



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 the Joint Communication from Special Procedures dated 1 March 2021 (AL TUR 4/2021), has the honour to enclose herewith the observations provided by 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, 30 April 2021



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**

(Reference: AL TUR 4/2021)

1. With reference to the letter of the Special Procedures dated 1 March 2021 regarding Erol Önderoğlu, the Government would like to submit its observations herein below as a follow-up to its reply to the previous communication UA/TUR 4/2016 on 4 August 2016. The Government would like to state that the information and observations submitted in the previous reply remains relevant and should be taken into consideration along with the new information and observations provided in this present reply.

I. OVERVIEW

2. The Constitution of the Republic of Turkey imposes a positive obligation upon the state to ensure the welfare, peace and happiness of the people and the society, to protect the Republic and democracy, to remove the obstacles that limit the fundamental rights and freedoms of the persons. As a requirement of its positive obligations, the State takes the necessary measures to protect its people from terrorism.

3. In this context, the national authorities are resolutely combatting, in accordance with the rule of law and with due regard to the criteria of necessity and proportionality, the terrorist organizations that threaten the national security and the public order by targeting the security forces and the civilians.

4. Criminal investigations and prosecutions related to terrorism charges are conducted by independent and impartial judicial authorities with respect to international instruments and European Court of Human Rights (ECtHR) jurisprudence. Within the specific circumstances of each case, a distinction is made between expressions within the right to express opinions freely, which includes speeches that offend or disturb the state or any segment of society, and expressions that absolutely and seriously incite violence and hatred.

5. In this vein, publishing a terrorist organization's declarations/statements or making its propaganda that praise, legitimize or encourage the methods involving force, violence or threats of the terrorist organization are listed as crimes in the Turkish legislation.

6. Turkey pursues a simultaneous fight against multiple terrorist organizations operating within its territory and along its borders, namely FETO, PKK, PYD/YPG, DHKP-C and DAESH. Turkey's fight against terrorism which is in line with its obligations under international law has the main goal of protecting first and foremost the right to life and enjoyment of fundamental rights of all people living in its territory.

7. The PKK terrorist organization, which caused the loss of more than 40.000 lives, is a terrorist organization committing murder and injuries towards civilians, soldiers, police, women and children; robbery, extortion, latrocination, raiding villages, police stations and arson along with many illegal activities such as money laundering, arms, human and drug trafficking. In many countries worldwide as well as in the European Union since 2002, the PKK is listed as a terrorist organization.

II. FACTS

8. Erol Önderoğlu was charged with making propaganda of a terrorist organization, public incitement to commit crime and praising criminals under Anti-Terror Law, Penal Code and Press Law, for the articles published in *Özgür Gündem* newspaper that are considered to have legitimized PKK violence and praised persons who had committed crimes in the name of this terrorist organization, or otherwise engaged in PKK propaganda.

9. On 17 July 2019, Istanbul 13th Assize Court found that there is no evidence suggesting that Önderoğlu and other defendants actually did editing work of the mentioned newspaper, and that [REDACTED], who is the responsible editor-in-chief of the newspaper and has a separate ongoing prosecution about himself, should be held responsible for the mentioned articles. The first instance court thus ordered Önderoğlu's acquittal.

10. On 20 October 2020, the Istanbul Regional Court, upon appeal, found the decision unlawful and reversed the decision on grounds that the defendants' intents on their contribution to the articles were not evaluated by the Assize Court, that [REDACTED] was not questioned on whether he gave information to the defendants about the articles and that the decision was given with lack of review of evidence as İnan Kızılkaya's ongoing case could have been merged with the present case and the evidence could have been evaluated altogether.

11. After the reversal decision, the case has been sent back to the Istanbul 13th Assize Court, where Önderoğlu's prosecution is ongoing.

III. OBSERVATIONS

Regarding criminal proceedings against Önderoğlu

12. The Turkish legal system consists of three-level judiciary namely first instance courts, Regional Courts (Court of Appeals) and Court of Cassation. In case a decision given by a first instance court is appealed to the higher court in time, the decision from the first instance court is not finalized. Whether a person has committed a crime or not, shall be finalized after the exhaustion of legal remedies.

13. In the present case, the first instance court's decision was not finalized as the Public Prosecutor, in line with the provisions prescribed in Criminal Code of Procedure (CCP), appealed the first instance court's decision to the Istanbul Regional Court within his authority given by the law.

14. The criminal proceedings conducted against Önderoğlu represents a single trial, including the legal remedies. He is not prosecuted twice for the same offenses. The acquittal decision given by the first instance court was not finalized as the decision was appealed. The decision from the first instance court was reviewed by the higher court in accordance with Article 14/5 of International Covenant on Civil and Political Rights (ICCPR). Therefore, at this stage, the proceedings that are carried out transparently by the independent and impartial courts pursuant to CCP and in line with the European Convention on Human Rights (ECHR) and ICCPR, needs to be respected.

15. Önderoğlu and the other defendants have been effectively able to defend themselves, put forth issues in their favour and benefit from legal aid. At the end of the proceedings, the parties have the right to apply for legal remedies as well as the right to make an individual application to the Constitutional Court, which is an effective domestic remedy, as held by the ECtHR.

Regarding freedom of expression

16. Freedom of expression is not an absolute right and is not without limits. While everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, the exercise of these freedoms may be restricted for the purposes of national security and public order as per Article 26 of the Constitution, Article 10 of ECHR and Article 19 of the ICCPR.

17. ECtHR, in its jurisprudence, states that the expressions including hate speech, inciting people to commit a crime or praising violence shall fall outside the protection of the Convention. In the Court's judgment of *Gürbüz and Bayar v Turkey*¹, a case also involving similar articles that praised and legitimized PKK violence published in *Özgür Gündem* and mostly contains the same circumstances of the present case, it was stated that statements that are against the basic values of justice and peace and that also include the elements of praising or inciting violence which can be regarded as hate speech cannot be considered within the scope of freedom of expression. The Court, concluded that the interference with the applicants' freedom of expression carried legitimate purposes in terms of the protection of national security, territorial integrity, public order and the prevention of crime in terms of Article 10/2 of the Convention and decided that there is no violation of applicants' freedom of expression.

18. In this context, the Government is of the view that the charges against Önderoğlu have been levied with the aim of protecting the democratic social order and combatting terrorism and the judicial proceedings conducted against him on suspicion of committing aforementioned offenses constitutes a legitimate interference to his freedom of expression in accordance with the ECHR and ICCPR.

19. There are no convicts and detainees held in penal institutions merely for press activities. As for the number of journalists that have been prosecuted for terrorism related charges, there are no such statistics available on the professions of the persons prosecuted. However, it is found that some convicts and detainees who claim to be press employees, do not actually possess press credentials or have relevant records registered to the authorities, and are falsely presented as members of the press.

Regarding Anti-Terror legislation

20. The Government would like to remind the Rapporteurs that all aspects on Turkish anti-terror legislation and implementation thereof was thoroughly addressed in its reply dated 22 October 2020 to the Joint Communication OL TUR 13/2020 from Special Procedures.

21. As regard to Article 7/2 of the Law no. 3713, with the amendment made in 2013, the act of making propaganda of terrorist organizations has been circumscribed as an offence only if it justifies or praises the methods which include force, violence or threat, or which incite the use of such

¹ *Gürbüz and Bayar v. Turkey* (8860/13), dated 23 July 2019. The judgment of the ECtHR is available at: <http://hudoc.echr.coe.int/eng?i=001-194948>

methods. With the amendment made in 2019, the expressions that do not exceed the limits of reporting or made for the purpose of criticism shall not constitute a crime.

22. Legal elements of terrorism related offenses are foreseen in the relevant legislation in a clear, predictable and understandable way and are consistent with the international human rights law. The ECtHR, in his *Altay v Turkey* decision², in which the applicants were charged with making propaganda for a terrorist organization for their publications under Article 7/2 of the Law no. 3713, accepted that the intervention to the applicants' freedom of expression was made pursuant to foreseeable provisions of the law and decided that the intervention held legitimate purposes of protecting national and public security under Article 10/2 of the Convention.

Regarding Judicial Reform Strategy and Human Rights Action Plan

23. The Judicial Reform Strategy, which serves as a roadmap for the works carried out in the field of justice, was published in 2019. The objectives and activities in the Strategy are to strengthen the rule of law, to protect and promote rights and freedoms more effectively, to strengthen the independence and impartiality of the judiciary, to increase transparency, to simplify judicial processes, to improve access to justice, to strengthen the right to defense, to increase effectiveness of the right to trial within a reasonable time and to raise standards applied by the courts with regard to freedom of expression. As part of the Reform Strategy, the aforementioned amendment to Article 7/2 of Law no. 3713 was introduced.

24. With the Human Rights Action Plan (HRAP), which was announced on 2 March 2021, establishment of a strong, accessible and effective human rights protection system is determined as a primary goal. The Action Plan is prepared with broad participation of all stakeholders including NGOs.

25. HRAP includes comprehensive set of activities to raise the standards of freedom of expression and press freedom. In this context, reviewing the relevant the legislation in light of the human rights standards, facilitating the professional activities of journalists and ensuring the safety of journalists as an overarching principle are specified among the planned activities.

² *Altay v. Turkey* (11236/09), dated 9 July 2019. The judgment of the ECtHR is available at: <http://hudoc.echr.coe.int/eng?i=001-192210>

IV. CONCLUSION

26. Erol Önderoğlu was charged with making propaganda of a terrorist organization, public incitement to commit crime and praising criminals under Anti-Terror Law, Penal Code and Press Law. Judicial proceedings against him are not conducted due to any other considerations. The Turkish Constitution as well as ICCPR enshrine the principle of equality of all persons before the law. While everyone is under the guarantee of the State in terms of protection and promotion of fundamental rights and freedoms at both national and international level in accordance with the requirements of democratic society; this guarantee does not give an absolute immunity from being subjected to the law. In this respect Önderoğlu, as with anybody suspected of the same crime would be, was investigated, is being prosecuted and tried by the independent and impartial judicial courts.

27. Önderoğlu is not being prosecuted twice for the same offences. As mentioned above, the criminal proceedings conducted against him represents a single trial, including the legal remedies.

28. Considering the available domestic remedies that are yet to be exhausted and the fact that Önderoğlu's criminal proceedings is currently ongoing before the competent courts, the Government is of the view that reaching conclusions on the present case by the Special Procedures before the proceedings are finalized, would be inappropriate.

29. No one in Turkey is being subjected to investigation or prosecution for solely their journalistic activities. Judicial proceedings conducted by the independent and impartial courts with regard to offenses of making propaganda of a terrorist organization or otherwise praising and legitimizing terrorist organization's activities are only evaluated within the scope of the subject matter of the offense. These proceedings are not initiated due to any other considerations and are well in line with Turkey's international obligations and freedom of expression. The Government, in this respect, considers that the allegations on repeated judicial harassment or deliberate and systematic pattern of judicial prosecution of the journalists have neither legal nor factual basis.

30. The Government would further like to remind the Rapporteurs of their responsibility to study each issue on which they receive information impartially and within that issue's particular circumstances before hastily making generalizations to suggest systematic pattern of human rights violations. The Government expects the Rapporteurs to respect the ongoing judicial processes conducted by the domestic courts and uphold their responsibilities with regard to the objectivity in their communications.

31. Terrorism is the most severe threat to democracies. Spreading messages and glorifying the violent acts of a terrorist organization are not within the scope of freedom of expression in a democratic society.