



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 in 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 from Special Procedures, dated 26 August 2020 (REF: OL TUR 13/2020), has the honour to enclose herewith an information note compiled by relevant Turkish authorities, in reply to the information request stated in the aforementioned letter.

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, 22 October 2020

Encl: As stated



Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10

**INFORMATION NOTE IN REPLY TO THE JOINT COMMUNICATION FROM THE
SPECIAL PROCEDURES DATED 27 AUGUST 2020 (OL TUR 13/2020)**

Observations on national legal framework for countering terrorism

1. Turkey pursues a simultaneous fight against multiple terrorist organizations operating within its territory and along its borders, namely FETÖ, PKK, PYD/YPG, DHKP-C and DAESH. Turkey's fight against terrorism, which is in line with its obligations under international law, protects first and foremost the right to life and enjoyment of fundamental rights of its citizens and many others in its region. Turkey is an active member of the coalitions and efforts on countering terrorism and organized crime.

2. All measures in the context of the fight against terrorism that may have actual or potential effects on fundamental rights are subject to a three-fold test of legality, necessity and proportionality. Strict adherence to the principle of rule of law is paid utmost attention in this vein.

3. While "terrorism" lacks a comprehensive and agreed treaty definition under international law, Turkey has developed its own national formula in line with international standards and based on its decades-old experience in fighting terrorism. The definition, as set out in the first article of the Anti-Terror Law (ATL-No.3713), is a clear combination of both objective and subjective elements which are emphasized in various existing definitions. That is, it contains the elements of use of force and violence on one hand, and of pursuing a particular purpose, such as, *inter alia*, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, on the other¹.

The ATL frames "terrorism" primarily by an organization's resort to the use of "force and violence" which can in no way be deemed as a legitimate and/or peaceful way for exercising rights and freedoms of any kind.

4. Quite contrary to the point raised in the joint communication, neither elements of a particular crime nor any sanction are set out in the aforementioned article, but the notion of "terrorism" is depicted. This definition is taken into account as to whether a particular group could be designated as a terrorist organization. Objective elements (*modus operandi*) of the definition distinguish terrorist organizations from any other organization pursuing political ends.

5. In order for an act to be defined as terrorism, one of the offences listed in articles 3 or 4 of the ATL should be committed. While aforementioned articles provide an exhaustive list of "absolute terror crimes" and "crimes committed with the motive of terrorism", respectively, none of the articles 216, 299 and 301 of the Turkish Penal Code (TPC-No.5237) fall in this scope.

¹ "Definition of Terrorism

Article 1: Terrorism is any kind of criminal act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by using force and violence, and by one the means of pressure, intimidation, oppression or threat."

On the other hand, forming or commanding an armed terrorist organization, or membership to such groups constitute an independent crime under the article 314 of the TPC. That is why and how any individual who has taken part within the hierarchical structure of the organization is held responsible even if they have not committed any other crime in furtherance of the aims of the terrorist organization. In Turkish criminal justice system membership to a criminal/terrorist organization is described as one of the "concrete endangerment offences".

6. Article 314 covering armed terrorist organizations is applied in conjunction with article 220 which pertains to other criminal networks, be them armed or unarmed. The latter presents main criteria regarding the structure of criminal organizations, as well as two legal presumptions, in its sixth and seventh paragraphs, for those who are not members but commit offences on behalf of the criminal organization and for those who intentionally aid and abet the organization, without taking place within the hierarchical structure of it.

Işıkırık v. Turkey judgment of the ECtHR does not concern the crime of membership to criminal organizations as a whole or the whole notion of "terrorist offender" which is clustered into three groups by the second article of the ATL, but the legal presumption set forth in the sixth paragraph of article 220 under TPC. Factual background of the judgment dates back to 2007 and it evaluates the application of the sixth paragraph of article 220 by national courts in 2009 which was amended later on, in 2013.

7. According to the letter of the Law and well established case-law of the Court of Cassation, in order for a particular organization to be regarded as a criminal organization within the meaning of article 220 of the TPC, the group has to have at least three members with a tight or loose hierarchical connection between them. An "abstract link" between the members is not sufficient. The members should have a common intention to perpetrate certain crimes even if envisaged crimes have yet to be committed. Moreover, the group has to present continuity in time and due to its nature while the structure of the group, the number of its members, tools and equipment at the disposal of the group should be sufficient for the commission of the envisaged crimes.

8. The main distinction between armed terrorist organizations and other criminal groups lies at the purpose of the formations. Terrorist organizations, as indicated in the first paragraph of article 314 of the TPC, are the criminal formations established for the commission of certain crimes, namely, the offences against state security and the offences against the constitutional order.

9. The crimes of "dissemination of terrorist propaganda" and "printing and disseminating declarations made by terrorist organizations" have not been formulated as broadly as claimed in the joint communication. Justifying, praising or inciting not the abstract existence of any terrorist organization but the modus operandi of such networks, conducive to hatred and violence is prohibited and penalized under the relevant provisions.

10. As part of the efforts for expanding an enabling environment for the exercise of freedom of expression and following ECtHR case-law in this regard, articles 6(2) and 7(2) of the ATL have already been amended to prevent any possible restrictive application with a view to safeguarding expression of non-violent ideas and to attain a higher level of legal certainty as well.

With those amendments made in 2013, elements of both crimes have become more concrete and clearer. The criterion indicating that statements subject to the crime of propaganda should be delivered “in a manner which justify or praise terrorist organization’s methods which include force, violence, or threat, or which incite the use of such methods” was included in the provision. Likewise, inclusion of the same elements into article 6(2) of the ATL limited the scope, underlining that printing and disseminating declarations made by terrorist organizations shall give rise to criminal liability if they "justify or praise terrorist organizations' methods which include force, violence or threat, or incite the use of such methods".

11. With the same amendments, publicly known as the "Fourth Judicial Package", a new paragraph was added to article 7 of the ATL. Introduction of this paragraph excluded the perpetrators of three different crimes (printing and disseminating declarations made by terrorist organizations and dissemination of terrorist propaganda, as defined under the ATL; and participating in an unlawful demonstration as defined by article 28/1 of the Public Demonstrations Law, No.2911) thereof from the application of article 220/6 (and Article 314/2) of the TPC, even if those crimes are committed on behalf of the terrorist organization. Limiting the application of article 314/2 in conjunction with article 220/6 of the TPC has further broadened the scope of the freedom of expression.

12. Lastly, following the adoption of the new Judicial Reform Strategy covering the period 2019-2023 which was announced last year, Turkish Grand National Assembly passed on 24 October 2019 the first legislative package bringing a number of amendments which aimed to further promote and protect rights and freedoms in accordance with the Strategy document. Among other positive developments facilitated by those amendments, an explicit provision underscoring that statements made within the limits of providing information or made with the purpose of criticism could not be criminalized was added to article 7/2 of the ATL.

13. Apart from the general observations above, points on some other issues raised in the joint communication and which diverge from the actual wording or interpretation of the legislation in force are as follows:

a. The Law No.7145 has not granted extra-ordinary powers to the governors but limited their existing powers. While governors already had the authority to impose curfews in case of serious disruption of public order and security, the amendment restricted that power by laying down its conditions and increased the legal certainty.

b. Severity or proportionality of punishments cannot be assessed independently from the integrity of the criminal justice system as a whole, particularly without giving due consideration to the rules of individualization and execution of penalties. The fact that the lower limit of a sentence envisaged for a particular crime appears to be one year imprisonment in the letter of the law does not necessarily mean that the perpetrator would in any case receive it. Nor does it result in the execution of the sentence in penitentiary institutions in all cases.

c. Holding suspects under police custody without charge is not legally possible; nor is the case. Taking suspects into custody requires necessity to resort to such a measure in the course of investigation and depends on the presence of concrete evidence indicating the suspicion that a crime has been committed, according to article 91/2 of the Criminal Procedure Code (CCP-No.5271). Law enforcement officers are obliged to promptly inform the individuals whom they

apprehend, of the grounds for apprehension and charges regardless of the type of crime committed. Non-compliance of this obligation stipulated by article 6 of the By-Law on Apprehension, Custody and Statement-Taking, constitutes a legal ground for claiming compensation under article 141 of the CCP. The Law No.7145 has brought no exception to those rules/obligations.

d. Disciplinary sanctions including dismissals decided and imposed by competent administrative authorities are not immune to judicial scrutiny. Decisions pertaining to dismissal of public officials were subject to administrative and/or judicial oversight even during the state of emergency. The Law No.7145 has brought no exemption in this vein.

e. As for the procedural right of the accused to challenge testimonies against him, nondisclosure of identity has not been anticipated in relation to witnesses but to informants, under article 14 of the ATL. Witness protection measures, procedure of hearing witnesses under protection and the exercise of cross-examination rights in legal proceedings are covered by the CCP and the Law on Witness Protection.

14. Despite various challenges posed by several terrorist organizations, Turkey's commitment to strike a proper balance between protecting fundamental freedoms and maintaining public order and security remains unabated.