

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on Arbitrary Detention; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
AL TUR 4/2021

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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; Working Group on Arbitrary Detention; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 43/4, 42/22, 41/12, 43/16 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government, information we have received concerning the continued and recently renewed judicial harassment and criminal prosecution of Mr. Erol Önderoğlu, a journalist and human rights defender, who had allegedly been accused of and faced trial for "propagandizing for a terrorist organization" following his public support for a Kurdish media outlet in 2016. Although Mr. Önderoğlu had been acquitted of the terrorism-related charges levied against him in 2019, in November 2020 the Istanbul Regional Court of Appeal overturned this decision and he is now reportedly facing a re-trial on what appear to be identical charges.

The case of Mr. Erol Önderoğlu was the subject of a previous communication issued by United Nations Special Procedures, TUR 4/2016. We acknowledge the reply to this communication by your Excellency's Government, received on 4 August 2016. Broader concerns about the alleged use of national security and counter-terrorism charges against journalists, human rights defenders, and members of Turkish civil society were the subject of a numerous other communications issued by United Nations Special Procedures since 2016, including TUR 3/2017, TUR 9/2017, TUR 11/2017, TUR 13/2017, TUR 3/2018, TUR 7/2018, TUR 14/2018, TUR 15/2018, TUR 1/2020, TUR 4/2020, TUR 13/2020, TUR 18/2020 and TUR 20/2020. We acknowledge the replies received to all these communications and appreciate the consistent engagement with United Nations Special Procedures by Your Excellency's Government. However, we remain deeply troubled by what continues to appear to be a systematic use of terrorism charges and national security concerns to restrict the legitimate activities of independent media and civil society in Turkey.

According to the information received:

Mr. Erol Önderoğlu is a journalist with the news website *Bianet*, a Turkish outlet that covers political, social and cultural affairs with a particular focus on human rights and fundamental freedoms, as well as the Turkey representative of *Reporters Without Borders*.

On 3 May 2016, Mr. Önderoğlu, had allegedly participated in a solidarity campaign for the journal *Özgür Gündem*, a pro-Kurdish publication. It is reported that this journal was perceived as hostile by the Government, and had been the subject of multiple investigations and lawsuits, and was ultimately forcibly closed by decree in 2016. The solidarity campaign was made up of over 40 other journalists, writers, and activists who acted as symbolic co-editors of this publication for a day, in order to advocate for media freedom in Turkey. It appears that the authorities perceived the campaign as “terrorist propaganda” and subsequently opened 37 criminal investigations into those who had been involved.

On 20 June 2016, an Istanbul court ordered the pre-trial detention of Mr. Önderoğlu, as well as his two co-defendants on charges of “propagandizing for a terrorist organization” following their participation in said solidarity campaign. The three defendants were consequently placed in detention, pending an investigation into their alleged involvement in propaganda of terrorism. Mr. Önderoğlu and another defendant appear to have been conditionally released on 30 June 2016, while the third was conditionally released the following day.

On 17 July 2019, after a reported series of delays, hearings, and re-hearings, the tenth and final hearing in the case of Mr. Önderoğlu and his two co-defendants was held at the İstanbul 13th Heavy Penal Court. The Court ruled for the acquittal of all three individuals, seemingly on the grounds that there was no evidence that the three individuals had performed the duties of editor in chief and therefore could not be held liable.

However, on 3 November 2020, the Istanbul Regional Court of Appeal reversed the ruling that had acquitted Mr. Önderoğlu and his two co-defendants, and ordered a re-trial. It seems that the Istanbul Regional Court of Appeal criticised the Istanbul 13th Heavy Penal Court’s decision and reasoning for acquittal, arguing that the three individuals’ defence statements demonstrated that they were aware of the content of the newspaper articles. The Istanbul Regional Court of Appeal furthermore questioned the first instance court’s alleged failure to ask the managing editor of *Özgür Gündem* if the three defendants had been informed of the content published in the newspaper. It also seems that the Appeals court suggested that the case of the three defendants could be combined with the cases against the managing director, where necessary.

On 3 February 2021, the first re-trial of Mr. Önderoğlu and his co-defendants on charges of “propagandizing for a terrorist organization”, inciting or provoking a commission of an offence, and “praising the crime and the criminal”, took place. According to article 7 (2) of Anti-Terror Law No. 3713, they could face up to five years’ imprisonment if found guilty.

It is alleged that this case is representative of a broader pattern of judicial persecution of journalists in Turkey, where the few remaining independent media outlets are harassed and marginalized through drawn-out legal proceedings, while journalists facing criminal prosecution and closed media organizations have limited or no access to effective legal recourse to decisions

taken against them. It is further alleged that this case is also reflective of a more recent related trend where past acquittals by lower courts of prominent civil society actors and human rights defenders have later been overturned by higher courts.

Without prejudging the accuracy of the information received, we express serious concern as to the allegations of renewed judicial harassment and recycled terrorism-related charges brought against Mr. Önderoğlu, reportedly in retaliation for his one-day symbolic participation in a campaign in support of a Kurdish media organisation in 2016. We are particularly troubled by reports indicating that the charges levied against Mr. Önderoğlu appear to be identical to those of which he was already acquitted in 2019, despite having spent a significant period in detention and faced nine trials before this acquittal verdict was ultimately reached.

We have previously detailed our concerns about Turkey's counter-terrorism legislation in OL TUR 13/2020, and how loosely-defined crimes, such as "propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations", can potentially lead to severe punishment and imprisonment. In particular we have repeatedly warned that these and other broad categories of speech-based offenses contained in Turkey's counter-terrorism legislation and other related laws,¹ due to the lack of clarity and precision in the manner in which they are formulated, risk unnecessarily and disproportionately limiting the exercise of the rights to freedom of expression and freedom of peaceful assembly and association, as well as the legitimate activities of journalists and human rights defenders, as appears to be exemplified by the above case. We remain deeply concerned about the broad nature of this body of legislation in general, and how its vague provisions are seemingly being used to curtail and punish peaceful protest as suggested by this case in particular.

We are also concerned that this case may be representative of a seemingly deliberate and systematic pattern of judicial persecution of journalists and human rights defenders in Turkey, as well as what appears to be a deteriorating environment in regard to media freedom more generally. In this regard, we recall that journalism constitutes an essential service for any society, as it provides individuals and society as a whole with the necessary information to allow them to develop their own thoughts and to freely draw their own conclusions and opinions (A/HRC/20/17 para. 3). We also recall that a free, uncensored, and unhindered press constitutes one of the cornerstones of a democratic society (CCPR/C/GC/34 para. 13). We are accordingly troubled by the allegations detailed above and by the chilling effect that the repeated judicial harassment of a journalist and human rights defender on what appears to be unfounded terrorism-related charges may have on media freedom and the right to freedom of expression in Turkey more broadly. Such a chilling effect inhibits human rights defenders and other civil society actors from realizing their legitimate work, furthering the protection and promotion of human rights and fundamental freedoms in Turkey. In this connection, we note that the penalization of a journalist and human rights defender solely for being critical of the Government or the political social system espoused by the Government is incompatible with the State's obligations under international human rights law (CCPR/C/GC/34 para. 42).

¹ We note that Turkey's Penal Codes criminalises other forms of expression, including those that denigrate the Turkish nation (art. 301), denigrate the religious values of a section of the population (art. 216 (3)), or insults the President (art. 299).

Should these allegations be confirmed, they would be in violation of articles 9, 14 and 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003, which guarantee the rights not to be arbitrarily deprived of liberty, to fair proceedings before an independent and impartial tribunal, and to freedom of opinion and expression.

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 further details 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 or comments you may have on the above-mentioned allegations.
2. Please provide information on the legal and factual basis for the re-trial of Mr. Önderoğlu on seemingly identical terrorism-related charges to those of which he had already been acquitted previously, and how this is compatible with your Excellency's Government's international human rights obligations under the ICCPR.
3. Please provide information on why terrorism-related charges have been levied against Mr. Önderoğlu and his two co-defendants 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. In regard to your Excellency's Government's counter-terrorism legislation more broadly, please indicate how many journalists have been prosecuted for alleged terrorism related offences since July 2016.
5. In addition, please provide further information about how the phrase "propaganda of a terrorist organization by justifying or praising or inciting the terrorist organizations", from Anti-Terror Law No. 3713, is interpreted and applied in manner that is consistent with the obligations of your Excellency's Government under international human rights law, in particular article 19 of the ICCPR.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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.

Moreover, we would like to inform your Excellency's Government that after having transmitted an allegation letter to the Government, the Working Group on Arbitrary Detention may transmit the cases through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. Such appeals in no way prejudge any opinion the Working Group may render. The Government is required to respond separately for the allegation letter procedure and the regular procedure.

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

Irene Khan

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Elina Steinerte

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Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer to articles 9, 14 and 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Turkey on 23 September 2003.

We recall that article 9 of the ICCPR guarantees the right not to be deprived arbitrarily of liberty and article 14 of the ICCPR guarantees the right to fair proceedings before an independent and impartial tribunal.

Article 19 of the ICCPR guarantees the right to freedom of expression, which includes “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”. We would like to remind your Excellency’s Government that any limitation to the right to freedom of expression must meet the criteria established by article 19 (3) of the ICCPR. Any limitations must be determined by law and must conform to the strict test of necessity and proportionality must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

Article 19 of the ICCPR protects, inter alia, political discourse, commentary on one’s own and on public affairs, discussion on human rights and journalism (Human Rights Committee, General Comment no. 34, CCPR/C/GC/34 para 11). As indicated by the Human Rights Committee, “the function of journalists includes not only full-time reporters and analysts, but also bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere”, CCPR/C/GC/34 para. 44. While all restrictions must comply with the requirements of necessity and proportionality, the penalisation of a journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression, CCPR/C/GC/34 para 42. Furthermore, Human Rights Committee, in its General Comment No. 35 paragraph 53 has stated that detention purely due to peaceful exercise of right protected by the Covenant may be arbitrary. Laws justified by national security, whether described by sedition laws or otherwise, can never be invoked to prosecute journalists, see CCPR/C/GC/34 para 30. Likewise, the arbitrary arrest or torture of individuals because of the exercise of their freedom of expression will under no circumstance be compatible with Article 19, CCPR/C/GC/34 para. 23.

As stated by the Committee, the deprivation of liberty of an individual for exercising their freedom of expression constitutes an arbitrary deprivation of liberty contrary to Article 9 of the Covenant, see CCPR/C/GC/35 para. 17, and a concurrent violation of Article 19. Such attacks against individuals for exercising their rights to freedom of expression should be “vigorously investigated in a timely fashion, and the perpetrators prosecuted”, CCPR/C/GC/34 para. 23.

In this regard, we would like to refer to the Human Rights Council resolution 45/18 on safety of journalists adopted on 6 October 2020, in which the Council expressed “deep concerns about all attempts to silence journalists and media workers,

including by legislation that can be used to criminalize journalism, by the misuse of overbroad or vague laws to repress legitimate expression, including defamation and libel laws, laws on misinformation and disinformation or counter-terrorism and counter extremism legislation, when not in conformity with international human rights standards, and by business entities and individuals using strategic lawsuits against public participation to exercise pressure on journalists and stop them from critical and/or investigative reporting”. This resolution also recognised that the development of national legal frameworks that are consistent with States’ international human rights obligations are an essential condition for a safe and enabling environment for journalists.

Attacks on journalism are fundamentally at odds with protection of freedom of expression and access to information and, as such, they should be highlighted independently of any other rationale for restriction. Governments have a responsibility not only to respect journalism but also to ensure that journalists and their sources have protection through strong laws, prosecutions of perpetrators and ample security where necessary. (A/HRC/71/373 para. 35). It has indeed long been recognised that “journalism constitutes a necessary service for any society, as it provides individuals and society as a whole with the necessary information to allow them to develop their own thoughts and to freely draw their own conclusions and opinions” (A/HRC/20/17 para 3).

In this context, we would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. We would also like to bring to the attention of your Excellency’s Government the following provisions of the UN Declaration on Human Rights Defenders:

-article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights;

-article 12, paragraphs 2 and 3, which provides that the State shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

We also refer to the relevant provisions of the United Nations Security Council resolutions 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 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, which 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.