiding a terrorist organisation has been subjected to severe criticisms and even been described as "judicial harassment" by the Council of Europe's Commissioner for Human Rights. [91]

62- The expansive and cursory interpretation of anti-terrorism laws in Turkey condemned by the ECtHR in a number of cases as contravening the principle of 'foreseeability' and 'proportionately'.[92] In those cases, participation in a public march, funeral or a demonstration and expression of non-violent views on Kurdish issue has been construed as acting "on behalf of" or "aiding" an illegal organisation without being a member of it by the domestic courts under Article 220/6 and 7 of the Criminal Code. The broad definition of these offences, coupled with the practice of the reliance of weak evidence in their prosecution, raise fundamental problems in relation the principle of legality under criminal law.[93]

63- Similar problems arise in the application of Article 7(2) of the Anti-Terror Law specifically. In *Ekin Association v France*, the ECtHR raised its concerns about the foreseeability of the offence of propaganda for a terrorist organisation in Turkey.[94]

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[89] Academics for Peace who signed a Peace Declaration raising their concerns about the excessive use of force during counter-terrorism operations in South-East Turkey have been prosecuted for making propaganda of an illegal organisation.

[90] *Cumhuriyet*'s investigative journalists, Ahmet Sik, Hurriyet Newspaper journalist Hasan Cemal, German Die Welt daily reporter Denize Yucel, Wall Street Journal journalist Ayla Albayrak and journalist Idris Yilmaz are among those who have been prosecuted for making a propaganda for a terrorist organisation. After the attempted coup d'etat, more than 300 journalists were arrested for terrorism charges: https://turkeypurge.com/journalism-in-jail. See also, Amnesty International Report "Journalism is Not a Crime",3 May 2107 at: https://www.amnesty.org/download/Documents/EUR4460552017ENGLISH.PDF

[91] Muižnieks (n 10), para. 43.

[92] Turkish ECHR cases on this point include *Yılmaz and Kılıç v Turkey* (n 68); *Gül and others v Turkey* (n 68); ECtHR, *Gülcü v Turkey* (Application no. 17526/10), Judgment of 19 January 2016; ECtHR, *Işıkırık v Turkey* (Application no. 41226/09), Judgment of 14 November 2017; *İmret v Turkey* (n 31).

[93] Venice Commission Opinion (n 85) para. 105: Venice Commission notes that convictions of membership of a terrorist organisation only on the basis of some forms of expressions may create problem concerning the foreseeability and the principle of legality in criminal law.

[94] *Ekin Association v France* (n 23), para. 46.

Even after the amendment of Article 7(2)[95] in the 2016 judgment of *Belge v Turkey*, the ECtHR found that the offence proscribed by Article 7(2) and its interpretation by the domestic court did not appear to be entirely clear. Nevertheless, it did not reach a conclusion regarding the "lawfulness" of the interference, given its conclusion about the necessity of the interference.[96]

64- The ECtHR has examined several cases concerning the application of Article 7(2) of the Anti-Terror Law in the context of the conflict in southeast Turkey. In the majority of these cases, the domestic authorities construed text messages and slogans which referred to Abdullah Öcalan as "the president" or "Kurdish leader", or statements referring to the "national liberation struggle" or stating "Long live Kurdistan", as dissemination of propaganda in favour of the PKK. However, the European Court concluded that there had been a violation of Article 10 in the application or interpretation of "incitement to violence" or "incitement to hostility". The Court considered that the statements in question should be protected under Article 10 as they did not incite violence, armed resistance, uprising or spread hatred.[97] Similarly, newspaper articles discussing the potential consequences of the Turkish army's intervention in Northern Iraq,[98] criticising state policies on the Kurdish question[99] or publication of the statements of members of the PKK,[100] did not amount to incitement to violence and thus, criminalisation of those statements was not considered to be necessary and justified in a democratic society. In contrast, in some of cases relating to Article 7(2), such as *Taşdemir v Turkey*, the content and context of certain slogans were such that they were seen as linked to acts of violence and terrorism, which

[95] As noted above, Article 7(2) of the Anti-Terror Law was amended on 30 April 2013 by Law no. 6459 to bring the provisions closer into line with the ECHR.
[96] *Belge v Turkey* (n 57), para. 29.
[97] ECtHR, *Yılmaz and Kılıç* (n 68); ECtHR, *Kızılyaprak v Turkey* (Application no. 27528/95), Judgment of 2 October 2003; ECtHR, *Feridun Yazar v Turkey* (Application no. 42713/98), Judgment of 23 September 2004; ECtHR, *Bahçeci and Turan v Turkey* (Application no. 33340/03), Judgment of 16 June 2009, para. 30; ECtHR, *Savgın v Turkey* (Application no. 13304/03), Judgment of 2 February 2010, para. 45; ECtHR, *Faruk Temel v Turkey* (Application no. 16853/05), Judgment of 1 February 2011, para. 62; ECtHR, *Öner and Türk v Turkey*, (Application no. 51962/12), Judgment of 31 March 2015, para. 24.
[98] ECtHR, *Yıldız and Taş v Turkey* (no. 1) (Application no. 77641/01), Judgment of 19 December 2006.
[99] ECtHR, *Yıldız and Taş* (no. 4) (Application no. 3847/02), Judgment of 19 December 2006, paras. 6, 35.
[100] *Özgür Gündem v Turkey* (n 17).

justified restrictions on free speech.[101] It is therefore clear from the Court's case law that what is required is a rigorous case by case analysis of the facts in light of the factors set out above.[102]

65- According to the procedural requirements under Article 10, the reasons adduced by the domestic authorities have to be "relevant and sufficient",[103] justifying the restriction on freedom of expression. This necessitates a holistic assessment of facts and context by the judicial authorities in each case, an adequate assessment of relevant factors influencing necessary and appropriate responses, and the provision of "relevant" and "sufficient" reasons for the interference with Article 10. However, as the international concern highlighted in this section illustrates, in a series of cases concerning Turkey, there has not been such an adequate assessment of the facts: an essential prerequisite to make a careful decision on the necessity and proportionality of an interference, and its conformity with human rights and criminal law principles.[104] It is hoped that the standards and experience reflected in this opinion might be taken into account by the Constitutional Court to avoid such violations of human rights in the Ayşe Çelik case.

Respectfully submitted,

Helen Duffy

Philip Leach

Senem Gurol

For the Turkish Human Rights Litigation Support Project

[101] e.g. By contrast to the comments in the present case, in that case the applicant had shouted "Biji Serok Apo, HPG cepheye misillemeye" (Long live Apo! HPG [the armed wing of the PKK] to the front line in retaliation!)

[102] ECtHR, *Taşdemir v Turkey* (Application no. 38841/07), Judgment of 23 February 2010.

[103] See, among recent authorities, ECtHR, *Bédat v Switzerland* (Application no. 56925/08), Grand Chamber Judgment of 29 March 2016, para. 46.

[104] See, for example, *Gülcü v Turkey* (n 92).