



## **International Commission of Jurists Expert Opinion**

### **Ankara Appeal Court, 19<sup>th</sup> Criminal Chamber**

#### **Case No. 2019/1191**

**Defendants:** 1. Mehmet Raşit Tükel, 2. Taner Gören, 3. Sinan Adıyaman, 4. Mehmet Sezai Berber, 5. Selma Güngör, 6. Bülent Nazım Yılmaz, 7. Funda Barlık Obuz, 8. Dursun Yaşar Ulutaş, 9. Ayfer Horasan, 10. Şeyhmus Gökalp and 11. Hande Arpat (Members of the Turkish Medical Association Council)

### **I. Introduction**

1. This expert opinion has been prepared by the International Commission of Jurists (ICJ). The ICJ is a non-governmental organization working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Council of Europe and the African Union. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union.

2. The expert opinion draws on the ICJ's extensive experience and expertise in developing, analysing and applying rule of law, international human rights law and international law concerning terrorism, counter-terrorism and national security.

3. The ICJ has been requested by the lawyer Ziyet Özçelik representing the defendants in this case to advise on the compatibility of the defendants' prosecution and conviction with international human rights law and standards, in particular on freedom of expression. It is understood that this expert opinion will be relied upon by the defendants in the case currently pending against them before the Court of Appeals.

4. The case before the Appeal Court concerns 11 defendants who have been prosecuted, convicted and sentenced to custodial sentences for the crime of provoking hatred and hostility in one section of the public against another section

which has a different characteristic based on social class, race, religion, sect or regional difference, which creates explicit and imminent danger to public security under Article 216 (1) of the Turkish Criminal Code. Their offences stem from two separate statements made by the Council of the Turkish Medical Association. All defendants are members of the Council. (Section II below on facts).

5. This expert opinion examines international law standards relevant to the criminalization and prosecution of crimes of expression. Section III sets out relevant international legal standards governing freedom of expression with special focus on war propaganda, incitement to violence and provoking hatred and hostility. Section IV discusses the implementation of these standards to the current case.

## II. Facts

6. The Turkish Medical Association (TMA) represents around 80 percent of Turkey's doctors, with over 83,000 members. Article 135 of the Turkish Constitution provides: "Professional organizations having the characteristics of public institutions and their higher bodies are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision". TMA is established, in accordance with this provision, by Law no. 6023 and recognized as public legal entity under Turkish Law.

7. The main governing body of the TMA is the Council, which has 11 members. At the time of the events, the eleven TMA Council members were: 1. Mehmet Raşit Tükel, 2. Taner Gören, 3. Sinan Adıyaman, 4. Mehmet Sezai Berber, 5. Selma Güngör, 6. Bülent Nazım Yılmaz, 7. Funda Barlık Obuz, 8. Dursun Yaşar Ulutaş, 9. Ayfer Horasan, 10. Şeyhmus Gökalp and 11. Hande Arpat.

8. The Council released a public statement on 24 January 2018, headed "War is a public health issue!". The statement is as follows:

"As doctors we warn:

War is a human-made public health problem with effects of destroying nature and humankind, threat to social life.

Each armed conflict, each war brings along human tragedy by causing irremediable problems in terms of physical, mental, social and environmental health.

As members of a profession who have taken oath to save lives we constantly keep in mind our first and foremost duty to defend life and commit to maintain the environment of peace.

The way to cope up with the problem of war is to have a just, democratic, equalitarian, free and peaceful life and maintain it.

No to war; peace now and everywhere!"<sup>1</sup>

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<sup>1</sup>Turkish Medical Association, "**War is a public health problem!**", 24.01.2018, english version of the statement is available at, [http://www.ttb.org.tr/haber\\_goster\\_eng.php?Guid=28de85da-00e5-11e8-a05f-429c499923e4](http://www.ttb.org.tr/haber_goster_eng.php?Guid=28de85da-00e5-11e8-a05f-429c499923e4)

9. On 26 January 2018, in a public statement the President accused the Council of sympathizing with "terrorists" and not being "domestic and national". In his speech to party members the President stated that "Today is the 7<sup>th</sup> day of the operation. 343 terrorists have been neutralised. These are the only known ones. Those who are disturbed from these developments, like alleged Turkish Medical Association, want to conduct a campaign against war. We haven't heard so far that these terrorist lovers saying yes to peace. My citizens have become martyrs in eastern and South-eastern parts of the country. Have we heard any statement from them against terrorists inside the country? No, we haven't. They are involved in these things".<sup>2</sup> The Council responded in a separate statement denying this accusation. In this response the TMA stated that "The TTB Central Council expressed its opinion in this process in line with a stance and sense of responsibility that a medical association should adopt. The values of the profession of medicine in regard to such cases as conflict, war, actions against terrorism and similar others as well as position statements with long years of background are clear enough to dismiss divergent interpretations. The statement by the TTB Central Council dated January 24<sup>th</sup> remains fully loyal to this ground". The Council also made reference to the duty of the authorities to protect freedom of expression: "In the light of this information, TTB Central Council reminds the public authority of its responsibility to fulfill the duty of creating an environment in which the life safety of all is ensured and freedom of expression is protected for all without any exception".<sup>3</sup>

10. The TMA statement was issued in January 2018 during which time a military operation was underway, known as "Operation Olive Branch", involving the targeting by Turkish military of forces of Afrin, Syria. Following the speech of President Erdoğan criticizing the TMA, an official complaint was brought by the Ministry of Interior, which on 19 January 2018 resulted in the initiation by the Chief Prosecutor's Office in Ankara of a criminal investigation concerning the TMA statement. On 30 January, the police raided the houses of the eleven members of the Council and seized certain items including mobile phones, computers and books. Eleven Members of the Council were taken into custody. Sinan Adıyaman, Ayfer Horasan and Şeyhmus Gökalp were released on 2 February 2018, while Mehmet Raşit Tükel, Taner Gören, Mehmet Sezai Berber, Selma Güngör, Bülent Nazım Yılmaz, Funda Barlık Obuz, Dursun Yaşar Ulutaş, and Hande Arpat were released on 5 February 2018.

11. The eleven members of the Council were thereafter indicted by the Public Prosecutor for "disseminating propaganda in support of a terrorist organization", "making terrorist propaganda" and "provoking the public to hatred and hostility". With the indictment, lawyers of the defendants also learned that a second criminal investigation against them had been initiated in relation to another statement made by the TMA in 2016 on International Peace Day. Although, under Turkish criminal procedure law prosecutors should have taken a separate statement from the defendants under this second investigation, the two cases were merged into a single

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<sup>2</sup> "Cumhurbaşkanı Erdoğan'dan TTB'ye sert tepki"

<https://www.sabah.com.tr/gundem/2018/01/26/cumhurbaskani-erdogandan-ttbye-sert-tepki>

<sup>3</sup> See Public Declaration by Turkish Medical Association on 26.1.2018.

[http://www.ttb.org.tr/haber\\_goster.php?Guid=2f40ea04-02a6-11e8-9cbe-7ab728a3b7ab](http://www.ttb.org.tr/haber_goster.php?Guid=2f40ea04-02a6-11e8-9cbe-7ab728a3b7ab)

indictment without any statements taken from the defendants for the second charge.<sup>4</sup>

12. In a 2016 statement, the Council had declared that “[a]ttacks against humanity target our meetings, weddings that are one of the most joyous days of Anatolian people, and the country's opposition leader. We are still fresh in our anger about the bombing of parliament, the essential element of democracy, and the suffering of dozens of our citizens who were massacred by the coup attempt by a reactionary structure that the government nurtured by its own hand with all kinds of support (..) We invite all our people to give strength to our voice, to join the union of Labor and Democracy in order not to sacrifice our lives, our children, our brothers to this blood politics, and not to face another World Peace Day in pain, to raise our voice against this blood politics, which distorts social and universal peace both within our country and outside our borders.”

13. The defendants were indicted on 01.10.2018 for “disseminating propaganda in support of a terrorist organization” and “provoking the public to hatred and hostility”.<sup>5</sup> Evidence referred by the indictment included some links to the websites of the Kurdistan Workers’ Party (PKK/PYD/YPG) commenting on the Afrin operation of Turkish Armed Forces, news from the ANF website about the call of YPG to clarify attitudes towards the Afrin operation, TMA’s statement, complaints brought against the statement, an e-mail sent by People’s Democratic Party (HDP) Ankara Office to many institutions including TMA inviting these institutions to sign a common declaration, some photos of the Gezi Park protests of X dates and “terrorist organization” members, an attached CD to a booklet of HDP concerning human rights violations committed in Sur sub-province, tweets and Facebook posts of defendants and some books from their libraries.

14. The indictment alleges that following “calls and orders” from PKK/KCK aimed at stopping the military operation in Afrin, HDP sent a press release to the TMA Council. The TMA Council, according to the indictment, in line with this request made a similar statement separately. According to the prosecutor, as the TMA received an e-mail from HDP inviting some organizations to protest the government’s operation, it should have been aware of the calls made by PKK/KCK terror organization in their websites to stop the operation in Afrin. The Prosecutor contended that the Council had supported these calls with the statement issued on 24 January 2018. The indictment also claimed that the statement had implied that the operation in Afrin that had been conducted against “terrorist organizations” targeted civilians instead.

15. The indictment also included certain photos and reports found at the headquarters of the TMA. These include some photos from Gezi events, reports prepared by the Human Rights Association and the Human Rights Foundation of Turkey, and reports of HDP concerning operations conducted in South-East Turkey.

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<sup>4</sup> Pursuant to Article 174 of the Turkish Criminal Procedural Code an indictment might be returned by the Court if the indictment is prepared without collecting a present evidence that might affect the decision about the existence of a crime. There’s no doubt that the testimony of the defendants about their statement should be deemed an evidence of this nature.

<sup>5</sup> Article 216 of the Penal Code : A person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates a explicit and imminent danger to public security shall be sentenced to a penalty of imprisonment for a term of one to three years. (2) A person who publicly degrades a section of the public on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to a penalty of imprisonment for a term of six months to one year. (3) A person who publicly degrades the religious values of a section of the public shall be sentenced to a penalty of imprisonment for a term of six months to one year, where the act is capable of disturbing public peace.

It is not clear how these documents are linked to the accusation brought against TMA Council Members.

16. On 3 May 2019, Ankara 32. Assize Court concluded that two impugned statements did not constitute terrorist propaganda on the ground that the statements did not include any expression that glorifies the methods of a terrorist organisation that contains violence or threat and acquitted the physicians on this account. However, the Court concluded that the members of the Council publicly provoked hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, in a way that creates an explicit and imminent danger to public security. The Court convicted each defendant to two terms of 10 months' imprisonment for provoking the public to hatred and hostility in two separate statements.

17. With regard to the statement about Afrin operation, the Court accepted that the expression "war is a public health issue" could not *per se* constitute a crime. However, according to the Court, the Council members had depicted the legitimate operations of the security forces against "terrorist organizations" as an unlawful attack against civilians. The Court also noted that similar statements had been previously issued by "terrorist organizations" and their media offsets. Considering the social position of the physicians, the Court concluded that the impact of the statements made by the TMA was high on public. Following these observations, the Court concluded that although the military operation had been conducted to protect national security of Turkey, the view presented by "terrorist organizations" that it had been conducted against civilians was strengthened by the statements made by the TMA. Due to this misrepresentation, Turkish citizens of Kurdish origin, according to the Court, might have conceived the operation being conducted against Kurdish civilians. As a result, the Court held that the statement provoked hatred and hostility in one section of the public against another section that constitutes a crime under Article 216 of the Turkish Criminal Code.

18. As to the second statement made on the Peace Day on 1 September 2016, the Court made similar observations. The Court stated that security forces had conducted operations against "terrorist organizations" to close ditches to clear cities from explosives and ammunition. However, according to the Court, with its statement the TMA misled the public and presented security forces as carrying out operations against civilians. The Assize Court further stated that "there is not a single word of condemnation of the actions of an armed terrorist organization, nor are there sentences that imply it." This position, the Court said, "strengthened the propaganda of the terrorist organization which portrayed legitimate operations against PKK/KCK/YPG as massacre and illegitimate attack against the civilian population". The Court came to the conclusion once again that the Turkish citizens of Kurdish origin might have conceived the operation being conducted against Kurdish civilians.

19. Hande Arpat was additionally sentenced for "disseminating propaganda in support of a terrorist organization" to 18 months and 22 days in prison concerning her three Facebook posts.

### **III. International Law and Standards**

20. Turkey is party to the following major human rights treaties: the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD) and the European Convention on Human Rights (ECHR).

21. Under Article 90 of the Constitution, "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". Therefore, any decision that is in conflict with international human rights law treaties to which Turkey is a party also violates the Constitution.

22. It is similarly a fundamental principle of international law, also reflected in article 27 of the Vienna Convention on the Law of Treaties, that a State may not invoke provisions of its internal law for its failure to perform a treaty obligation.

23. Neither the indictment nor the judgment of the Assize Court invokes international law and standards concerning propaganda for war, incitement to violence and hate speech. This expert opinion now turns to the international law and standards.

#### **A. The protection of freedom of expression and permissible restrictions**

24. Freedom of expression and belief is protected under Article 19 of the ICCPR, which provides:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include 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.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a. For respect of the rights or reputations of others;*
  - b. For the protection of national security or of public order (ordre public), or of public health or morals.**

25. The European Convention on Human Rights similarly protects freedom of expression. Article 10 provides:

- 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

26. Both treaties, therefore, allow for the restrictions of the rights to freedom of expression under only highly conditions. The restrictions must be

- Provided or prescribed by law
- Undertaken for one of the legitimate purposes expressly identified in 19(3) and 10(2)
- Necessary and proportionate to those ends, ie, the least restrictive means to achieve the purpose.

27. Consequentially, as stressed by the Human Rights Committee, when "a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."

28. In addition to the possibility of restrictions contemplated by article 19(3) Article 20 of the ICCPR requires the prohibition of two limited categories of expression:

- 1. Any propaganda for war shall be prohibited by law.*
- 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

29. The UN Human Rights Committee, which is the supervisory body for the ICCPR responsible for the authoritative interpretation of its context, has set out the relationship between article 19 and article 20 in its General Comment 34 on article 19:

*50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.*

*51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.*

30. In this regard, the bases set out for limitation under article 19 - respect of the rights or reputations of others and the protection of national security or of public order (*ordre public*), or of public health or morals - must be read together with article 20.

31. Article 19 of the ICCPR and 10 of the ECHR protect a wide range of expression. The Human Rights Committee affirms that paragraph 2 of article 19 “requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse. ...The scope of paragraph 2 embraces even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20.”

32. The Human Rights Committee has stated that restrictions of the right to freedom of expression “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”<sup>6</sup> And where a statement is not subject to permissible limitations, such as inciting to violence or instigating ethnic hatred, States cannot restrict, with reference to maintaining public order and safety, the right of the public to be informed of matters of general interest, by applying the weight of the criminal law.<sup>7</sup>

33. Indeed, the European Court of Human Rights, in *Fatullayev v. Azerbaijan*, the applicant criticized the foreign and domestic political moves made by the Azerbaijani Government, noting that the country’s continued close alliance with the US was likely to lead to Azerbaijan’s involvement in a possible US-Iranian war. The author also proposed a hypothetical scenario of such a war, according to which Iran would respond by bombing a number of facilities on the territory of Azerbaijan. The ECtHR categorized the article as political expression and concluded that the domestic courts had overstepped any margin of appreciation that might afforded to them for restrictions on debates on matters of public interest.<sup>8</sup>

34. The ECtHR has also stated that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system, the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings when replying even to the unjustified attacks and criticisms of its adversaries, particularly where other means are available.<sup>9</sup>

## **B. “Propaganda for war and advocacy for peace”**

35. The expression of views about war and military operations are therefore protected under article 19. Indeed as noted above, Article 20 of the ICCPR provides that “Any propaganda for war shall be prohibited by law”. State parties, therefore, have a positive duty to protect against war propaganda, and that duty is likely to be undermined if it seeks to prohibit and punish views that may be critical of war. The

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<sup>6</sup> CCPR, General Comment no. 34, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 23.

<sup>7</sup> See *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, 8 July 1999, para. 63 and *Erdoğan v. Turkey*, no. 25723/94, ECHR 2000-VI, para. 71.

<sup>8</sup> *Fatullayev v. Azerbaijan*, no. 40984/07, 22.4.2010, para.128.

<sup>9</sup> See *Incal v. Turkey*, 9 June 1998, Reports 1998-IV, para. 54.



Human Rights Committee in its General Comment on article 20 clarified that the prohibition of war propaganda is fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.<sup>10</sup>

36. While the ECHR does not explicitly prohibit war propaganda, similarly to the ICCPR,<sup>11</sup> the Preamble of the Convention states that fundamental freedoms are the foundation of justice and peace. The European Court of Human Rights (ECtHR) in *Garaudy v. France* has made clear that expressions that go against the fundamental values of the Convention, including justice and peace, are not protected by the Convention.<sup>12</sup> In *Hizb ut-Tahrir and Others v. Germany*, the ECtHR also held that the commitment to the peaceful settlement of international conflicts and to the sanctity of human life are also founding principles of the Convention. The ECtHR, therefore, concluded that expressions that aim the violent destruction of a State and for the banishment and killing of its inhabitants could not be protected under the Convention.<sup>13</sup>

37. It might be concluded then that war propaganda is inconsistent with the ECHR. Since the preamble regards justice and peace as targets to be achieved through the exercise of fundamental rights, statements advocating for peace should be seen as presumptively protected under the ECHR system.

38. Statements against war will often entail the author to criticizing governmental policies and practices. Such speech falls within the category of political expression, which as noted is protected by both the ICCPR and the ECHR. The ECtHR has held that there is only very limited scope under Article 10.2 –for restrictions or limitations on political speech or on debate on questions of public interest.

### **C. Restrictions based on “Hate Speech”**

39. Article 20(2) of the International Covenant on Civil and Political Rights narrowly defines speech that requires prohibition as “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The UN Human Rights Committee has held that any prohibition of propaganda of such a “hate speech” must be subject to all restrictions pursuant to article 19.3 ICCPR,<sup>14</sup> according to which the exercise of freedom of expression may be limited “only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.” This must take into account “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.”<sup>15</sup>

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<sup>10</sup> General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) : 29/07/1983, CCPR General Comment No. 11. (General Comments), para. 2.

<sup>11</sup> See Preamble ICCPR, “Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

<sup>12</sup> *Garaudy v. France* (dec.) , no. 65831/01, 24.6.2003.

<sup>13</sup> *Hizb ut-Tahrir and Others v. Germany* (dec.), no. 31098/08, 12.6.2012, para. 73. See also *Kasymakhunov and Saybatalov v. Russia*, no. 26261/05, 14.3.2013, para. 106.

<sup>14</sup> CCPR, General Comment no. 34, op. cit., para. 50.

<sup>15</sup> CCPR, General Comment no. 34, op. cit., para. 21.

## I. Definitions

40. There is no universally accepted definition of the term “hate speech” under international law. As the UN Special Rapporteur on freedom of expression pointed out in his 2019 report to the UN General Assembly, ““Hate speech”, a shorthand phrase that conventional international law does not define, has a double ambiguity. Its vagueness and the lack of consensus around its meaning can be abused to enable infringements on a wide range of lawful expression.”<sup>16</sup>

41. The UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence<sup>17</sup> defines “Hatred” and “hostility” as referring to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term “incitement” refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.<sup>18</sup>

42. According to the preamble to ECRI General Policy Recommendation No. 15, hate speech may be defined as “the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of “race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status; may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes”.

43. Recommendation 97/20 on hate speech adopted by the Committee of Ministers of the Council of Europe defined hate speech as “covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.

## II. Legitimate restrictions

44. As stressed above, any limitation based on “hate speech” must however always respect the three-tier test for a legitimate restriction of the right to freedom of expression under international law: being provided by law; being for one of the legitimate purposes set out in ICCPR 19(3) and ECHR 10(2) ; and being necessary and proportionate. Indeed, although in some cases critique against the government might exceed the permissible limits and turn to incitement to violence, international

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<sup>16</sup> UN Special Rapporteur on freedom of expression, Annual report, UN Doc. A/HRC/22/17/Add.4, para. 1. According to Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, “States Parties shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”

<sup>17</sup> The Plan of Action is the result of a discussion by a high-level group of human rights experts, convened under the auspices of the United Nations High Commissioner for Human Rights in 2013.

<sup>18</sup> UN Special Rapporteur on freedom of expression, Annual report, op. cit., appendix, footnote 5

law and jurisprudence shows this will only meet the requirements of necessity and proportionality only under very exceptional conditions.<sup>19</sup>

45. The UN Human Rights Committee has held that a State party, in any given case, must demonstrate in specific fashion the precise nature of the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression".<sup>20</sup>

46. The UN Special Rapporteur on freedom of expression has stressed that "[a] critical point is that the individual whose expression is to be prohibited under article 20 (2) of the Covenant is the advocate whose advocacy constitutes incitement. A person who is not advocating hatred that constitutes incitement to discrimination, hostility or violence, for example, a person advocating a minority or even offensive interpretation of a religious tenet or historical event, or a person sharing examples of hatred and incitement to report on or raise awareness of the issue, is not to be silenced under article 20 (or any other provision of human rights law). Such expression is to be protected by the State, even if the State disagrees with or is offended by the expression."<sup>21</sup>

47. Based on a range international human rights standards and jurisprudence, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence has set a set of six criteria to assess the severity of the "hatred" such to reach the threshold of prohibition under article 20.2 ICCPR:

*"(a) **Context:** Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated;*

***Speaker:** The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed;*

***Intent:** Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.*

***Content and form:** The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed;*

***Extent of the speech act:** Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on*

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<sup>19</sup> See, for instance, *Süreç v. Turkey* (no. 1), no. 26682/95, 8.7.1999; *Medya FM Reha Radyo ve İletişim A.Ş v. Turkey* (dec.) - 32842/02, 14.11.2006.

<sup>20</sup> Human Rights Committee, General Comment No. 34 (2011), para. 36.

<sup>21</sup> UN Special Rapporteur on freedom of expression, Annual report, op. cit., para. 10.

*the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public;*

**Likelihood, including imminence:** *Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct.*<sup>22</sup>

48. The ECtHR requires domestic judicial authorities to take into account the text or content of the speech expression alongside the broader context in which it is made. The context of the expression includes an assessment of multiple factors, including who exercises it, where and when it is made, its target audience, whether there exists real and present danger that the expression will lead to violence, hatred or intolerance. However the mere fact that an expression is harsh and critical of the government and even one-sided does not necessarily mean that it amounts to incitement. In this regard, the ECtHR has found various statements to fall within the acceptable limits of freedom of expression including those such as, Kurdistan having been annexed as a colony by the Turkish State; the portrayal of the Turkish State as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms; the "racist policy of denial" *vis-à-vis* the Kurds being instrumental in the development of the "fascist movement";<sup>23</sup> the romanticizing of the aims of the Kurdish movement by saying that "it is time to settle accounts"; referring to the Republic of Turkey as a "terrorist state";<sup>24</sup> the condemning of the "*military action*" of the State which includes the State's "dirty war against the guerrilla" and the "open war against the Kurdish people";<sup>25</sup> saying that "*Kürdistan is burning*" and "describing events as genocide";<sup>26</sup> claiming that the State is engaging in "massacre" or defining the conflict as "a war"<sup>27</sup>.

49. Two different approaches have been adopted by the ECtHR in dealing with hate speech, depending on the nature of the speech. The ECtHR either excludes hate speech from the protection of the Convention under Article 17 when the speech negates the fundamental values of the Convention (category 1), or applies the tests of proportionality and necessity under Article 10 of the Convention when the relevant hate speech is not apt to destroy fundamental rights (category 2).

50. Category 1 hate speech includes such expression as incitement to violence and support for terrorist activity,<sup>28</sup> statements denying the Holocaust, or justifying a pro-Nazi policy.<sup>29</sup> In some other cases, the ECtHR has classified ethnic, religious and racial hate in Category 1.

51. In *Pavel Ivanov v Russia*, the applicant authored and published a series of articles portraying the Jewish population as the source of evil in Russia. He accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed a fascist ideology to the Jewish leadership. Both in his publications and in his oral submissions at the trial, he consistently denied Jews the right to dignity. The

<sup>22</sup> UN Rabat Plan of Action, para. 29, endorsed by UN Special Rapporteur on freedom of expression.

<sup>23</sup> *Başkaya and Okçuoğlu v. Turkey*, no. 23536/94, 08.7.1999, para. 64.

<sup>24</sup> *Sürek v. Turkey* (no. 4), no. 24762/94, 08.7.1999, para. 56

<sup>25</sup> *Erdoğan v. Turkey*, no. 25723/94, 15.6.2000, para. 62.

<sup>26</sup> *Şener v. Turkey*, no. 26680/95, 18.7.2000, para. 44.

<sup>27</sup> *Karkin v. Turkey*, no. 43928/98, 23.9.2003.

<sup>28</sup> *Roj TV A/S v. Denmark*, No. 24683/14, 17/04/2018.

<sup>29</sup> *Lehideux and Isorni v. France*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, para. 50; *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX; *Williamson v. Germany*, no. 64496/17, 08.01.2019.

ECtHR found that by reason of Article 17 of the Convention, the applicant may not benefit from the protection afforded by Article 10 of the Convention.<sup>30</sup>

52. In the early *Glimmerveen and Haagenbeek v. the Netherlands* case, the applicants were members of a far right party that were defending the removal of Surinamers, Turks and other migrant workers from Netherlands. The European Commission of Human Rights held that the expression of racist political views constituted activities within the meaning of Article 17 of the Convention.<sup>31</sup>

53. In *Norwood v. United Kingdom*, the applicant was a member of an extreme right party. Between November 2001 and 9 January 2002 he displayed in the window of his first-floor flat a large poster with a photograph of the Twin Towers in flame, the words "Islam out of Britain – Protect the British People" and a symbol of a crescent and star in a prohibition sign. The ECtHR noted that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, was considered incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.<sup>32</sup>

54. In Category 2 cases, the ECtHR, sometimes has found applications inadmissible whereas in some cases it found the restriction in the margin of appreciation of the respondent government. The common feature of all cases where no violation under Article 10 was found is that the hatred against a certain group had been expressed in a very clear way.

55. With regard to the international law three-part test developed for qualified rights, the European Court, as the UN Human Rights Committee applies it to hate speech prohibitions under Article 10. Prohibitions imposed upon expressions are permissible in terms of art 10(2) where they are 'prescribed by law'; serve a 'legitimate aim', including the protection of the rights of others; and where the 'the restriction is necessary in a democratic society'.

56. For instance in *Soulas and Others v. France*, the ECtHR noted, in particular, that, when convicting the applicants, the domestic courts had underlined that the terms used in the book were intended to give rise in readers to a feeling of rejection and antagonism, exacerbated by the use of military language, with regard to the communities in question, which were designated as the main enemy, and to lead the book's readers to share the solution recommended by the author, namely a war of ethnic re-conquest.<sup>33</sup>

57. In *Balsyte-Lideikiene v. Lithuania*, the applicant expressed aggressive nationalism and ethnocentrism ("The Lithuanian nation will only survive by being a nationalist nation – no other way exists!"), repeatedly referred to the Jewish population as perpetrators of war crimes and genocide against the Lithuanians also used the same language with reference to the Polish population. The ECtHR considered that these statements were "a biased and one-sided portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred [and] could be attributed to the "ideology of extreme nationalism", which promoted national hatred, xenophobia and territorial claims [and that therefore the authorities] did not overstep their margin of appreciation when

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<sup>30</sup> Pavel Ivanov v. 35222/04, 20.2.2007.

<sup>31</sup> *Glimmerveen and Haagenbeek v. the Netherlands*, no. 8348/78, 11.10.1979.

<sup>32</sup> *Norwood v. United Kingdom*, no. 23131/03, 16.11.2004.

<sup>33</sup> *Soulas and Others v. France*, no. 15948/03, 10.7.2008, para. 43.

they considered that there was a pressing social need to take measures against the applicant".<sup>34</sup>

58. In *Féret v. Belgium*, slogans including "Stand up against the Islamification of Belgium", "Stop the sham integration policy" and "Send non-European job-seekers home" was seen to be liable to arouse feelings of distrust, rejection or even hatred towards foreigners, especially among less knowledgeable members of the public.<sup>35</sup>

59. When the target group and hatred is not clear, however, the ECtHR requires national authorities to carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference and carefully balancing the applicants' right to freedom of expression with the protection of the rights of other people not to be insulted on the grounds of their beliefs, ethnic identity or other protected grounds. National judicial authorities should also examine the statements under the general context and content of the article, assess the author's intention, the public interest of the matter discussed and other relevant elements. Domestic courts in such proceedings are required to consider whether the context of the case, the public interest and the intention of the author of the impugned article justified the possible use of a degree of provocation or exaggeration.<sup>36</sup> In *Tagiyev and Huseynov v. Azerbaijan*, the ECtHR held that the respondent State had violated Article 10 of the Convention due to failure of domestic authorities to make these assessments.

60. In *Savva Terentyev*, the applicant was prosecuted and given a suspended prison sentence for statements which, as the domestic courts found, incited hatred and enmity against police officers as a "social group" and called for their "physical extermination". The applicant commented that "it would be great if in the centre of every Russian city, on the main square ... there was an oven, like at Auschwitz, in which ceremonially every day, and better yet, twice a day (say, at noon and midnight) infidel cops would be burnt". However, the ECtHR held that it was used as a provocative metaphor, which frantically affirmed the applicant's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops"), and was his emotional appeal to take measures with a view to improving the situation.<sup>37</sup>

61. In *Perinçek v. Switzerland*, the intervening Turkish government itself underscored the importance of freedom of expression in hate speech charges. Indeed the Turkish government stated that "opinions could not be interfered with simply because the public authorities saw them as unfounded, emotional, worthless or dangerous".<sup>38</sup> While concluding that the applicant's freedom of expression was violated the Court took these elements into account: the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured the applicant simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

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<sup>34</sup> *Balsyte-Lideikiene v. Lithuania*, no. 72596/01, 04.11.2008, para. 79.

<sup>35</sup> *Féret v. Belgium*, no. 15615/07, 16.7.2009, para. 71. Similarly see *Le Pen v. France* (dec.), no. 18788/09, 20.4.2010.

<sup>36</sup> *Tagiyev and Huseynov v. Azerbaijan*, no. 13274/08, 05.12.2019, para. 46 and 48.

<sup>37</sup> *Savva Terentyev v. Russia*, no. 10692/09, 28.08.2018, para. 72.

<sup>38</sup> *Perinçek v. Switzerland*, 27510/08 [GC], 15.10. 2015, para. 107.

62. For similar reasons the ECtHR, in *Dink v. Turkey*, concluded that the respondent state violated Article 10 of the Convention by convicting the applicant for denigrating Turkish identity.<sup>39</sup>

63. It follows then that to be regarded as hate speech under international law; i. the impugned statement should fall within the definition developed under the ICCPR and ECHR and their attendant jurisprudence, ii. the statement should clearly target a person or group of persons on the ground of "race, colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status", iii. national authorities should examine the statements under the general context and content of the article, assess the author's intention, the public interest of the matter discussed.

64. Furthermore, the a restriction of such speech must pursue a legitimate aim under international law – and articles 19.3 ICCPR and 10.2 ECHR – and be necessary in a democratic society and proportionate in respect of any other less intrusive measure.

## **IV. Implementation of Standards to the Current Case**

### **A. Propaganda for War and Defending Peace**

65. In the current case defendants were convicted for two separate statements made by the TMA Council. There is no controversy about the lack of the element of incitement to violence in the statements. Indeed the 32<sup>nd</sup> Ankara Assize Court acquitted the defendants for terror propaganda charges on the ground that they had not glorify or incite violence.

66. Therefore, the analysis below will only focus on the conviction of the defendants for inciting hatred and hostility.

67. The Court in convicting the defendants ignored the fact that both statements had been related to advocacy for peace demand by a professional organization. Although the Court stated that an expression stating that "war is a public health issue" cannot *per se* be seen as crime, neither it did discuss the political nature of the statement nor the importance of peace in human rights law.

68. As noted above under Article 90 of the Constitution "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". It follows then the Court, in construing and interpreting the domestic laws under consideration, must do so in a manner consistent with Turkey's international legal obligations.

69. According to international human rights law binding on Turkey under articles 19 ICCPR and 10 ECHR, a statement opposing the government's military actions clearly falls squarely within the category of political speech. A restriction of such speech does not pursue a legitimate aim under international law – and articles 19.3 ICCPR and 10.2 ECHR – and, even if it would, it is neither necessary in a democratic society nor proportionate in respect of any other less intrusive measure. In any event, any "margin of appreciation" by domestic authorities regarding political

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<sup>39</sup> *Dink v. Turkey*, no. 2668/07, 14.9.2010.

speech and on matters of public interest is extremely narrow. The Court, while convicting the defendants, also disregarded the political nature of supporting peace.

70. Even if there is no rule prohibiting propaganda for war in the Turkish law, a systematic interpretation of international human rights law requires domestic courts to take into account Article 20 (1) of the Covenant into consideration while drawing the scope of freedom of expression.

71. The Ankara 32<sup>nd</sup> Assize Court accepted that the statement that “War is a public health issue” cannot *per se* be seen as crime. However, the Court also concluded that opposition to war in certain conditions can incite hatred amongst people. It is considered that such a conclusion is in stark contrast with clear wording of the Covenant and therefore cannot be considered in pursuance of this obligation under international law. A statement opposing an armed conflict if it does not insult, ridicule or slander a group of people cannot be criminally punished according to international human rights law.

72. Although the Court accepted the contention that the TMA opposed war to support “terrorist organizations”, the only evidence backing this claim was the revelation of unrelated websites and e-mails sent by a legal political party to the TMA. However, it is striking that the official statement made by the TMA relying on ethical principles to explain its position<sup>40</sup> was entirely ignored by the Court. Peace is one of the fundamental values on which the international human rights system is based. Questioning the real intent of peace campaigners without reliable evidence against their explicit will is in stark contradiction with the spirit of this system.

73. The ICJ considers that by convicting under criminal law the defendants for an expression protected under international law, the first instance court unduly restricted their right to freedom of expression, as such a restriction is neither legitimate nor necessary or proportionate under articles 19.3 ICCPR and 10.2 ECHR. Furthermore, article 20 ICCPR cannot be considered as applicable in this case as in accordance with the privileged protection offered by international human rights law it does not prohibit speech on important matters of public interest such as support for peace.

74. The decision of the Ankara 32<sup>nd</sup> Assize Court breached the right to freedom of expression as protected by international human rights law. This approach not only violates international obligations of Turkey, but also ignores the Turkish Constitution which requires judicial authorities to comply with international human rights treaties.

## **B. Hate Speech**

75. The Ankara 32<sup>nd</sup> Assize Court sentenced each defendant to 10 months imprisonment twice for provoking the public to hatred and hostility in two separate statements under Article 216 of the Penal Code.

76. Relevant paragraph 1 of Article 216 of the Penal Code provides that “A person who publicly provokes hatred or hostility in one section of the public against another section which has a different characteristic based on social class, race, religion, sect or regional difference, which creates explicit and imminent danger to public security shall be sentenced to a penalty of imprisonment for a term of one to three years”.

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<sup>40</sup> See the public statement of the TMA at supra note 3.



77. This provision is in principle in line with international standards. However, the Venice Commission in its opinion on Article 216 of the Penal Code of Turkey also stated that "Article 216 should not be applied to punish non-violent but harsh criticism of government policies, but rather to prevent racist statements in particular against national minorities that create an explicit and imminent danger to public security."<sup>41</sup>

78. The ICJ considers that application of the provision in the present case would be incompatible with Turkey's international legal obligations.

79. First, the defendants were convicted for the two statements published by the TMA. Contrary to what may be categorized as "hate speech" for the purpose of limiting freedom of expression under international human rights law, none of the statements prepared by the defendants include a name of national, ethnic, racial or religious group. The text does not implicate a group either, let alone inciting hatred against it. The defendants' general statement concerning war is not even did not even criticize or otherwise specifically comment on the Turkish armed forces.

80. Secondly, even the widest definition of hate speech under international human rights law requires the presence of some kind of "advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons law."<sup>42</sup> However, the decision of the Ankara 32<sup>nd</sup> Assize Court does not make it clear, which part of the impugned statements constitute which type of conduct. It failed to identify any specific phrases that were said to "insult" or "to incite hatred" against the Turkish ethnic or national group. Even the widest interpretation of the texts does not allow such a conclusion. As the ECtHR jurisprudence shows, arousal of rejection, antagonism, distrust, or hatred towards a certain group is required in order to consider a speech as hate speech under the ECHR. None of these exists in the impugned statements.

81. Thirdly, when the target group and hatred is not clear, the national authorities should carry out a comprehensive assessment of the impugned remarks, putting forward relevant and sufficient reasons for justifying the interference with the applicants' freedom of expression as necessary and proportionate to a legitimate aim of protection of the rights of other people not to be insulted on the grounds of their beliefs, ethnic identity and other protected grounds. The national judicial authorities should also examine the statements under the general context and content of the article, assess the author's intention, the public interest of the matter discussed and other relevant elements. The TMA in its response to criticism, stated that it relied on ethical requirements of the medical profession. The Ankara Assize Court entirely ignored the consequences of fact that the statements were made by physicians in their capacity as a professional association. Following the Afrin operation, international organizations and international human rights NGOs also raised some concerns about civilian casualties.<sup>43</sup> This point was also unobserved in the decision. The elements that were taken into account in the Perinçek judgment, namely whether the applicant's statements bore on a matter of public interest, whether it did amount to a call for hatred or intolerance; the context in which they were made;

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<sup>41</sup> European Commission For Democracy Through Law (Venice Commission) Opinion on Articles 216, 299, 301 And 314 Of The Penal Code Of Turkey, 106th Plenary Session, 11-12 March 2016, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)002-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)002-e)

<sup>42</sup> See ECRI General Policy Recommendation No. 15 at para. 42 above.

<sup>43</sup> See amongst others HRW, Turkey/Syria: Civilians at Risk in Syria Operation, available at: <https://www.hrw.org/news/2019/10/11/turkey/syria-civilians-risk-syria-operation>; Amnesty International, Syria: Turkey must stop serious violations by allied groups and its own forces in Afrin, <https://www.amnesty.org/en/latest/news/2018/08/syria-turkey-must-stop-serious-violations-by-allied-groups-and-its-own-forces-in-afrin/>

whether they could be regarded as affecting the dignity of the members of the Turkish community to the point of requiring a criminal law response in Turkey; whether defendants were voicing an opinion that diverged from the established ones in Turkey, were not examined by the Ankara Assize Court. It must be concluded that the decision rendered by the Court, therefore, does not meet the requirements international human rights law.

82. The decision of the Ankara 32<sup>nd</sup> Assize Court does not protect an ethnic group from insult, hatred or hostility but rather silences a professional organization's call for peace, a type of expression protected under international human rights law.

83. The ICJ, therefore, considers that the impugned statements of the defendants in the current case cannot be deemed unprotected "hate speech" under international human rights law and be protected under relevant provisions concerning freedom of expression.