



PERMANENT MISSION OF THE REPUBLIC OF TURKEY
TO THE UNITED NATIONS OFFICE IN GENEVA

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The Permanent Mission of the Republic of Turkey to the United Nations Office at Geneva and other international organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human Rights and with reference to the joint communication by Working Group on Arbitrary Detention; The Special Rapporteur on the situation of human rights defenders; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on violence against women, its causes and consequences dated 11 December 2017 (Ref: AL TUR 13/2017)), has the honour to enclose herewith an information note comprising the response of the Government of the Republic of Turkey.

The Permanent Mission of the Republic of Turkey avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 9 February 2018

Encl: As stated.



Office of the High Commissioner for Human Rights
Special Procedures Branch
Geneva

REFERENCE: AL TUR 13/2017

**Information Note Regarding the Joint Urgent Appeal of the Working Group on Arbitrary Detention; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on violence against women dated 11 December 2017
(REFERENCE: AL TUR 13/2017)**

1. The Government would like to present its observations and relevant information herein below in respect of the Joint Urgent Appeal of the Working Group on Arbitrary Detention; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on violence against women dated 11 December 2017 (REFERENCE: AL TUR 13/2017).

2. At the outset, the Government would like to underline that respect for human rights, rule of law and democracy are the fundamental tenets of the Republic of Turkey.

Under Article 90 of the Turkish Constitution, if international agreements on fundamental rights and freedoms conflict with national legislation, priority is given to international conventions.

The Republic of Turkey is fully committed to protection and promotion of human rights and its obligations under international law.

The freedom of expression is one of the fundamental principle of the Turkish democracy. The right to express and disseminate thoughts and opinions without interference from official authorities is safeguarded by the Constitution, which stipulates that nobody can be accused of his or her thoughts and opinions.

3. Article 19 of the ICCPR defines the freedom of expression stating that “everyone shall have the right to hold opinions without interference and the right to freedom of expression including 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”. Article 19 states also that “this right can be restricted in cases of respecting the rights and reputation of other persons, protecting national security or public order or preserving public health and public morality.”

In the same vein, as per Article 26 of the Turkish Constitution, with the sub-heading “*Freedom to express and disseminate thought*”, everyone has the right to express and disseminate his thoughts and opinions in oral, written, picture form or through other means individually or collectively. This right also includes the freedom to receive or impart information or ideas without interference from official authorities.

The said Article stipulates that this right can be restricted for the purposes of protecting national security, public order, public security, the basic features of the Republic and the indivisible integrity of the State with its territory and nation; of the prevention of crimes; of the punishment of criminals; of withholding information duly classified as State secret; of the protection of the reputation and rights of other persons, their private and family lives or professional secrets

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stipulated by law; or of ensuring the proper functioning of the judiciary.

Furthermore, Article 13 of the Turkish Constitution, with the sub-heading "*Restriction of the Fundamental Rights and Freedoms*", states that fundamental rights and freedoms shall be restricted only for specific reasons stipulated in the relevant articles of the Turkish Constitution and only by law, provided that their essences are not amended; and that these restrictions cannot be contrary to the letter and spirit of the Constitution, the requirements of the democratic order of society and the secular Republic and the principle of proportionality.

Furthermore, Articles 6 and 7 of the Anti-Terrorism Law (Law No. 3713) address the matters related with the freedom of expression.

Regarding the issue in question, the Government would also like to refer to the case-law of the European Court of Human Rights (ECtHR), which is the judicial authority within the scope of the European Convention on Human Rights (ECHR).

According to the ECtHR case-law, the statements which do not contain any incitement to violence or which do not incite persons to armed rebellion, are accepted within the scope of the freedom of expression. Additionally, the Court takes into account the time, venue and conditions into consideration to determine whether a statement incites violence.

Thus, ECtHR considers whether the statements incite violence by taking into consideration the effect of the relevant expression on the society into consideration at the time of the release of the statement.

4. The Government would like to recall that the substantial amendments were made with the Law No. 6459, dated 11 April 2013, which is publicly known as the "*Fourth Judicial Package*", in Articles 6 and 7 of the Law No. 3713.

As per the amendment, in accord with the case law of the ECtHR, the act of making propaganda of terrorist organisations by justifying or praising or inciting the terrorist organisations' methods has been recognised as an offence only if they contain violence, use of force or threat.

Thus, the nature of the offence has been further concretised and the provision has narrowed in order to bring the judicial practice further in line with the case-law of the ECtHR. Accordingly, peaceful enjoyment of freedom expression in this respect will not any more constitute a crime.

The said Article reads before and after the amendment as follows:

Art. 7 § 2 Former Version	Art. 7 § 2 Amended Version
Anyone who makes propaganda of a terrorist organization shall be sentenced to imprisonment for a term of one to five years (2-)	Anyone who makes propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations' methods which contain violence, use of force or threat shall be sentenced to imprisonment for a term of one to five years (2-)

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Within the limits specified by the Turkish Constitution, by restricting the scope of the offenses through the amendments made by Law No. 6459 on Articles 6 and 7 of the Law No. 3713, statements that do not legitimize or praise the methods of terrorist organizations, including coercion, violence or threat, or that do not encourage them to adopt these methods, have been considered within the scope of the right to freedom of expression. For a detailed analysis of the issue in question, the Government would also like to mention that the action report in respect of the Incal group of cases, which was submitted to the Committee of Ministers of the Council of Europe by the Turkish Government can be referred¹. The said action report reflects the measures taken concerning the legislative amendments and implementation in Turkey regarding the freedom of expression, particularly in Articles 6/2 and 7/2 of the Law No. 3713 and Articles 215 and 216 of the Turkish Penal Code (Law No. 5237).

5. In Turkey, the trials are conducted in a fair and free manner and in compliance with international human rights law. Necessary safeguards are in place to ensure the protection of the right to a fair trial. The Turkish Constitution states that everyone has the right to claim and to defense, either as plaintiff or defendant, to have a fair trial before the judicial authorities by use of legitimate means and methods, and that all citizens have the right to have a fair trial within the scope of the right to legal remedies. In this vein, the principal of natural judge is guaranteed in the Constitution as well.

Article 138 of the Constitution stipulates that judges are independent in the conduct of their duties; they shall make judgment in accordance with the Constitution, laws, and their conviction in conformity with the law; no organ, authority, office or individual can give orders and instructions to the relevant courts and judges in the exercise of the judicial power; send them circulars; make recommendations and suggestions to them; no questions can be asked, no debates can be held or no statements can be made in the Legislative Assembly concerning the exercise of judicial power; thus, fundamental principles regarding judicial independence have been stated in detail.

Article 141 of the Constitution and Article 34 of the Code on Criminal Procedure (Law No. 5271) stipulate that decisions taken by the courts should be reasoned and contain information regarding its duration, legal authority and procedures which can be resorted to, in order to ensure a fair and impartial trial. Article 35 of Law No. 5271 states that the decision shall be read and rendered to the relevant person in his presence, and that it shall be notified to the relevant person in case of his absence at the trial. In this way, relevant persons are informed on the court decisions.

Within this scope, Article 141 of the Constitution and Article 182 of the Law No. 5271 foresee that hearings held by courts shall be open to the public and closed hearings can only be held in cases that it is absolutely required to do so due to matters related with public morality or public security. Thus, the principle of publicity is adopted with certain exceptions.

Furthermore, in order to enable a suspect or a accused to enjoy the right of defense properly, Article 150 of the Law No. 5271 stipulates that the suspect or the accused has the right to select a defense counsel in order to benefit from legal assistance or in case that he/she declares

¹ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168069483b

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inability to select a defense counsel and mentions his/her demand to this end, a defense counsel shall be assigned by the bar association.

On the other hand, with regard to the procedures and principles to be applied during the hearings, the principle of "directness" (without intermediary) is accepted as a requirement for the judge or for the court, who or which will give judgment, to evaluate the evidence in order to ensure a fair and independent judgment.

In this context, Article 216 of the Law No. 5271 stipulates that the evidences shown shall be discussed at the hearing and that during this discussion the participant or his attorney, the relevant public prosecutor of the Republic, the accused and his defense counsel or his legal representative shall be given the floor respectively, and that the last word before the judgment is given to the accused.

Article 217 of the said Law states that the judge can only base his/her decision on evidences brought to the hearing and discussed before the court; that the judge shall freely assess the evidences by his/her conscientious conviction; and that the attributed offence can be proven through all kinds of evidence, provided that they have been obtained in accordance with the law.

6. In line of above, The Government wants to submit following information regarding the judicial proceedings concerning the so-called "Declaration of Academics".

Regarding the relationship between the declaration entitled *"We will not be a party to this crime!"* and the PKK's call for help addressed to academics to its terrorist activities, the Government refers to its "Information Note on the Joint Urgent Appeal of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders dated 31 March 2016 (REFERENCE:UA, TUR 3/2016).

The Government summarized in its previous observations regarding REFERENCE:UA, TUR 3/2016, as stated below:

"While the security forces continued these counter-terrorism operations, one of the leaders of PKK/KCK made a call on 22 December 2015 demanding the intellectuals' support to the PKK's so-called "self-governance units".

Not long after, on 11 January 2016, 1128 academics signed and published a declaration ("the Declaration") which was titled as "We won't be a party to this crime". The Declaration was published in a period while security forces were fighting against terrorists and twenty days after the above-mentioned call. The declaration openly labeled the state forces' counter-terrorism operations as "illegitimate" and levelled unfounded accusations against the security forces such as committing "deliberate and planned massacres". Accordingly, authorized public prosecutors launched investigations against signatories to the Declaration pursuant to Articles 301 and 216 of the Turkish Penal Code and Article 7 of the Anti-Terrorism Law."

Istanbul Chief Public Prosecutor's Office initiated an investigation (File No. 2016/5734) on 14 January 2016 regarding the declaration entitled *"We will not be a party to this crime!"* published under the name of "Academics for Peace Initiative" on 11 January 2016, for the offence of making propaganda of the terrorist organization.

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A second declaration was published on 10 March 2016 while the said investigation was in progress.

On 15 March 2016, suspects [REDACTED], [REDACTED], and [REDACTED] were detained on remand in accordance with the decision (No. 2016/116) of İstanbul 5th Criminal Court of Peace.

A criminal case was initiated by İstanbul Chief Public Prosecutor's Office against the suspects [REDACTED], [REDACTED], and [REDACTED] based upon the indictment dated 22 March 2016 for the offence of making propaganda of the terrorist organization, before İstanbul 13th Assize Court (Case No.2016/65).

The section of the said indictment related to the pieces of evidence is as follows: *"The investigation report regarding Beşe Hozat's statement, co-chairman of the executive council of the PKK/KCK terrorist organization, dated 27 December 2015; the investigation reports regarding the declarations of the suspects dated 11 January 2016 and 10 March 2016 supporting the PKK/KCK terrorist organization; testimony and interrogation reports of the suspects and their arrest warrants and the entire content of the file."*

Again, within the scope of the investigation, suspect [REDACTED] was detained on remand on 31 March 2016 in accordance with the decision (No. 2016/133) of İstanbul 3rd Criminal Court of Peace.

A criminal case was initiated by İstanbul Chief Public Prosecutor's Office against the suspect [REDACTED] with the indictment dated 4 April 2016 for the offence of making propaganda of the terrorist organization before İstanbul 13th Assize Court (Case No.2016/65).

The section of the said indictment related to the pieces of evidence is as follows: *"The investigation report regarding Beşe Hozat's statement, co-chairman of the executive council of the PKK/KCK terrorist organization, dated 27 December 2015; the investigation reports regarding the declarations of the suspects dated 11 January 2016 and 10 March 2016 supporting the PKK/KCK terrorist organization; testimony and interrogation reports of the suspects and their arrest warrants and the entire content of the file (The evidence within the scope of the file case No. 2016/65 of the Court)"*

The case filed against [REDACTED] was merged with the case No. 2016/65 of İstanbul 13th Assize Court in which the other suspects [REDACTED], [REDACTED], and [REDACTED] were tried.

[REDACTED], [REDACTED], and [REDACTED] and [REDACTED] were released pending trial upon the decision taken at the hearing dated 22 April 2016.

İstanbul 13th Assize Court decided to halt proceedings on 22 April 2016 due to the possibility of the change in the assessment of the nature of the suspects' actions and constitute the crime defined in Article 301 of the Turkish Penal Code.

In accordance with Article 301/4 of the Turkish Penal Code, the file was transferred to İstanbul Chief Public Prosecutor's Office to get an inquiry permission from the Minister of Justice.

In this context, İstanbul Chief Public Prosecutor's Office issued a summary investigation report on 1 September 2016 with inquiry permission request pursuant to Article 301/4 of the Turkish Penal Code.

The suspects who signed the declaration have given their depositions in the scope of the investigations. The decision for the separation of the cases was given on 21 September 2017.

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As of 5 January 2018, separate cases were filed against 210 suspects in different courts for the offence of making propaganda of the terrorist organization. Investigations are being conducted for other suspects.

7. The Government would like to recall that the legal remedies are available in the Turkish law, both at the level of internal law and international law.

In this context, as the trial processes are concluded, the relevant persons can apply to the regional courts of justice and to the Court of Cassation as legal remedies, or they can also submit an individual application to the Constitutional Court and also to the ECtHR.

Furthermore, all national and international authorities should respect independent judicial decisions and the outcome of the trials should be awaited.