

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/18 and 31/3.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the conviction of journalist Ayla Albayrak for her journalistic activities on the basis of counter-terrorism legislation.

Ms. Ayla Albayrak is a Finnish-Turkish citizen, residing in Germany. She has since 2010 worked as a reporter for *The Wall Street Journal*.

Concerns at the use of overbroad counter-terrorism legislation and emergency decrees to detain journalists, academics and human rights defenders have previously been raised in a number of communications to your Excellency's Government by Special Procedures Mandate holders, as well as by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his report on his official visit to Turkey in November 2016 (A/HRC/35/22/Add.3). We thank your Excellency's Government for the replies received but remain gravely concerned at the continued arrest, detention and criminal prosecution of journalists and human rights defenders based on legislation that is incompatible with international human rights law.

According to the information received:

In August 2015, *The Wall Street Journal* published an article reported by Ms. Albayrak, about the urban warfare in the southeast of Turkey, entitled "*Urban Warfare escalates in Turkey's Kurdish-Majority Southeast*". The story was based on Ms. Albayrak's interviews with authorities and private individuals in the region following her travel to Sirnak province in South-east Turkey. The report was published after editorial review and in accordance with the standards of *The Wall Street Journal*.

In the days following the publication of the article, a number of Turkish language websites reprinted in their own articles selective quotes from the *Journal* article. Neither *The Wall Street Journal* nor Ms. Albayrak had authorized these websites to publish the articles.

On 24 August 2015, Turkish authorities identified 24 such articles on Turkish language websites to which they requested that the Telecommunications Directorate block access.

On 23 November 2015, Ms. Albayrak received notice that the public prosecutor in Silopi had initiated an investigation into whether or not she had aided and abetted terrorism by publishing the August article.

On 26 November 2015, Ms. Albayrak attended an Istanbul police station where she gave a statement denying the allegations against her. She made clear to the police that the *Journal* article was a factual piece which in no way sought to promote a terrorist organization, and that she had no connection to the websites that had selectively quoted the report. Moreover, the *Journal* article notes that the PKK is a designated terrorist organization by both Turkey and the United States.

On 14 April 2016, the public prosecutor of Cizre, to whom the public prosecutor of Silopi had transferred the case, filed an indictment against Ms. Albayrak alleging that she had breached Article 7(2) of Law No. 3713 on Counter-Terrorism. Specifically, it was alleged that by publishing the article, Ms. Albayrak had promoted, justified or encouraged the practices of the PKK.

On 18 April 2016, the High Criminal Court of Cizre held the indictment to be admissible. The court also ordered that arrangements be made for Ms. Albayrak to give testimony by video link from an Istanbul court on 27 October 2016, and for the Anti-Terror Police to provide a report on Ms. Albayrak.

On 10 October 2016, the Anti-Terror Police provided the report and found that there was no connection between Ms. Albayrak and the PKK or any of its members, other than that she had carried out interviews of its armed wing as part of her work for *The Wall Street Journal*.

On 25 October, Ms. Albayrak's lawyers wrote to the court informing that neither the indictment nor the writ requiring Ms. Albayrak to attend a video conference facility at an Istanbul court had been served. As such, they requested an adjournment.

At the 27 October 2016 hearing, the Cizre court issued a "catch warrant" ordering the Turkish police to detain Ms. Albayrak so as to compel her appearance and testimony at court despite the fact that her lawyers had given an explanation as to why her testimony could not go ahead. A new hearing date was set for 24 January 2017.

On learning of the “catch warrant”, Ms. Albayrak’s lawyers applied to the Cizre court for it to be quashed on the basis that Ms. Albayrak would have appeared at the hearing but for the failure to serve the indictment to her. This submission was accepted on 8 November 2016, where the Cizre court quashed the “catch warrant” and re-sent the original writ and indictment so as to facilitate Ms. Albayrak giving evidence from the Istanbul court to the Cizre court by video link on 24 January 2017.

At the hearing on 24 January 2017, Ms. Albayrak testified in her defence from the Istanbul courthouse. Following Ms. Albayrak’s evidence and submissions by her lawyers, the prosecution requested an adjournment to prepare a response. The request was granted and a new hearing was set for 21 March 2017.

At the hearing on 21 March 2017, the prosecutor applied for and was granted an additional adjournment and a new hearing date was set for 30 May 2017. At the 30 May hearing, without raising any new evidence or arguments, the prosecution repeated their allegations that Ms. Albayrak’s article justified or promoted the methods of the PKK’s armed wing. In response, Ms. Albayrak’s lawyers requested adjournment in order to respond. This was granted a new hearing date was set for 28 September 2018.

In advance of the 28 September hearing, Ms. Albayrak’s lawyer submitted a written response. The hearing itself was very brief, the purpose of which was to set the date for the next hearing on 10 October for the giving of the verdict.

On 10 October 2017, the final hearing at first instance was held. The prosecution repeated the allegations against Ms. Albayrak and asked for the court to convict her of the offences with which she was charged. The Court ruled that the article constituted “propaganda for a terrorist group” in violation of Article 7/2 of Law No. 3713, and sentenced Ms. Albayrak to 2 years and 1 month imprisonment.

On 8 November 2017, the court provided a “Reasoned Judgment” which set out the reasons for Ms. Albayrak’s conviction, in particular focusing on Ms. Albayrak’s alleged failure to condemn the Kurdish separatists on whom she reported. In addition, it focused on the article’s description of them as “*Kurdish youth*” rather than as members of a recognized terrorist organization.

Ms. Albayrak’s lawyers lodged an appeal to the Gaziantep Regional Court of Appeals. The 3rd Chamber of the Gaziantep Regional Court of Appeals heard her case (file no. 2017/1886) on 26 June 2018. The court requested additional information and set a new hearing date of 2 October 2018.

We express serious concern at conviction of Ms. Albayrak on the basis of overbroad counter-terrorism legislation that criminalizes her journalistic activities. This measure is incompatible with international human rights norms, including article 19 of

the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003, guaranteeing the right to freedom of opinion and expression. We are particularly concerned at the conflation of the reporting on issues related to the South-East region and the PKK with the spreading of terrorist propaganda. The use of national security and counter-terrorism as justifications to suppress Ms. Albayrak's right to freedom of expression and to curtail her work as a journalist without meeting the strict threshold established by article 19(3) of the ICCPR represents a measure that is incompatible with Turkey's obligations under international human rights law. We reiterate our concern at the shrinking space for civil society in Turkey resulting from the growing use of counter-terrorism legislation, in particular against the work of journalists, making difficult any kind of critical reporting and thereby limiting the right to freedom of expression and access to information.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comments you may have on the above-mentioned allegations.
2. Please provide detailed information about measures taken to ensure that Ms. Albayrak appeal hearing on 2 October 2018, will take place in accordance with international human rights law, in particular the right to due process and fair trial.
3. Please provide information on why charges related to propaganda for a terrorist group and promotion, justification or encouragement of the practices of the PKK, based on Ms. Albayrak's alleged failure to condemn the Kurdish separatists and describing them as "*Kurdish youth*" rather than as the members of a recognized terrorist organization have been levied against her and indicate how this complies with United Nations Security Resolution 1373, and a strict understanding of the definition of terrorism as elucidated by international law norms including but not limited to United Nations Security Council Resolution 1566 (2004).
4. Please provide information about measures taken to bring article 7/2 of the Counter-Terrorism Law and its enforcement into line with Turkey's obligations under international human rights law, in particular with article 19(3) of the ICCPR.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Fionnuala Ní Aoláin

Special Rapporteur on the promotion and protection of human rights and fundamental
freedoms while countering terrorism

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 November 2003.

Article 19(3) requires that any restriction on the right to freedom of expression is provided by law, serves a legitimate purpose, and is necessary and proportional to meet a legitimate objective. For a restriction to be "provided by law", it must "not confer unfettered discretion for the restriction of freedom of expression on those charged with its executions (CCPR/C/GC/34). Domestic law must furthermore provide for adequate and effective safeguards against abuse. In this connection, we are concerned at the conflation of the reporting on issues related to the South-East region and the PKK with the spreading of terrorist propaganda. The use of national security and counter-terrorism as justifications to restrict the right to freedom of expression without meeting the strict threshold established by article 19(3) of the ICCPR represents a measure that is incompatible with Turkey's obligations under international human rights law.

We reiterate our concern at the shrinking space for civil society resulting from the growing use of counter-terrorism legislation, in particular against the work of journalists, making difficult any kind of critical reporting and thereby limiting the right to freedom of expression and access to information. The overbroad article 7/2 of the Counter-Terrorism Law, and the application of it in the case of Ms. Albayrak, is not in line with international and regional human rights standards as it does not meet the strict threshold for restrictions to freedom of expression under article 19(3) of the ICCPR. While we acknowledge the responsibility of every government to protect national security and to counter terrorism, we would highlight that national security and counter terrorism must not be abused as excuses to limit fundamental rights, such as the right to freedom of expression, whether exercised by ordinary persons or journalists in performing the duties of their profession.

We would like to stress that counter terrorism legislation with penal sanctions should not be misused against individuals peacefully exercising their rights to freedom of expression and freedom of peaceful association and assembly. These rights are protected under ICCPR and non-violent exercise of these rights is not a criminal offence. Counter terrorism legislation should not be used as an excuse to suppress peaceful dissent and independent journalists.

We respectfully remind your Excellency's Government of the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. All these resolutions require that States must ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with

all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.

We reiterate the statement by the Human Rights Committee in General Comment 34 that article 19(3) may never be invoked as a justification for the muzzling of any advocacy of human rights (CCPR/C/G/34). We regret to see that article 7/2 of the Counter-Terrorism law is repeatedly used in contravention of this, leading to unnecessary and disproportionate interference with the right to freedom of expression.

As observed by the Special Rapporteur on freedom of opinion and expression following his official visit to Turkey in November 2016, the arbitrary employment of the counter-terrorism legislation and state-of emergency decrees have granted broad discretion to the executive branch, which holds unbridled prosecutorial authority with little to no judicial oversight. Because these laws are extremely vague and have been arbitrarily applied by the Government, they are effectively limitless and it is nearly impossible to foresee what exercises of the right to freedom of expression fall outside their bounds.