London, June 20, 2019

In the matter concerning

Rasime Sebnem KORUR

Case No. 2019/121 E.before the İstanbul Regional Court of Justice, 3rd Penal Chamber

On Appeal from

the Decision of the 37th Heavy Penal Court, 19 December 2018

AMICUS CURIAE SUBMISSION

I. INTRODUCTION

1. This submission is made by Dr Lutz Oette, Senior Lecturer of Law and Director of the Centre for Human Rights Law, SOAS, University of London and Dr Carla Ferstman, Senior Lecturer of Law at the School of Law and Human Rights Centre, University of Essex. Both follow closely the legal developments in Turkey and have wide-ranging experience over many years in the key issues raised by this case.[1]

2. Both amici have observed trials in Turkey (in Istanbul and in Cizre, South East Turkey) which have involved alleged offences concerning support of terrorism and terrorist propaganda, under Turkish criminal law, including but not limited to, proceedings involving the appellant, Dr Rasime Sebnem KORUR.

3. The purpose of the amicus curiae submission is to provide comparative information on jurisprudence and practice of other jurisdictions of relevance to Turkey, with the view to assisting the judges with the issues we understand are before them.

II. THE ISSUES COVERED BY THIS SUBMISSION

4. This submission covers the following issues:

   i) The status of international law in the Republic of Turkey;
   ii) The terrorist offenses applied to the defendants and the principle of legality;
   iii) The terrorist offenses applied to the defendant and the application of the presumption of innocence;
   iv) Freedom of expression in the context of States' efforts to counter terrorism: essential guarantees;
   v) The important role of States to foster the work of human rights defenders in a counter-terrorism context;
   vi) Academic freedom in the context of the criminal law prohibition against terrorism.

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[1] Additional information on the backgrounds of the amici curiae can be found on their websites:
Dr Lutz Oette: https://www.soas.ac.uk/staff/staff46048.php
Dr Carla Ferstman : https://www.essex.ac.uk/people/ferst81809/carla-ferstman

III. SUMMARY OF THE CASE

5. This matter concerns the appeal of the verdict of the 37th Heavy Penal Court concerning Dr Rasime Sebnem KORUR, dated 19 December 2018, in which she was convicted of the crime of "making propaganda in favour of a terrorist organization" contrary to Article 7(2) of Law No. 3713. The conviction stems from an indictment of the Istanbul Public Prosecutor's office dated 23 September 2017, investigation No. 2017/134592.

6. Dr Korur was convicted for being involved in the "Academics for Peace Initiative", supporting peace in the south-east of Turkey. In particular, she was convicted for signing a petition released in January 2016 calling for an end to violence in the region. In the petition, the signatories said that they were condemning both the state violence against the peoples of the region and the Turkish state's ongoing violation of its own laws and international treaties. Additionally, cited in her judgment of conviction were certain statements attributed to her concerning the activities of the Turkish Armed Forces and related matters.

7. Dr Korur was sentenced *inter alia*, to 1 year and 8 months imprisonment, which was increased to 1 year and 18 months, which took into account what was viewed as the aggravated aspect of the acts for which she was convicted, namely that she used the press and media to carry out those acts.

IV. THE STATUS OF INTERNATIONAL LAW IN THE REPUBLIC OF TURKEY

8. In accordance with Article 90 of the Constitution of Turkey (Constitution of 1982, as amended in 2004), international agreements which are duly in force in Turkey have the force of law. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

9. According to the above mentioned constitutional rule and other relevant laws, international treaties ratified by the Turkish Government constitute an integral part of Turkish Law.

V. TERRORIST OFFENSES APPLIED TO THE DEFENDANT AND THE PRINCIPLE OF LEGALITY

The applicable principles under international law

10. The principle of legality (*nullum crimen, noella poena sine lege*) is a fundamental principle of justice that means that no one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. It is set out in Article 15 of the International Covenant on Civil and Political Rights, ratified by Turkey on 23 September 2003. Also the United Nations Human Rights Committee, in its General Comment N° 29, has pointed out that the principle of legality in criminal matters cannot be subjected to derogation.[2] The principle is also reflected in Article 7(1) of the European Convention on Human Rights.

[2] Human Rights Committee ,General Comment N° 29, "States of emergency (article 4)", para. 7, UN Doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001.

11. The principle of legality requires that crimes be classified and described in precise and unambiguous language that narrowly defines the punishable offence, so that persons can know what behavior is prohibited by the law and to be sure that the law is not subject to interpretation which would unduly widen the scope of prohibited conduct, or result in the criminalisation of any legitimate form of exercise of fundamental freedoms. In the Kafkaris case, the European Court of Human Rights declared that :

> [t]he guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection … It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[3]

12. Vague and broad definitions are problematic because they can be used by States to unnecessarily penalise and discourage otherwise legitimate and lawful behaviour. This need for certainty which is embodied in the legality principle, has been interpreted by the European Court of Human Rights as requiring that criminal law must not be extensively construed to an accused's detriment, for instance by analogy. This requires that the offence be clearly defined in law, so that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him liable".[4]

13. Criminal law concerning terrorist offences cannot deviate from these principles; "It is essential to ensure that the term 'terrorism' is confined in its use to conduct that is of a genuinely terrorist nature."[5] Martin Scheinin, the former United Nations Special Rapporteur on the promotion and protection of human rights while countering terrorism, has commented on this requirement of certainty in the criminal law in the particular context of legislation concerning terrorist offenses. He has noted that criminal law legislation which is overly broad or ambiguous may not only breach the legality principle, but may additionally offend the principles of necessity and proportionality:

> f]ailure to restrict counter-terrorism laws and implementing measures to the countering of conduct which is truly terrorist in nature also pose the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights.[6]

14. With respect to the particular issue of terrorist offences which rely on speech acts or incitement, as recommended in the Council of Europe Guidelines on protecting freedom of expression and information in times of crisis, "Member States should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis. Incitement to violence and public disorder should be adequately and clearly defined."[7]

15. The Inter-American Court of Human Rights has taken a similar approach in relation to terrorism legislation in Peru. It held that:

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[3] *Kafkaris v Cyprus*, Application no. 21906/04, European Court of Human Rights (12 February 2008), para. 137.
[4] *Kokkinakis v. Greece*, Application no. 14307/88, European Court of Human Rights (25 May 1993), para. 52.
[5] Special Rapporteur on human rights and counter-terrorism, UN Doc. E/CN.4/2006/98 (2005) para. 42.
[6] *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, UN Doc. A/HRC/16/51, 22 December 2010, para. 26.
[7] Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies, Guideline IV, para.19.

> The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention.[8]

16. Furthermore, the Inter-American Commission on Human Rights in another case against Peru, made clear that "the definition of a type of criminal offense based on mere suspicion or association shifts the burden of proof, violates the fundamental presumption of innocence of the accused, and should be eliminated."[9]

The relevance of the principles to Turkish criminal law

17. Article 7(2) of the Anti-Terrorism Law 3713 provides that:

> Any person making propaganda for, legitimating or praising the methods of a terrorist organization, which comprise force, violence or threat, or for inciting these methods to be used, shall be punished with imprisonment from one to five years. If this crime is committed through means of press and media, the penalty shall be aggravated by one half. In addition, editors of press or publishing media that have not participated in the perpetration of the crime shall also be punished with a judicial fine at the rate of one thousand to five thousand days.

18. The UN Special Rapporteur for the Promotion and Protection of Human Rights while Countering Terrorism recommended that the definition of terrorist crimes be brought in line with international norms and standards "including defining more precisely what crimes constitute acts of terrorism and confining them to acts of deadly or otherwise grave violence against persons or the taking of hostages"; "only full clarity with regard to the definition of acts that constitute terrorist crimes can ensure that the crimes of membership, aiding and abetting and what certain authorities referred to as 'crimes of opinion' are not abused for purposes other than fighting terrorism."[10]
19. The references to 'propaganda' and 'terrorist organization' included in this law are extremely broad in light of the expansive definition of 'terrorism' in its article 1, and would ostensibly cover acts which would constitute lawful and legitimate human rights activity, such as the publication of views in support of political, legal, social or economic reform. Furthermore, the lack of precise legal definitions and criteria of what constitutes a terrorist organization and the offence of membership in such an organization makes these articles prone to arbitrary application and abuse.

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[8] *Castillo Petruzzi et al.* v. *Peru (Merits, Reparations and Costs)* Judgment of 30 May 1999, Series C No. 52, para. 121.
[9] Annual Report of the Inter-American Commission: Peru, OEA/Ser.L/V/II.95, doc. 7 rev. (1996) Ch.V Section VIII, §4.
[10] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Turkey (April 16-23, 2006), 16 November 2006.

20. Article 7(2) of the Anti-Terrorism Law 3713 was amended through Law No. 6459 in 2013, following a series of judgments by the European Court of Human Rights in which it had expressed concerns over the wording and interpretation of the provision, particularly the absence of any link to violence (see below at paragraphs 24-25).[11] The amended law establishes such a connection between the propaganda and methods of violence, threats or coercion. However, as set out below in paragraph 25 and further in paragraphs 38-45 in relation to the petition signed by the accused, the amended provision continues to provide scope for broad interpretation that runs counter to the required narrow construction and the notion of precision and predictability integral to the notion of legality.

V. THE TERRORIST OFFENSES APPLIED TO THE DEFENDANT AND THE PRESUMPTION OF INNOCENCE

21. The presumption of innocence is a fundamental principle of human rights law.[12] It means that defendants are deemed innocent until proven guilty by court in a final judgment in accordance with the law. The presumption of innocence presupposes that the burden of proof is on the prosecution. Any doubt on guilt should benefit the suspect or accused person ('in dubio pro reo').[13] This is underscored by General Comment 32 of the United Nations Human Rights Committee:

> The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt and requires that persons accused of a criminal act must be treated in accordance with this principle.[14]

22. The United Nations Human Rights Committee has made clear that, for a conviction to be entered in relation to any criminal offence, the Prosecution must demonstrate that <u>every element of that offence</u> has been proven to the necessary standard:

> Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of nullum crimen sine lege, and the principle of legal certainty, provided by article 15, paragraph 1.[15]

23. There must be significant and probative evidence on <u>each required element of the crime, leading to no other possible conclusion that the crime has been committed</u>. A court's judgment must be based on evidence as put before it and not on mere allegations or assumptions.[16] In international criminal law, the principle has been incorporated into the

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[11] See *Faruk Temel v. Turkey*, Application no. 16853/05, European Court of Human Rights (1 February 2011); *Yavuz and Yaylali v. Turkey*, Application no. 12606/11, European Court of Human Rights (17 December 2013).

[12] See for example, International Covenant on Civil and Political Rights, Article 14(2); European Convention on Human Rights Article 6(2).

[13] Human Rights Committee (HRC), General Comment 32, CCPR/GC/32 (23 August 2007), para. 30; *Barberà,Messegué and Jabardo v Spain,* Application No. 10590/83, European Court of Human Rights (6 December 1988), para. 77; *Telfner v Austria,* Application No. 33501/96, European Court of Human Rights (20 March 2001), para. 15.

[14] HRC General Comment 32, para. 30.

[15] Nicholas v Australia, HRC, UN Doc. CCPR/C/80/D/1080/2002 (2004) §7.5.

[16] *Telfner v Austria* Application No. 33501/96, European Court of Human Rights (20 March 2001), para. 19.

statutes and jurisprudence of international criminal tribunals and the International Criminal Court. The Yugoslavia Tribunal clarified that this standard "requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused".[17]

24. The European Court of Human Rights has had occasion to consider in a series of cases, convictions by Turkish courts for 'propaganda' glorifying a terrorist organization contrary to Law 3713. In particular, the European Court of Human Rights has underscored that mere dissent cannot constitute a crime; incitement to violence or armed resistance is an essential element of the offence. A conviction which does not prove according to the requisite standard of proof that an individual's speech acts were done with a view to inciting violence or armed resistance would make that conviction unsound. For instance, in the case of *Faruk Temel v. Turkey*, the Court, in finding that the conviction and the treatment of the petitioner breached Article 10 of the European Convention, noted that: "[T]he statement read as a whole does not encourage the use of violence, armed resistance or uprising and - a fundamental element to be taken into consideration - that it does not constitute a discourse either of hatred. The content of the statement was also not likely to promote violence by instilling a deep and irrational hatred towards identified individuals. It follows that the applicant's criminal conviction did not meet a 'pressing social need'."[18]

25. In the case of *Öner and Türk v. Turkey*, the European Court of Human Rights observed that, in that case "the speech in question consisted of a critical assessment of Turkey's policies concerning the Kurdish problem. The applicants expressed discontent with respect to certain policies of the government, the practices of the security forces, and the detention conditions of Abdullah Öcalan, whereas the domestic courts considered that the impugned speech contained terrorist propaganda. The Court considers that, taken as a whole, the applicant's speech does not encourage violence, armed resistance or an uprising. Moreover, the speeches in question delivered by the applicants were not capable of inciting violence by instilling a deep-seated and irrational hatred against identifiable persons and therefore did not constitute hate speech."[19] As part of the execution of judgments, the Committee of Ministers expressed its regret that, …

> no progress had been reported in the implementation of the legislation so as to comply with Convention standards (see CM/Del/Dec(2017)1294/H46-31, 1294th meeting, September 2017). It therefore urged the authorities to take: complementary legislative or other measures to ensure that criminal investigations are not initiated solely on the basis of expressions of opinion unless compelling reasons exist, such as incitement to violence or hatred; measures to ensure that individuals are not taken into police custody or detained on remand when the evidence in the investigation or case-file concerns solely expressions of opinion, unless compelling reasons exist, such as incitement to violence or hatred; and measures to align the practice of prosecutors and first instance courts to ensure that they apply the case law of the Constitutional Court and the European Court under Article 10 of the Convention.[20]

V. FREEDOM OF EXPRESSION IN THE CONTEXT OF STATES' EFFORTS

[17] *Prosecutor v Milan Martić* (IT-95-11-A), ICTY Appeals Chamber (8 October 2008) paras. 55, 61.
[18] *Faruk Temel v. Turkey*, Application no. 16853/05, , European Court of Human Rights (1 February 2011), para. 62. See also, *Savgin v. Turkey*, Application no. 13304/03, European Court of Human Rights (2 February 2010), para. 45.
[19] *Öner and Türk v. Turkey*, Application no. 51962/12, European Court of Human Rights (31 March 2015), para. 24.
[20] See, Council of Europe, Committee of Ministers, https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%22oner%22],%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECLanguage%22:[%22ENG%22],%22EXECState%22:[%22TUR%22],%22EXECIsClosed%22:[%22False%22],%22EXECIdentifier%22:[%22004-36806%22]}

TO COUNTER TERRORISM: ESSENTIAL GUARANTEES

26. Freedom of expression is "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment."[21] The right to freedom of expression is recognised in article 26 of the Turkish Constitution and in article 10 of the European Convention on Human Rights as well as article 19 of the International Covenant on Civil and Political Rights, both of which are binding on Turkey as a State party.

27. The scope of freedom of expression is broad, in recognition of its fundamental role as part of the public and political debate in a pluralistic, democratic society. This applies particularly to 'political discourse' and the 'discussion of human rights'.[22] Discussion of human rights, including advocacy that highlights concerns about violations of rights guaranteed in national and international law, is specifically protected in article 6 of the United Nations Declaration on Human Rights Defenders, [23] which recognises the importance of free expression in the promotion and protection of human rights:

> Everyone has the right, individually and in association with others: …
>
> (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;
> (c) To study, discuss, form and hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms, and, through these and other appropriate means, to draw public attention to those matters.

28. Considering the importance of political debate, freedom of expression recognises speech even if it is considered to be offensive.[24] As established in the jurisprudence of the European Court of Human Rights, "[s]ubject to paragraph 2 of Article 10, [freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."[25] In a number of cases, the European Court of Human Rights has recognised that language falling within the scope of the right comprises words such as 'massacres', for example where used to raise concerns about alleged violations of fundamental rights, such as the right to life.[26] Most relevant to the present case, the European Court of Human Rights has determined that the right covers speech including "a critical assessment of Turkey's policies concerning the Kurdish problem", and "discontent with respect to certain policies of the government, the practices of the security forces, and the detention conditions of Abdullah Öcalan."[27]

Limitations on the right to freedom of expression

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[21] *Erdoğdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, European Court of Human Rights (8 July 1999), para. 47.
[22] Human Rights Committee, General Comment 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR GC 34 (12 September 2011), para.11.
[23] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144 (8 March 1999).
[24] Human Rights Committee, General Comment 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR GC 34 (12 September 2011), para.11.
[25] *Erdoğdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, European Court of Human Rights (8 July 1999), para. 47.
[26] *Karkin v. Turkey*, Application No. 43928/98, European Court of Human Rights (23 September 2003), para. 34.
[27] *Öner and Türk v. Turkey*, Application no. 51962/12, European Court of Human Rights (31 March 2015), para. 24.

29. The right to freedom of expression is qualified. Where an expression made falls within the scope of the right, the state may under certain circumstances legitimately limit the exercise of the right, provided that such limitation is prescribed by law, has a legitimate aim, and is proportionate. Freedom of expression is therefore the rule, and any limitations are exceptional.

Prescribed by law

30. Freedom of expression "is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly."[28] Any interference with the right, such as criminalising certain forms of expression, must be prescribed by law. Such law must be "formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she need to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail."[29] In addition, the compatibility of legal norms "with the rule of law [must] be ensured."[30]

31. As emphasised by the United Nations Human Rights Committee, "[s]uch offences as 'encouragement of terrorism' and 'extremist activity' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression."[31]

32. This requirement for precision applies to article 7(2) of the Anti-Terrorism Law 3713, which criminalises propaganda for a terrorist organisation. The European Court of Human Rights has criticised the lack of accessibility and foreseeability of article 7(2), particularly where its interpretation is not entirely clear.[32]

33. Also, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression identified several shortcomings when analysing Turkish legislation in light of applicable international human rights standards on freedom of expression:

> The Government has a critical duty to protect against terrorist threats, but international law mandates respect for human rights in the fight against terrorism. In keeping with these dual requirements, criminal offences should be narrowly defined and applied according to strict implementation of the standards of necessity and proportionality. Despite this, counter-terrorism and national security provisions in Turkish legislation are used to restrict freedom of expression through overly broad and vague language that allows for subjective interpretation without adequate judicial oversight.[33]

Legitimate aim

34. Any restriction of freedom of expression must serve a legitimate aim such as the maintenance of national security and public safety, however such aims cannot be

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[28] *Erdoğdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, European Court of Human Rights (8 July 1999), para. 47.
[29] *Perinçek v Switzerland* (Grand Chamber), Application No. 27510/08, European Court of Human Rights (15 October 2015), para. 131. See above, section on the principle of legality.
[30] *Belge v Turkey*, Application nos. 50171/09, 6/12/2016, European Court of Human Rights (6 December 2016), para. 28.
[31] Human Rights Committee, General Comment 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR GC 34 (12 September 2011), para. 46.
[32] *Belge v Turkey*, Application Nos. 50171/09, 6/12/2016, European Court of Human Rights (6 December 2016), para. 29.
[33] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, UN Doc. A/HRC/35/22/Add.3 (21 June 2017), para. 17.

interpreted in the abstract. While the aim of the Anti-Terrorism Law may be legitimate, provisions "that permit interference with Convention rights must be interpreted restrictively."[34] This necessitates evidence to the sufficient standard of proof that any statements actually risk jeopardising national security and public safety. The fact that a statement is critical of government conduct, and is therefore considered inappropriate, is not sufficient ground to restrict it. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression concluded, following his mission to Turkey, that there is "limited evidence that the restrictions [of freedom of expression] are necessary to protect legitimate interests, such as national security and public order…" [35]

Proportionate

35. Any restriction must also be necessary in a democratic society, which "implies the existence of a 'pressing social need'."[36] This entails a contextual assessment to "determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts."[37]

36. States may legitimately criminalise certain terrorism offences, and may even be obliged to do so pursuant to United Nations Security Council resolutions or treaties to which they have become a party, such as the Council of Europe Convention on the Prevention of Terrorism (196/2005) ratified by Turkey on 23 March 2012. However, such anti-terrorism legislation, and its interpretation and application, must itself be compatible with the right of freedom to expression. As recognised in article 12(1) of the Council of Europe Convention on the Prevention of Terrorism:

> Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression… as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

37. The European Court of Human Rights scrutinises the criminalisation of freedom of expression, taking into consideration the nature of the speech and speaker, the content of any statement made in terms of whether it constitutes incitement to violence, and the context, namely whether it is likely that it will cause violence: "Regard must be had … to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence."[38]

Application to the 'Academics for Peace Initiative' petition, released in January 2016

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[34] *Perinçek v Switzerland*, Application No. 27510/08 (Grand Chamber), European Court of Human Rights (15 October 2015), para.151.
[35] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on his mission to Turkey, UN Doc. A/HRC/35/22/Add.3 (21 June 2017), para. 7.
[36] *Erdoğdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, European Court of Human Rights (8 July 1999), para. 47.
[37] Ibid.
[38] *Özgür Gündem* v Turkey, Application nos. 23144/93, European Court of Human Rights (16 March 2000), para. 63

38. The statement "We will not be party to the crime" was published and signed by academics and researchers as part of a wider political debate on the conduct of Turkish forces in the South-East of Turkey, and its impact on the rights of the region's population. It therefore contributed to the public debate on public institutions. As a general rule, "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant [on Civil and Political Rights] upon uninhibited expression is particularly high."[39] There is no duty of restraint for academics or others in prominent positions, under international human rights law on the right to freedom of expression. On the contrary, the European Court of Human Rights has emphasised "that there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate, where that freedom is of the utmost importance."[40] These "principles also apply to measures taken by domestic authorities to maintain national security and public order as part of the fight against terrorism."[41]

39. The academic authors and signatories to the statement published and signed on to it in the exercise of their academic freedom. They are also human rights defenders as recognised in the United Nations Declaration on Human Rights Defenders, namely "individuals, groups and associations … contributing to … the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals."

40. The publication of a statement that draws attention to human rights violations and requests accountability and an end to violations falls within the scope of recognised human rights promotion and protection. This includes action to address human rights situations on behalf of individuals or groups, disseminating information on violations, and action to secure accountability and to end impunity.[42] The United Nations Declaration on Human Rights Defenders recognises that human rights defenders fulfil a valuable role and merit special protection.[43] The United Nations Human Rights Committee has equally recognised that "[s]tates parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 [of article 19 of the International Covenant on Civil and Political Rights] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights."[44]

41. According to the second element of the three-tier test set out above (paragraph 29), any restriction to freedom of expression would only be capable of being justified if the statement incites violence or the commission of a violent crime. The statement "We will not be party to the crime" uses terms such as 'deliberate and planned massacre', 'torture', and 'deportation'. These terms refer to alleged violations and notwithstanding the fact that they might be considered to constitute criticism, the European Court of Human Rights has consistently held that the mere use of such terminology does not amount to incitement to violence.[45]

42. The statement does not mention violence, does not include any threats to this effect, nor does it have any passages that indicate any intent to foster terrorism. There is no evidence of any intention to legitimise acts of terrorism, or to prevent Turkey from taking counter-terrorism measures in accordance with international human rights law. On the contrary,

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[39] Human Rights Committee, General Comment 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR GC 34 (12 September 2011), para. 38.
[40] *Belge v. Turkey*, Application no. 50171/09, European Court of Human Rights (6 December 2016), para.31.
[41] Ibid. (references omitted)
[42] See in particular articles 6 and 12 of the United Nations Declaration on Human Rights Defenders.
[43] Article 2, ibid.
[44] Human Rights Committee, General Comment 34, Article 19: Freedom of opinion and expression, UN Doc. CCPR GC 34 (12 September 2011), para. 23.
[45] *Sürek v Turkey* No.4, Application no. 24762/94, European Court of Human Rights (8 July 1999), para. 58.

the statement calls for an end to human rights violations and violence, and for a peaceful resolution of the situation. It therefore constitutes legitimate advocacy to promote compliance with international human rights standards, which is aimed at uncovering the truth.

43. The Council of Europe Commissioner for Human Rights stated that he "regards this declaration as falling clearly within the boundaries of freedom of expression, and the concerns behind it as legitimate and of interest to the public, in particular given the many human rights violations which, according to the Commissioner, were indeed committed during the curfews and anti-terrorism operations."[46]

44. The statement does not amount to indirect incitement either. The use of certain terminology such as massacre, or torture, is not sufficient to incite violence or propagate commission of terrorism offence. According to the European Court of Human Rights, states cannot invoke aims such as national security to restrict the right of the public to be informed where opinions do not incite violence, i.e. advocate the use of violent methods or bloody revenge, or justify the commission of terrorist acts with a view to achieving the objectives of their supporters, and cannot be interpreted as promoting violence by instilling a deep and irrational hatred towards identified persons.[47]

45. The statement, under any of the tests applied in relation to freedom of expression, does neither directly nor indirectly call for violence, has no demonstrable link to violence, or the threat thereof, and does not constitute a clear and present danger resulting in violence. There is no evident glorification of, or propaganda for, any terrorist organization. On the contrary, the statement clearly renounces all forms of violence.

VI. THE IMPORTANT ROLE OF STATES TO FOSTER THE WORK OF HUMAN RIGHTS DEFENDERS IN A COUNTER-TERRORISM CONTEXT

46. The protection of the work of human rights defenders under freedom of expression is set out in the previous section. Suffice to add that in accordance with relevant international standards, the State's obligation is not simply one of refraining from impeding the work of human rights defenders – all States are obliged to take positive steps to foster an environment in which human rights defenders can freely carry out their work. In particular, the United Nations Declaration on Human Rights Defenders makes clear in Paragraph 12 that:

> 2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, 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 present Declaration.
>
> 3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts

[46] Council of Europe Commissioner for Human Rights, Memorandum on freedom of expression and media freedom in Turkey, CommDH(2017)5, para. 62.
[47] Gözel and Özer v Turkey, Application no. 43453/04; 31098/05, European Court of Human Rights (6 July 2010) para. 56 (based on French translation).

of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

47. In contrast to these international standards, the 37th Heavy Penal Court's decision to convict and sentence Dr Rasime Sebnem KORUR, dated 19 December 2018, appears to have considered Dr Korur's position as a human rights defender and academic, and her use of the press and media as an aggravating factor, for which she was provided an extra length of time imprisonment.

VII. ACADEMIC FREEDOM IN THE CONTEXT OF THE CRIMINAL LAW PROHIBITION AGAINST TERRORISM

48. It is well recognised that academic freedom is a protected component of freedom of expression. The European Court of Human Rights has regularly underlined, including in cases concerning Turkey, "the importance of academic freedom, which comprises the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction."[48] It has further affirmed that academic freedom "is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof."[49]

49. In its Recommendation 1762 (2006), the Parliamentary Assembly of the Council of Europe adopted a declaration for the protection of academic freedom, which recognizes in accordance with the *Magna Charta Universitatum* that "academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction."[50] In the current case, the 37th Heavy Penal Court appears to have criminalized the statements of academics in violation of their right to academic freedom.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[48] See, e.g., *Sorguç v. Turkey*, Application no. 17089/03, European Court of Human Rights (23 June 2009), para. 35; *Kula v. Turkey*, Application no. 20233/06, European Court of Human Rights (19 June 2018).
[49] *Mustafa Erdoğan and Others v. Turkey*, Application nos. 346/04 and 39779/04, European Court of Human Rights (27 May 2014), para. 40.
[50] Parliamentary Assembly of the Council of Europe, Recommendation 1762 (2006) 'Academic freedom and university autonomy', adopted 30 June 2006.