



İNSAN HAKLARI DERNEĞİ
HUMAN RIGHTS ASSOCIATION

Necatibey Cad. 82/11-12,
06430 Demirtepe-Ankara
TÜRKİYE
Phone: +90 312 230 35 67-68-
69
Fax: +90 312 230 17 07
e-mail: ihd@ihd.org.tr,
www.ihd.org.tr

Department for the Execution of Judgments of the ECHR

Directorate General Human Rights and Rule of Law

Council of Europe 67075

Strasbourg Cedex France

Email: dgi-execution@coe.int

RULE 9.2 COMMUNICATION

in the Öner and Türk Group of Cases (no. 51962/12); Akçam Group of Cases (no. 27520/07); Şener Group of Cases (no. 38270/11); Işıkırık Group of Cases (no. 41226/09) and Artun and Güvener Group of Cases (no. 75510/01) v. Türkiye

Submitted by the
HUMAN RIGHTS ASSOCIATION

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DGI -Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the European Court of Human Rights
F-67075 Strasbourg Cedex FRANCE
Email: DGI-Execution@coe.int
Sent by email

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Ankara

Submission by the Human Rights Association pursuant to Rule 9.2 of the Committee of Ministers' Rules for the Supervision of the Execution of Judgments, Additional Observations on the Implementation of *Öner and Türk* (no. 51962/12); *Altuğ Taner Akçam* (no. 27520/07); *Şener* (no. 38270/11); *Işıkırık* (no. 41226/09); and *Artun and Güvener* (no. 75510/01) group of cases judgments.

I. INTRODUCTION

1. The Human Rights Association (İnsan Hakları Derneği –“İHD”) is a non-governmental, independent, and voluntary body. The association, founded in 1986, is the oldest and largest human rights organization in Türkiye and its sole and specific goal is to promote “human rights and freedoms.” İHD issues special reports on various human rights issues, including annual reports on human rights violations in Türkiye. İHD also submits shadow reports before committees at the United Nations and the Council of Europe as well as submitting Rule 9.2 communications.¹

2. The aim of this submission is to present information to the Committee of Ministers about the persistent negligence of Turkish authorities to take full and effective measures concerning the execution of judgments in the *Öner and Türk* (no. 51962/12); *Akçam* (no. 27520/07); *Şener*

¹ <https://www.ihd.org.tr/en>

(no. 38270/11); *Işıkırık* (no. 41226/09) and *Artun and Güvener* (no. 75510/01) group of cases to prevent violations of the right to freedom of expression in Türkiye.

A. Background

The ***Öner and Türk*** group concerns unjustified convictions of the applicants mainly based on Article 6 § 2 (printing of statements made by terrorist organizations) and Article 7 § 2 (propaganda in favor of an illegal organization) of the Anti-Terrorism Law (ATL); Article 215 (praising an offence or an offender) and Article 216 (provoking the public to hatred, hostility, denigrating a section of the public on grounds of social class, race, religion, sect, gender or regional differences) of the Turkish Penal Code (TPC) (violations of Article 10).

The ***Nedim Şener*** group focuses on the pre-trial detention of journalists on serious charges, such as aiding and abetting a criminal organization or attempting to overthrow the constitutional order, without relevant and sufficient reasons (violations of Articles 5 and 10).

The ***Altuğ Taner Akçam*** group deals with prosecutions under Article 301 of the TPC (publicly denigrating the Turkish nation or the organs and institutions of the state, including the judiciary and the army), which the Court found not to meet the “quality of law” requirement in view of its “unacceptably broad terms” (violations of Article 10).

The ***Artun and Güvener*** group concerns unjustified interferences with the applicants’ right to freedom of expression on account of their criminal convictions for insulting public institutions, officials, and the president under Articles 125 and 299 of the Criminal Code (the President, the Republic, police officers, tax inspectors etc.) (violations of Article 10).

The ***Işıkırık*** group concerns criminal sanctions imposed on the applicants on account of the exercise of their right to freedom of expression or assembly based on Article 220 § 6 (committing an offence on behalf of an organization without being a member) and 220 § 7 (aiding and abetting an organization without belonging to its structure) of the TPC.

II. GENERAL MEASURES

A. General Comments

1. In Turkey, the practices that lead to violations of the right to freedom of expression, in particular, stem from the ambiguity of the definition of terrorism in the Anti-Terror Law and problems with its implementation. The problem of the Anti-Terror Law and the

definition of terrorism, which is discussed in more detail in the *Öner and Türk* group, also hinders the implementation of judgments regarding these groups of cases.

2. The former UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, undertook a fact-finding mission to Türkiye in 2006 and delivered his first report to the UN Human Rights Commission which was deliberated at its 62nd session. The special rapporteur delivered his recommendations following his assessments on the definition of terrorism. These recommendations asked for a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities as well as making them comply with the definitions of terrorism and terrorist offenses with international norms and human rights standards, notably with the principle of legality enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) that limits such offenses to deadly, or otherwise serious violence against members of the general population or segments of it, or the taking of hostages. Moreover, the special rapporteur asked for the consideration of a separate definition of “terrorism” beyond acts comprising terrorist offenses and to take note of international covenants while drafting new anti-terror legislation.
3. The UN Special Rapporteur criticized the definition of terrorism as prescribed by Article 1 of the ATL since the definition was not based on specific criminal acts but on intent or target. According to the rapporteur, this definition was broad and vague. In such cases people and organizations could be criminalized as terrorists although they did not engage in any violent acts. This, indeed, is the case. Journalists, authors, academics, human rights defenders, trade unionists, artists, women, mayors, members of the parliament, politicians, students, basically everyone can easily be accused of being terrorists in Türkiye. Those who express their opinions can be charged although they have not engaged in any act of violence.
4. According to data provided by the Ministry of Justice, 10,745 people were prosecuted in 2013 under Articles 6 and 7 § 2 of the ATL and this figure steadily went up each year only to reach 24,585 in 2017. The 2018 statistics also revealed that investigations were initiated into 46,220 persons with 17,077 lawsuits were brought against these persons. Ministry of Justice’s 2020 data revealed that while 26,225 persons faced investigations under these articles, 6,551 of them stood trial.

5. Since the problem of the ambiguity of the definition of terrorism has not been resolved in Türkiye, the latest amendments introduced to ATL No. 3713 in 2019 also failed to solve the problem.²
6. The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, Fionnuala Ní Aoláin, presented her recommendations with regards to the United Kingdom in her opinion (7/2018) of 17 July 2018. The same standards must be applied to Türkiye as well.³
7. The ECtHR has started to rule on rights violations due to the ambiguity of the definition of terrorism under the ATL and the sentences imposed under the various articles of the TPC by using articles related to the ATL. The court stated in its judgment in the case of *Selahattin Demirtaş v. Turkey* that the definition of terrorism in the ATL was not clear and therefore Article 314 of the TPC was not foreseeable.⁴
8. The ECtHR's judgments in the cases of *İmret, Bakır*⁵ and *Işıkırık v. Türkiye* holding that the principle of legality was not met, based on the fact that the domestic courts opted for conviction under Article 314 § 2 of the TPC by applying Article 2 § 2 of the ATL, 220 § 6-7 and 324 § 3 of the TPC, confirm the view of the UN rapporteur.
9. Considering the ECtHR judgements, the Committee of Ministers must consider the application of Article 2 § 2⁶ of the ATL, paragraphs 220 § 6,7 and 8 of the TPC, and Article 314 § 3 of the TPC together when addressing the *Işıkırık Group* of cases. The Constitutional Court held in its judgment in the case of Hamit Yakut⁷ that the imprisonment sentence delivered based on Article 220/6 of the TPC did not meet the "legality criterion," while indicating that there was no explanation as to what the statement "crime committed on

² For a comprehensive analysis of the ATL in Türkiye, see:

https://ihd.org.tr/en/wp-content/uploads/2022/05/OzturkTurkdogan_ATL-Report_OMCT_EN.pdf

³ Accordingly, the Special Rapporteur indicated that any counter-terrorism law to be passed in the UK "must indicate the scope of discretion it confers on implementing authorities 'with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference'" reiterating that such provisions must not unduly interfere with the right to freedom of expression, the freedom to seek, receive and impart information and ideas and the right to hold opinions without interference. The Special Rapporteur specifically underlined that counter-terrorism powers must be narrowly defined and be in line with the principles of necessity, proportionality, and non-discrimination .

⁴ <https://hudoc.echr.coe.int/eng?i=001-207173>

⁵ These are cases repeated within the *Işıkırık* group as well as the *Öner and Türk* group.

⁶ "The ones who are not members of terrorist organizations but committed a crime on behalf of the organization shall be deemed as terrorist offenders and punished as members of organizations."

⁷ <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/6548>

behalf of an organization” referred to and decided to render a pilot judgment. Yet, no changes has been made to the text of the law as of yet.

- 10.** Venice Commission’s “Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media” (No. 872/2016) dated 13 March 2017 stated that public prosecutors often charged rights defenders and activists, most notably journalists, under Article 314 or 220 of the TPC and Article 7 of the ATL on the grounds of their press statements, protests and articles; this was unlawful with no substantiation in legality of offenses and led to serious deprivation of rights.⁸
- 11.** According to the “Rule of Law Checklist” by the Venice Commission of the Council of Europe adopted at its 106th plenary session held on 11-12 March 2016, the principle of legal certainty has 8 elements.⁹ These are: accessibility of legislation, accessibility of court decisions, foreseeability of the laws, stability and consistency of law, legitimate expectations, non-retroactivity, nullum crimen sine lege and nulla poena sine lege principles (no crime and punishment without law) and res judicata (no double jeopardy).
- 12.** In the current situation, Article 7 § 2 of the ATL is not foreseeable. It is used in contradiction to the principles established by the ECtHR and the Constitutional Court judgements in this regard, thus, constitutes a violation of the principle of legal certainty.
- 13.** The Venice Commission’s “Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Türkiye,” adopted at its 106th plenary session on 11-12 March 2016, offered fundamental criticism of these articles and found that although there had been some progress, it was not sufficient and that these articles as well as Article 7 of the ATL were applied too broadly, which was contrary to Article 10 of the ECHR and Article 19 of the UN Convention on Civil and Political Rights.¹⁰
- 14.** Turkey has been under political monitoring by the Parliamentary Assembly since 2017, which has consistently adopted resolutions recommending Türkiye to bring its anti-terrorism legislation in line with the protection of human rights. This has been reflected in the Council of Europe Commissioner for Human Rights report following her visit in Türkiye in 2019 as well.¹¹

⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)007-e)

⁹ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

¹⁰ [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)

¹¹ <https://pace.coe.int/en/news/6603/pace-reopens-monitoring-procedure-in-respect-of-Türkiye>

15. The amendments introduced to Article 7 § 2 of the ATL have not been sufficient and the practice has not changed. This situation reveals that there are serious problems regarding legality and foreseeability in the implementation of the text of the law.
16. In the criminal complaint submitted by the Ministry of National Defense, which was disturbed by the scientific opinion statement of the Turkish Medical Association's (TMA)¹² Central Council President Şebnem Korur Fincancı, arbitrary punishment was requested by calling for the application of Articles 125, 216, 301 of the TPC and Article 7 § 2 of the ATL, which have no foreseeability in practice, are contrary to the principle of legal certainty, and as a result, conviction was sought by applying Article 7 § 2 of the ATL.

The ECtHR case law cannot be applied in Türkiye due to the lack of geographical guarantees for judges.

1. The lack of geographical guarantees for judges in Turkey is an obstacle to their independence in making decisions. There is no clear provision specifying term of office for judges in the courts they serve, thus, they can easily be transferred to other places regardless of the term they serve. For instance, the presiding judge hearing the case against Ekrem İmamoğlu, the Mayor of İstanbul, for insulting members of the Supreme Board of Elections, was replaced because he rejected the request to convict Mr. İmamoğlu to more than two years in prison and ban him from politics.¹³
2. In violation of the principle of the natural judge set out in Article 37 of the Constitution of the Republic of Türkiye, courts are established by the decision of the Council of Judges and Prosecutors (CJP) and closed down when their work is completed in Türkiye. In particular, high criminal courts tasked with trying criminal offenses under the ATL are established through the decision of the CJP. Upon the decision (No. 224) of the CJP dated 12 February 2015, the first decision regarding the high criminal courts authorized and mandated to hear criminal offences within the scope of the ATL was rendered on the grounds of additional sentences introduced to Article 9 § 5 of Law No. 5235 and the implementation started in this way.¹⁴

¹² <https://www.indyturk.com/node/580406/haber/ttb-ba%C5%9Fkan%C4%B1-%C5%9Febnem-korur-fincanc%C4%B1-hakk%C4%B1nda-7-y%C4%B1l-6-aya-kadar-hapis-istemi>

¹³ <https://www.evrensel.net/haber/474096/iddia-imamoglundun-davasina-bakan-hakim-siyasi-yasakli-hale-getirmem-telkin-edildi-dedi>

¹⁴ <https://www.resmigazete.gov.tr/eskiler/2015/02/20150217-3.pdf>

3. Judges have no geographical guarantee in Türkiye. In the Judicial Reform Strategy Document announced by the Ministry of Justice in 2019, it was promised that judges would be granted geographical guarantees.¹⁵ However, more than three years later, this promise has not been kept. This situation is quite serious.
4. The ECtHR has already established¹⁶ that the lack of guarantee of judges and their removal from office against their will or before the end of their term of office was in violation of Article 6 § 1 of the Convention.
5. With regard to Turkey, the Venice Commission's "Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017"¹⁷ emphasized that the president, as a party member, would be the sole decisive power over the CJP and the Constitutional Court, which would seriously undermine the principle of separation of powers and increase the influence of political power over the judiciary.¹⁸ It would be unrealistic to expect judges without geographical guarantees to be impartial and independent in such a constitutional regulation.¹⁹ For these reasons, the ECtHR case law is not applied in the case of individuals targeted by the political power.

B. Öner and Türk Group of Cases

1. In the Action Plan dated 05 January 2023, the government reiterated its statements in previous action plans and argued that Articles 6 and 7 of the ATL and Article 215 of the TPC had been brought in line with the ECHR standards through amendments. In the action plan, the government provided examples of judgments delivered by the Court of Cassation and Constitutional Court. In addition, the government mentioned the amendment that made the right of appeal to the Court of Cassation against sentences imposed under these articles available and stated that this new right protects freedom of expression and that prosecutors' offices follow the ECtHR's case law in their investigations. However, the

¹⁵ https://sgb.adalet.gov.tr/Resimler/SayfaDokuman/23122019162931YRS_TR.pdf

¹⁶ *Grzeda v. Poland* [GC], 15 March 2022 (Application No. 48572/18)

¹⁷ Paragraphs 128 and 129 of the conclusions

¹⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)005-tur](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)005-tur)

¹⁹ <https://ihd.org.tr/en/wp-content/uploads/2019/11/Turkey-Justice-Reform-Strat-Advocacy-Analysis-brief-2019-ENG.pdf>

examples provided do not reflect the systematic violations of freedom of expression and freedom of expression in Türkiye.

2. Türkiye continues to violate the provisions of the ECHR and to move away from the case law of the ECtHR. The dissemination of dissenting voices and freedom of expression have been negatively affected by increased repression and restrictive measures. Criminal cases against and convictions of journalists, human rights defenders, lawyers, authors, opposition politicians, students and social media users continued. It has especially become an established practice in Türkiye to subject human rights defenders and civil society representatives to judicial harassment and criminalize their activities. Many rights defenders face the risk of criminal investigations or prosecution simply for exercising their right to freedom of expression through social media posts. The examples below are clear examples of the structural problems stemming from Article 7 § 2 of the ATL, contrary to what the government claims in its action plan.
3. In one of the most recent examples, Prof. Dr. Şebnem Korur Fincancı, a well-known human rights defender and forensic medicine expert and the President of the Central Council of the Turkish Medical Association (TMA), was targeted by government officials²⁰ and high-level politicians²¹ on the grounds that she expressed her “scientific opinion as a pre-diagnosis and stated that the area should be effectively investigated by independent boards” in a TV broadcast in October 2022 regarding the allegations that the Turkish Armed Forces (TAF) used chemical weapons within the borders of the Iraqi Kurdistan Regional Government. Subsequently, in the investigation initiated against Prof. Fincancı by the Ankara Chief Public Prosecutor’s Office’s Terrorist Offenses Investigation Bureau, she was taken into custody on 26 October 2022 after a raid to her house in İstanbul, brought to Ankara under custody conditions, and was detained by the Ankara 3rd Criminal Peace Judgeship on 27 October 2022 on the allegation of “making propaganda for a terrorist organization.” Prof. Fincancı’s lawyers’ appeal was rejected by the Ankara 49th Criminal Court of First Instance. On 10 November 2022, the prosecutor’s office filed an indictment merely translating its reasons for detention and filed a lawsuit for conviction under Article 7 § 2 of the ATL. Ankara 4th High Criminal Court accepted the indictment

²⁰ <https://www.evrensel.net/haber/473000/erdogan-ttb-baskani-sebnem-korur-fincanci-iyi-hedef-aldi>

²¹ <https://www.evrensel.net/haber/473097/bahceli-ttb-nin-kapatilmasini-sebnem-korur-fincancinin-vatandasliktan-cikarilmasini-istedi>

against Prof. Fincancı, which requested a prison sentence of up to 7 years and 6 months for “making propaganda for a terrorist organization.” The court ruled that the İstanbul High Criminal Court was the competent authority to try the case and sent the file to İstanbul with a decision of lack of jurisdiction. İstanbul 24th High Criminal Court accepted the file. On 11 January 2023, in the third hearing, the court sentenced Prof. Fincancı to 2 years, 8 months and 15 days in prison for “making propaganda for an illegal organization” and ordered her release. The sentencing of statements that are absolutely not crimes under Article 7 § 2 of the ATL shows that there is no progress in Türkiye in this regard.

4. According to the 2020 statistics²² of the Ministry of Justice, a total of 26,225 investigations were initiated under Articles 6 and 7 of the ATL No. 3713, 7,030 of these investigations resulted in a decision of non-prosecution, while 6,551 investigations led to prosecutions. According to the same statistics, a total of 14,443 court cases were filed under Articles 6 and 7 of the ATL in 2020, 4,179 of these cases resulted in conviction and 3,384 in acquittal. In the statistics for 2020, the Ministry of Justice shared separate data on investigations and prosecutions for crimes prescribed in the TPC and special laws. However, in the statistics for 2021, data on the articles regulated under the heading of the type of offense charged were provided collectively, rather than article by article. Therefore, it is not possible to access reliable data on investigations and prosecutions that lead to violations of freedom of expression.
5. For the reasons explained, contrary to the government’s arguments, the practice is not in line with the standards set forth by the ECHR. Articles 6 § 2, 7 § 2 of the ATL lack the “foreseeability and certainty” prescribed in the Convention and the ECtHR’s case law. As stated above in the general comments section, they do not comply with the principle of legal certainty.

C. Nedim Şener Group of Cases

1. In its action plan, the government stated that the free exercise of journalistic activities in Türkiye was enshrined in Article 28 of the Constitution and reiterated its argument that no one was imprisoned for journalistic activities but for criminal activities in the country and did not provide any data on the number of journalists in prison.

²² https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf

2. According to the Journalists' Union of Türkiye, 44 journalists and media workers are currently in prison in Türkiye.²³ In addition, the Ministry of Justice did not respond to the request for information submitted to the Presidential Communication Center on 7 September 2022 to find out the number of journalists in prison, claiming that it was "information that does not concern the public."²⁴

3. The following is a sample of journalists in pre-trial detention:

In Diyarbakır, 22 people, including 20 journalists working for Kurdish media outlets, were taken into custody after their homes and offices were raided on 8 June 2022. 16 of them were detained by the Diyarbakır Criminal Peace Judgeship on 16 June 2022 after 8 days of custody. Aziz Oruç, editor of Mesopotamia News Agency, Safiye Alagaş, news director of JinNews, Serdar Altan, co-chair of Dicle Fırat Journalists' Association, Mehmet Ali Ertaş, editor-in-chief of *Xwebün* newspaper, and journalists Ömer Çelik, Neşe Toprak, Mehmet Şahin, Zeynel Abidin Bulut, Elif Üngör, Remziye Temel, Suat Dođuhan, Lezgin Akdeniz, İbrahim Koyuncu, Abdurrahman Öncü, Ramazan Geciken and Mazlum Güler were among the Kurdish journalists detained.²⁵ In Ankara, 10 journalists working for Kurdish media outlets were also detained. As part of the investigation launched by the Ankara Chief Public Prosecutor's Office, 12 journalists, including Mesopotamia Agency's Managing Editor Diren Yurtsever, MA reporters Deniz Nazlım, Selman Güzelyüz, Zemo Ağgöz, Berivan Altan, Hakan Yalçın, Emrullah Acar and Ceylan Şahinli, JINNEWS reporters Habibe Eren, Öznur Deđer and Derya Ren, and journalist Mehmet Günhan, were taken into custody on charges of membership in an illegal armed organization in an early morning operation on 25 October 2022.²⁶ After 4 days of custody, journalists Diren Yurtsever, Deniz Nazlım, Selman Güzelyüz, Berivan Altan, Hakan Yalçın, Emrullah Acar, Ceylan Şahinli, Habibe Eren, Öznur Deđer and Derya Ren were detained by the court at midnight on 29 October 2022 and were sent to prison. The grounds for the criminal investigation against the journalists and their detention were their work for legally established agencies and certain news reports published in these media outlets. The indictments of the arrested journalists have not yet been filed.

²³ <https://tgs.org.tr/arrested-jailed-journalists-Türkiye/>

²⁴ <https://bianet.org/5/147/267127-justice-ministry-says-number-of-jailed-journalists-doesn-t-concern-public>

²⁵ <https://bianet.org/english/freedom-of-expression/263367-diyarbakir-detentions-16-journalists-remanded-in-custody-six-released>

²⁶ <https://www.ihd.org.tr/ozgur-basin-susturulamaz-2/>

4. A criminal investigation was launched into İHD Co-Chair Attorney Emire Eren Keskin in 2016 for acting as the editor-in-chief of *Özgür Gündem* newspaper in 2014-2015, which was one of the followers of the Kurdish free press tradition and closed down by the state of emergency Decree Law No. 675 dated 29 October 2016. In the same year, a total of 9 intellectuals, authors, journalists and human rights defenders were prosecuted within the scope of the same investigation. The main *Özgür Gündem* case was concluded by the İstanbul 23rd High Criminal Court on 15 February 2021. In its judgment (No. 2020/51, 2021/11) the İstanbul 23rd High Criminal Court, which is specially authorized to try crimes under the ATL, sentenced İnan Kızılkaya, the editor-in-chief of the newspaper, Emire Eren Keskin, the editor-in-chief of the newspaper, and Kemal Sancılı, the publisher of the newspaper, to 6 years and 3 months each for membership in an illegal armed organization. İHD's co-chair and other journalists appealed to the Court of Appeals. The 27th Criminal Chamber of the İstanbul Regional Court of Appeals upheld the conviction ruling of the İstanbul 23rd High Criminal Court with its judgment (No. 2022/466) dated 7 April 2022.²⁷ The appeal for review is currently pending before the Court of Cassation.
5. Despite the ECtHR Grand Chamber's judgment in the case of *Selahattin Demirtaş v. Türkiye (No.2)* stating that "terrorism offenses" under Article 314 of the TPC were not "foreseeable" under the Convention, according to the 2020 statistics of the Ministry of Justice, a total of 208,833 investigations were initiated under Article 314 of the TPC, 82,642 of these investigations resulted in non-prosecution decisions while 33,354 investigations led to prosecutions. According to the same statistics, 54,906 cases were filed under Article 314 of the TPC in 2020, 44,204 of these cases resulted in conviction and 16,516 in acquittal. The statistics for 2021 did not include data on Article 314 of the TPC.
6. The "demonstration of concrete facts" introduced by the Law No. 7331 dated 8 July 2021 and numbered 7331 in subparagraph d of paragraph 2 of Article 101 of the Code of Criminal Procedure (CCP) regarding the issuance of an arrest warrant is not applied in practice, especially in investigations and prosecutions conducted within the scope of the ATL. The above-mentioned situation of arrested journalists who are still in prison can be given as an example.

²⁷ <https://ihd.org.tr/en/ihd-statement-on-eren-keskins-conviction/>

7. Decisions of the criminal peace judgeships²⁸ are much debated; while the right to appeal against detention and judicial control decisions to the Criminal Courts of First Instance was introduced by Law No. 7331 of 8 July 2021 and started to be implemented as of 1 January 2022, it has not yet made a difference. The Council of Europe Venice Commission's "Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships" (No. 852/2016) of 13 March 2017 also proves to be very important.²⁹ Türkiye should comply with these recommendations of the Venice Commission as soon as possible.

D. Altuğ Taner Akçam Group of Cases

1. Article 301 of the TPC lacks the requirement of "the quality of law" as it "contains provisions that are unacceptably broad" and "yet its effects are not foreseeable."³⁰ In its action plan, the government stated that the amendments introduced to Article 301 of the TPC brought it in line with ECHR standards, narrowing the scope of application of the provision; that the launching of an investigation under Article 301 of the TPC was subject to the permission of the Ministry of Justice, which was introduced as a filtering mechanism against arbitrary and abusive use of the provision; and that the practical application of the permission mechanism had improved in recent years.
2. In contradiction to the allegations of the government, public prosecutors often resort to Article 301 of the TPC to silence criticism towards the government and the state. According to the 2020 statistics of the Ministry of Justice, a total of 12,536 investigations were launched under Article 301 of the TPC, while 6,678 of these resulted in non-prosecution decisions, 819 went to the courts. According to the same statistics, 791 court cases were heard in 2020 under Article 301 of the TPC, while 268 of them resulted in conviction, in 126 acquittal rulings were delivered. In the 2021 statistics of the Ministry of Justice, there were no separate data on Article 301 of the TPC, and the information was provided together with those on Article 299 of the TPC. According to these statistics, a total of

²⁸ Criminal peace judgeships were established by Law No. 6545 on Amendments to Turkish Penal Code and Certain Laws to deliver decisions which need to be taken by a judge during all investigations, conduct the proceedings and review the appeals against them. Thus the criminal peace courts were abolished. The duties of the criminal peace courts with regard to the trial proceedings were delegated to the criminal courts of general jurisdiction.

²⁹ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)004-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)004-e)

Also see: <https://www.icj.org/wp-content/uploads/2019/02/Türkiye-Judgeship-Advocacy-Analysis-brief-2018-ENG.pdf>

³⁰ <https://hudoc.echr.coe.int/eng?i=001-107206>

48,069 investigations were launched under Articles 299-301 of the TPC in 2021, while 20,046 of these investigations resulted in non-prosecution decisions; 10,622 of them led to public cases. According to the same statistics, a total of 13,934 trials were held under Articles 299-301 of the TPC, resulting in 4,586 convictions and 4,465 acquittals. It should be insisted that the government provide up-to-date and detailed statistical data on criminal investigations and prosecutions and comment on this data.

3. To offer an example of the prosecutions under Article 301 of the TPC, an indictment was filed against İHD Co-Chair Lawyer Öztürk Türkdoğan on the grounds that the statement titled “Stop Denying the Armenian Genocide for Justice and Truth”³¹ published on İHD’s website on 24 April 2017 constituted the crime of denigrating the Turkish Nation, the State of the Republic of Türkiye, the institutions and organs of the State under Article 301 of the TPC, and this indictment was accepted by the Ankara 24th Criminal Court of First Instance. The prosecution is still ongoing.³² The prosecution of the co-chair of the association due to a statement released by the association shows that in practice, the ECtHR case law has been completely disregarded and this article is being used as a tool of political pressure.
4. For instance, on 25 January 2023, an investigation was launched against the chairpersons of 12 bar associations, including the chairs of Diyarbakır, Van and Mardin Bar Associations, under Article 301 of the TPC, on the grounds of their joint statement “We must defend peace under all circumstances!” against the Turkish Armed Forces’ airstrikes in northern Syria and Iraq last November. The file is expected to be sent to the Ministry of Justice for permission to investigate.³³

E. Artun and Güvener Group of Cases

1. In its action plan, the government stated that legislative amendments and the practice of domestic courts were in line with the standards set forth in the ECHR. The government argued that the authorization of the Minister of Justice to investigate crimes under Article 299 of the TPC was a filtering measure and that the implementation of this mechanism has improved in recent years addressing such concerns. They also stated that the scope of

³¹ <https://www.ihd.org.tr/adalet-ve-hakikat-icin-ermeni-soykiriminin-inkarina-son/>

³² https://ihd.org.tr/en/wp-content/uploads/2022/01/Info-Note_O-Turkdogan_Jan-2022.pdf

³³ <https://bianet.org/bianet/siyaset/273315-her-kosulda-barisi-savunmaliyiz-diyen-12-baroya-tck-301-suclamasi>

the offense of “insulting the President” has been narrowly interpreted with the sample decisions given and was therefore in line with the criteria set out in the ECtHR’s judgments.

2. Republican People’s Party’s (CHP) İstanbul Provincial Chair Canan Kaftancıoğlu was sentenced to 9 years, 8 months and 20 days in prison for “insulting a public official”, “insulting the President” and “publicly degrading the State of the Republic of Türkiye” based on her social media posts in 2013. 4 years, 11 months and 20 days of the sentence was upheld by the Court of Cassation.³⁴ Further, İHD Co-Chair Eren Keskin has been facing many investigations and prosecutions as well as many members and executives of İHD due to their social media posts.³⁵ On 24 May 2022, İHD Co-Chair Eren Keskin and Reyhan Çapan were sentenced to 28,000 TRY in judicial fines in three separate criminal cases filed under Article 299 of the TPC for publishing various political news and articles in *Özgür Gündem*, including information and comments on President Erdoğan.³⁶
3. According to the 2020 statistics of the Ministry of Justice, a total of 31,297 investigations were launched under Article 299 of the TPC, 9,166 of which resulted in non-prosecution decisions while 7,790 investigations led to public cases. Similarly, according to the 2020 statistics, a total of 8,769 public cases were brought under Article 299 of the TPC, of which 3,325 resulted in conviction and 1,335 in acquittal. In the statistics of the Ministry of Justice for 2021, data on Article 299 were provided together with the statistics on Article 301 of the TPC.³⁷ As a result, the implementation of Article 299 of the TPC starts with the automatic authorization procedure of the Minister of Justice, and prosecutors render non-prosecution decisions only in a very small percentage of investigation files, while the majority result in convictions and/or suspended sentences.
4. The action plan also argues that the implementation of Article 125 §§ 3a of the TPC, which regulates the offense of insulting public officials, is in line with the Convention. İHD Co-Chair Attorney Öztürk Türdoğan was charged with insulting a public official within the scope of Article 6 of the TPC based on the statement titled “A Compulsory Response to the Minister of Interior Süleyman Soylu’s Statements Targeting İHD”³⁸ published on İHD’s

³⁴ <https://www.bbc.com/turkce/haberler-turkiye-61426730>

³⁵ <https://ihd.org.tr/en/update-to-the-ihd-report-on-human-rights-advocacy-and-repressive-policies-against-ihd/>

³⁶ <https://medyagozlemveritabani.org/ozgur-gundem-gazete-yetkilileri-eren-keskin-ve-reyhan-capan-hakkinda-cumhurbaskanina-hakaretten-3-dosyada-verilen-toplam-28-bin-tl-adli-para-cezasi-onandi/>

³⁷ Op cit. p. 7

³⁸ <https://ihd.org.tr/en/ihds-answer-to-interior-minister-suleyman-soylu/>

website on 29 June 2018. An indictment was filed, and it was accepted by Ankara 60th Criminal Court of First Instance, demanding conviction for the crime of defamation under Article 125 § 3 of the TPC. The trial resulted in Mr. Türkdöğän's acquittal as the elements of the offense impugned did not occur. However, the prosecutor's office objected to this ruling of the court and the file is pending under appellate review.

5. Türkiye's Supreme Board of Elections filed a written criminal complaint with the İstanbul Anatolian Chief Public Prosecutor's Office, stating that the members of the board who served during the 2019 municipal elections were insulted and victimized because of İstanbul Metropolitan Mayor Ekrem İmamođlu's press statement of 4 November 2019. The indictment drafted by the Chief Public Prosecutor's Office requested that Mr. İmamođlu be convicted for "publicly insulting public officials working as a board on the basis of their duties." On 14 December 2022, İstanbul Anatolian 7th Criminal Court of First Instance sentenced Mr. İmamođlu to 2 years, 7 months and 15 days in prison and rendered a political ban under Article 215 of the TPC.³⁹
6. According to the 2020 statistics of the Ministry of Justice⁴⁰, a total of 946,522 investigations were launched under Article 125 of the TPC, while 538,847 of these resulted in non-prosecution decisions; 348,822 investigations led to public cases. Similarly, according to the 2020 statistics, a total of 219,857 public cases were filed under Article 125 of the TPC, 48,911 of which resulted in conviction and 41,078 in acquittal. The 2021 statistics on Article 125 of the TPC were provided together with the offences regulated between Articles 125 and 131 of the TPC, therefore, individual data on Article 125 of the TPC has not been available.

F. Işıkrık Group of Cases

1. The complex and structural problems observed in the *Işıkrık* group of cases are still ongoing.
2. None of the fundamental problems highlighted in the *Işıkrık* group of cases have been resolved. On 10 June 2021, the General Assembly of the Constitutional Court ruled in the application of *Hamit Yakut* (Application No. 2014/6548) that the right to hold assemblies

³⁹ <https://www.reuters.com/world/middle-east/turkish-court-sentences-erdogan-rival-jail-insulting-officials-2022-12-14/>

⁴⁰ https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf

and demonstrations guaranteed under Article 34 of the Constitution was violated. In this decision, the Constitutional Court issued a pilot judgment finding a violation of the right to peaceful assembly due to the claimant being sentenced for committing an offense on behalf of an organization for participating in a demonstration march and notified the legislative branch to amend Article 220 § 6 of the TPC.⁴¹ Nevertheless, the law was not amended. In this judgement, the Constitutional Court stated that it would not take action in respect of other applications, causing indirect violation of the rights of many applicants.

3. Following the ECtHR's violation judgements in the *Işıkırık* group, the practice of filing cases under Article 220 § 6 and 7 of the TPC, Article 314 § 3 of the TPC and Article 2 § 2 of the ATL has been abandoned and instead cases are now being filed directly under Article 314 § 2 of the TPC. The statistics of the Ministry of Justice on Article 314 § 2 of the TPC confirm such state of affairs.⁴² As stated above in the general comments section, the problem of interchangeable penal articles is growing.
4. In the case of *Selahattin Demirtaş v. Türkiye* (Application no. 14305/17) dated 12 November 2020, the Grand Chamber of the ECtHR found that the detention was politically motivated and ruled a violation of several articles of the ECHR, including Article 18. In this judgment, the ECtHR clearly stated that Article 314 of the TPC was controversial in meeting the legality requirement.
5. In the application submitted to the UN Human Rights Committee by Mukadder Alakuş, who was dismissed from public office by a state of emergency decree law and convicted of membership of an illegal armed organization (TPC 314 § 2) using the newly-introduced concepts of contact (irtibat) and junction (iltisak), the UN Human Rights Committee's decision⁴³ found that Türkiye violated the applicant's rights under Article 9 § 1, 10, 14 § 3 paragraphs b, d and e and Article 15 of the UN Covenant on Civil and Political Rights. With this decision, it is concluded that there was a serious violation of the right to legal certainty in the implementation of the provisions within the scope of the ATL in Türkiye.
6. In the Constitutional Court's judgment on the case of *Bilal Celalettin Şaşmaz* (Application No. 2019/20791) dated 18 October 2022, which was published in the *Official Gazette* of 6

⁴¹<https://www.anayasa.gov.tr/tr/haberler/bireysel-basvuru-basin-duyurulari/gosteri-yuruyusune-katildigi-icin-orgut-adina-suc-isleme-sucundan-cezalandirilma-nedeniyle-toplantı-ve-gosteri-yuruyusu-duzenleme-hakkinin-ihlal-edilmesi-pilot-karar/>

⁴²<https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/310520221416422021H%C4%B0ZMETE%C3%96ZELK>

⁴³ 15 November 2022, No. CCPR/C/135/D/3735/2020

January 2023, the Venice Commission's opinion on Articles 216, 299, 301 and 314 of the TPC was specifically referred to in paragraph 33. In this judgment, it was emphasized that the principle of legality in crime and punishment should be taken into account in the application of Article 314 § 2 of the TPC and a violation of the principle of legality was found. This time, however, the President of the Court of Cassation criticized the Constitutional Court and stated that it had exceeded its powers.⁴⁴ This statement of the Court of Cassation is quite problematic.

IV. CONCLUSION AND RECOMMENDATIONS

- 1.** General measures to prevent violations of the right to freedom of expression and effective investigations into cases have so far been insufficient.
- 2.** No significant changes have been introduced to the relevant provisions since the last meeting of the Committee of Ministers at which the current group of cases was reviewed. The amendments previously introduced have not produced the results proposed by the government. İHD is of the view that the structural problems observed by the ECtHR and the Committee of Ministers persist and have not been properly addressed by the Turkish authorities.
- 3.** The latest amendments to the Turkish Penal Code and the Anti-Terror Law do not meet the Committee of Ministers' requirement of full harmonization with the ECtHR's case law in terms of the standards of foreseeability and necessity in a democratic society.
- 4.** Having in mind the arguments above, İHD requests the Committee of Ministers to set out the following recommendations to the Turkish authorities:
 - The Anti-Terror Law must absolutely be abolished and Articles 125, 215, 216, 220 § 6,7 and 8, 299, 301 and 314 § 2 and 3 of the Turkish Penal Code, which penalize freedom of expression, be amended.
 - The Committee of Ministers must require Türkiye to respect the principle of the natural judge in the establishment of courts and to provide geographical guarantees for judges.

⁴⁴ <https://www.yargitay.gov.tr/icerik/1675/yargitay-baskanligi-2022-yili-degerlendirme-toplantisi-basinsuplarnin-katilimiyla-gerceklestirildi>

- The government must be urged to provide detailed data on the implementation of the relevant provisions of the Turkish Criminal Code and the Anti-Terror Law. As the government arbitrarily changes the methodology for collecting data with each action plan, it is impossible to determine the real impact of the measures. It should also be noted that since 2017 the Ministry of Justice has stopped publishing detailed statistics on freedom of expression-related offences included in this submission in its judicial statistics. It is, therefore, recommended that the Committee of Ministers must request regular updates and detailed data on judicial practice regarding investigations, prosecutions and convictions related to freedom of expression.
- The government must also be asked to provide examples where individuals have been convicted under the relevant provisions. While the government provides some examples of good practice, in thousands of other cases the peaceful expression of opinions is subject to criminal sanctions.

Finally, the *Öner and Türk; Şener; Akçam; Işıkırık and Artun and Güvener* group of cases must remain supervised under the enhanced procedure and, given the close link between freedom of expression and the press as pillars of a democratic society, the Committee of Ministers must review the *Öner and Türk; Şener; Akçam; Işıkırık and Artun and Güvener* group of cases at frequent and regular intervals in relation to general legislative measures.