



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

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The Permanent Mission of the Republic of Türkiye 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 22 February 2022 (AL TUR 2/2022), has the honour to enclose herewith the observations provided by relevant Turkish authorities.

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

Geneva, 21 April 2022

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 2/2022)

1. With reference to the joint letter of the Special Rapporteurs on the situation of human rights defenders; on the promotion and protection of the right to freedom of opinion and expression; and on the promotion and protection of human rights and fundamental freedoms while countering terrorism, dated 22 February 2022 regarding Öztürk Türkdoğan, the Government would like to submit its observations herein below.

I. OVERVIEW

2. The Constitution of Türkiye 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 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 that praise, legitimize or encourage the methods involving force, violence or threats of a terrorist organization and making propaganda of a terrorist organization or otherwise publicly degrading the nation, the republic and the organs and institutions of the State are listed as crimes in the Turkish legislation just as in some other member States to the International Covenant on Civil and Political Rights (ICCPR).

6. The PKK terrorist organization that Türkiye has been fighting for 40 years 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 the European Union since 2002, the PKK is listed as a terrorist organization.

II. FACTS

7. Öztürk Türkdoğan was investigated for “*being a member of PKK armed terrorist organization*”, “*degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State*” and “*insulting a public officer due to performance of his public duty*” offenses under Articles 314, 301 and 125 of the Turkish Penal Code (TPC), respectively.

Criminal proceedings under the “membership of an armed terrorist organization” offense

8. An investigation was launched against Türkdoğan based on his interviews on various newspapers and TV channels that are deemed to disrepute the anti-terrorism operations conducted against PKK terrorist organization.

9. Under the investigation, Türkdoğan’s correspondence were listened to and recorded in accordance with Article 135 of the Criminal Code of Procedure (CCP), with the decision of the judge. The records revealed that Türkdoğan, with purposes aligned with PKK’s agenda, contacted some members of the press in order to convince them to spread stories that intend to legitimize PKK’s unlawful activities.

10. In light of these findings, Türkdoğan was taken into custody on 19 March 2021. After his statement was taken in the presence of his lawyers, judicial control measures which include a travel ban abroad and an obligation to report to the authorities by giving signature to the nearest police station, were decided to be applied.

11. Türkdoğan’s obligation to report to the authorities was lifted on 30 November 2021.

12. On 16 December 2021, a public action was brought against Türkdoğan. The indictment against him includes evidence of money transfers to persons who were subjected to legal action due to membership to an armed terrorist organization, correspondence records, digital records obtained in searching his house and various publications online supporting PKK’s agenda.

13. On the last hearing dated 19 April 2022, Türkdoğan was acquitted from the aforementioned charges. His travel ban was also lifted with the decision.

Criminal proceedings under the “degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State” offense

14. Türkdoğan was investigated under the aforementioned offense based on his statements in a declaration published on the *İnsan Hakları Derneği/Human Rights Association* (İHD) website.

15. On 30 December 2021, a public action was brought against him. Türkdoğan’s criminal proceedings on the abovementioned offense continues before the Ankara 24th Assize Court.

Criminal proceedings under the “insult against a public officer due to the performance of her/his public duty” offense

16. On 9 December 2021, a public action was brought against Türkdoğan under Article 125 of the TPC for his comments published on İHD website.

17. Türkdoğan’s criminal proceedings on the abovementioned offense, continues before the Ankara 60th Assize Court.

Individual application to the Constitutional Court

18. On 10 May 2021, Türkdoğan lodged an individual application to the Constitutional Court, claiming his rights were violated during the search on his house conducted under the investigation. The application is pending.

III. OBSERVATIONS

Regarding Anti-Terror legislation

19. 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 the Special Procedures.

20. “Terrorism” is clearly defined in Article 1 of the Law on Combating Terrorism no. 3713 as follows: “Any kind of 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 means of pressure, force and violence, terror, intimidation, oppression or threat.”

21. As for Article 314 of the TPC titled “*Armed Organization*”, for an organization to be considered as an armed terrorist organization, it is required to be established with the purpose of committing the crimes listed in the TPC under titles “*Offenses against State Security*” and “*Offenses against the Constitutional Order and Its Functioning*”; sufficiently armed or have the means to use such arms to commit such offenses; alongside with the requirement to match the conditions set out under Article 220 of the TPC titled “*Establishing Organization for the Purpose of Committing Crimes*”.

22. Article 7/1 of the Law on Combating Terrorism no. 3713, regulating the offenses of establishing, managing or being a member of an armed terrorist organization, specifies that the offenders shall be punished according to provisions of Article 314 of TPC.

23. The objective and subjective elements of “*being a member of an armed terrorist organization*” crime, had been determined through established jurisprudence of the Court of Cassation. As such, knowingly and willingly participating in the activities of an armed terrorist organization for the purpose of committing the crimes constitutes the subjective element of the crime. On the other hand, the existence of at least 3 members within the organization, a hierarchical bond between the members, gathering under the same purposes, continuity of activities and having the means to commit crimes are determined as the objective elements of the crime.

24. Article 6/2 of the Law on Combating Terrorism on the other hand, specifies that, only statements and expressions that legitimize, praise or encourage terrorist organizations’ methods of force, violence or intimidation are punishable under the said Law.

25. In this respect, the Government is of the opinion that the 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.

Regarding factual grounds of the charges against Türkdoğan for the terrorism related charges

26. The evidence against Türkdoğan and the factual grounds for the charges levied against him are mentioned above and after examination by the independent judiciary, he was acquitted from the said charges.

27. States have positive obligation to protect the public from terrorist threats as their responsibility to protect the right to life of all individuals subject to their jurisdiction and to ensure the rights recognized in human rights instruments they are party to, such as European Convention on Human Rights (ECHR) and ICCPR. Under this obligation, anti-terror legislation was formed and it applies to any terrorist threat, non-discriminately. In this respect, Türkdoğan, as with anybody suspected of the same crimes would be, was investigated and prosecuted by the independent and impartial judicial courts, in accordance with the domestic legislation and international law.

28. Türkdoğan has been effectively able to defend himself, represent himself with his lawyers, put forth issues in his favour in the proceedings. He is able to apply for legal remedies as well as lodging an individual application to the Constitutional Court, which he already did.

Regarding “insult” charge

29. Freedom of expression is not an absolute right 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 protection of the reputation or rights of others as per Article 26 of the Constitution, Article 10 of the ECHR and Article 19 of the ICCPR.

30. While criticizing public officials and evaluating their activities are within the limits of freedom expression in a democratic state of law, it is necessary to protect the officials against humiliating attacks aimed at harming their functions and dignity while performing their duties. The Constitutional Court states that the honour and reputation of an individual is included within the scope of "spiritual existence" which is stipulated in Article 17 of the Constitution. The state is obliged not to intervene in honour and reputation which are a part of the spiritual existence of an individual and to prevent the attacks of third parties.¹

¹ Judgment of the Constitutional Court dated 16 July 2014. Nilgün Halloran, App no: 2012/1184 § 35. The judgment of the Constitutional Court is available at: <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2012/1184?Dil=en>

31. According to the ECtHR, while the limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual, the Convention enables the reputation of all individuals to be protected and this protection extends to politicians too.² In *Prunea v. Romania*, a case concerned an article written by the applicant which was considered as defamation against a parliamentary election candidate by the domestic authorities, the ECtHR stated that the article was an attack on the candidate's reputation, reaching the requisite level of seriousness and causing prejudice to personal enjoyment of his right to respect for private life and found no violation of freedom of expression in the intervention by the authorities.³

32. The Constitutional Court, in its jurisprudence, evaluates whether a fair balance was struck by judicial bodies between the freedom of speech and protecting the individual's reputation. In this evaluation, the Court applies the criteria set by ECtHR in its jurisprudence which stated as follows: a) contribution of reports or expressions in the press to a debate of general interest which concerns public, b) level of famousness of the person targeted and the aim of the report, c) prior conduct of the person concerned, d) method of obtaining the information and its veracity, e) content, form and consequences of the publication and f) severity of the sanction imposed.⁴

33. The Constitutional Court states that the public bodies have discretion over the restrictions in relation to the freedom of expression. However, this sphere of discretion is also subject to the scrutiny of the Constitutional Court. During the scrutiny which will be conducted within the framework of the criteria of conforming to the requirements of the democratic order of the society, proportionality and not infringing upon the essence, a detailed assessment which differs according to various elements such as the type, form and contents of the expression, the time when it is expressed, the quality of the reasons for restriction is required instead of a general or abstract evaluation.⁵

² *Lingens v. Austria* (9815/82), dated 8 July 1986. The judgment of the ECtHR is available at: <https://hudoc.echr.coe.int/eng?i=001-57523>

³ *Prunea v. Romania* (47881/11), dated 8 January 2019. The judgment of the ECtHR is available at: <https://hudoc.echr.coe.int/eng?i=001-188987>

⁴ *Axel Springer AG v. Germany* (39954/08), dated 7 February 2012. The judgment of the ECtHR is available at: <https://hudoc.echr.coe.int/eng?i=001-109034>

⁵ Judgment of the Constitutional Court dated 23 January 2014. App no: 2013/2602. § 48. The judgment of the Constitutional Court is available at: <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/2602>

34. The Government, would like to remind the Special Rapporteurs that the judicial proceedings are ongoing before the first instance court, which is bound to consider the Constitutional Court’s jurisprudence in giving its decisions. Whether the charges against Türkdoğan respected to criteria of necessity, proportionality or non-discrimination and whether his rights were violated is subject to the examination by the judiciary.

Regarding “degrading Turkish Nation” charge

35. According to Article 301/1 of the TPC, a person who publicly degrades the Turkish Nation, State of the Turkish Republic, Turkish Grand National Assembly, the Government of the Republic of Türkiye and the judicial bodies of the State shall be sentenced a penalty of imprisonment for a term of six months to two years. Paragraph 3 of the said Article states that the expression of an opinion for the purpose of criticism does not constitute an offence.

36. The Government would again like to remind the Special Rapporteurs that the judicial proceedings are ongoing before the first instance court and will be subject to evaluation by the independent courts in terms of freedom of expression in accordance with the criteria mentioned above.

Regarding Judicial Reform Strategy and Human Rights Action Plan

37. 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, with the amendment made in 2019 to Article 7/2 of Law no. 3713, the expressions that do not exceed the limits of reporting or made for the purpose of criticism shall not constitute a crime.

38. 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.

39. HRAP includes comprehensive set of activities to raise the standards of freedom of expression. In this context, reviewing the relevant the legislation in light of the human rights standards are specified among the activities.

IV. CONCLUSION

40. 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, Türkdoğan was investigated, is being prosecuted and tried by the independent and impartial judicial courts, non-discriminately.

41. In light of the facts and observations above, the Government is of the view that the charges against Türkdoğan 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 “*insulting a public officer due to performance of his public duty*” and “*degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State*” constitutes a legitimate interference to his freedom of expression in accordance with the obligations of Türkiye under domestic and international law.

42. Considering the fact that Türkdoğan’s criminal proceedings are 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.