

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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Submission by the Human Rights Association (İnsan Hakları Derneği) 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 organization. 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

3. 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 illegal organizations) of the Anti-Terrorism Law (ATL); Article 215 (praising an offense 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).

4. 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).

5. 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).

6. 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 TPC (the President, the Republic, police officers, tax inspectors etc.) (violations of Article 10).

7. 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 offense 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

8. With regard to the *Öner and Türk*; *Altuğ Taner Akçam*; *Nedim Şener*; *Işıkırık and Artun and Güvener* groups of cases, İHD submitted its Rule 9.2 submission on 22.01.2023.² In the

² <https://ihd.org.tr/en/ihd-rule-9-2-communication-oner-and-turk-v-Türkiye-group-of-cases/>

submission, the latest developments regarding the relevant articles of law analyzed in each group of cases were discussed and up-to-date statistics were presented.

B. Öner and Türk Group of Cases

9. In the Action Plan (para. 395-446) dated 11.01.2024, the Government reiterated the statements made in previous action plans and stated that Articles 6 and 7 of the Anti-Terror Law (ATL) and Article 215 of the Turkish Penal Code (TPC) had been brought into alignment with Convention standards through amendments. In the action plan, the Government provided examples of judgments of the Court of Cassation and the Constitutional Court. In addition, the Government mentioned the amendment introducing the right of appeal to the Court of Cassation against sentences imposed under these articles and stated that this new right protects freedom of expression and that the practice of national judicial authorities was in line with the Court's case law. However, the examples provided do not represent the systematic violations of freedom of expression in Türkiye.

10. According to the statistics of the Ministry of Justice for the year 2022³, a total of 38,910 investigation files were examined within the scope of the ATL No. 3713 (Art. 6-7), 4,831 of these investigations resulted in non-prosecution decisions while 5,316 investigation files turned into prosecutions. According to the same statistics, in 2022, a total of 13,575 court cases were heard under the ATL (Art. 6-7), 1,302 of these cases resulted in convictions and 1,693 in acquittal. In the statistics for 2020, the Ministry of Justice shared separate data on investigations and prosecutions for offenses defined in the TPC and Special Laws. However, in the statistics for 2022, the data on the articles regulated under the heading of the type of offense charged were given collectively, rather than article by article. Therefore, it is not possible to access reliable government data on investigations and prosecutions that lead to violations of freedom of expression.

11. The following examples are only some of the examples of structural problems arising from Article 7/2 of the ATL, contrary to what the Government claims in the Action Plan: Dr. Mehmet Raşit Tükel, who served as the President of the Central Council of the Turkish Medical Association (TMA) between 2016 and 2018, and council members Dr. Sinan Adıyaman, Dr.

³https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/29032023141410adalet_ist-2022cal%C4%B1sma100kapakl%C4%B1.pdf , p. 70.

Ayfer Horasan, Dr. Bülent Nazım Yılmaz, Dr. Dursun Yaşar Ulutaş, Dr. Funda Barlık Obuz, Dr. Hande Arpat, Dr. Mehmet Sezai Berber, Dr. Mustafa Tamer Gören, Dr. Selma Göngür and Dr. Şeyhmus Gökalg were targeted, detained in house raids and a lawsuit was filed against them after the statement titled "War is a Public Health Problem"⁴ published on the official website of the TMA on 24 January 2018 regarding the military operation of the Turkish Armed Forces against Afrin. At the final hearing held on 3 May 2019, Ankara 32nd Assize Court sentenced all physicians to 1 year and 8 months each, two times for 10 months each on the charge of "inciting the public to hatred and hostility" and Dr. Hande Arpat to 1 year 6 months and 22 days on the charge of "making propaganda for a terrorist organization." On 28 September 2022, the 19th Criminal Chamber of the Ankara Regional Court of Appeals overturned the verdict of the court of first instance and acquitted 11 rights defenders. Ankara Regional Court of Appeals Chief Public Prosecutor's Office appealed the acquittal decision on 7 October 2022 with the request to uphold the sentences handed down to the rights defenders.⁵

12. Within the scope of an investigation carried out by the Batman Chief Public Prosecutor's Office, an indictment was prepared against Hasan Yalçın, who is a visually impaired Kurdish father, on charges of "aiding an illegal organization" and "making propaganda for an illegal organization" based on the coerced statements of his 14-year-old daughter that he "constantly reads the books of the (armed) organization and buys its newspapers."⁶

13. Contrary to the Government's allegations, the practice is not in line with Convention standards. Articles 6/2, 7/2 of the ATL lack the "foreseeability and certainty" prescribed by the Convention and the Court's case law. The problems described in the previous Rule 9.2 notification submitted on 22.01.2023 remain.

⁴ <https://bianet.org/haber/doctors-who-say-war-is-a-public-health-problem-appear-before-judge-203959>

⁵ Human Rights Foundation of Turkey (HRFT), Report on the Pressures, Obstacles and Challenges Faced by Human Rights Defenders in Turkey in 2022, available at: https://tihv.org.tr/wp-content/uploads/2023/09/TIHV_iHS-ihlal_2022_Raporu.pdf, p.3.

⁶ <https://artigercek.com/guncel/gorme-engelliye-orgutun-kitaplarini-okuyor-ifadesiyle-dava-acildi-244238h>

C. Nedim Şener Group of Cases

14. In its Action Plan (para. 447-451), the Government stated that the free exercise of journalistic activities in Türkiye was guaranteed by Article 28 of the Constitution and reiterated that no one was held in penal institutions for their journalistic activities but did not provide any data on the number of journalists in pre-trial detention.

15. According to the Journalists' Union of Türkiye (TGS), 14 journalists and media workers are currently in prison in Türkiye.⁷ In addition, the information request submitted to the Presidential Communication Centre (CIMER) on 7 September 2022 to find out the number of journalists in prisons was left unanswered by the Ministry of Justice claiming that such "information is of no public concern."⁸

16. Journalist Merdan Yanardağ, editor-in-chief of TELE 1, was arrested on 27 June 2023 within the scope of an investigation initiated into him on charges of "making propaganda for an illegal organization" and "praising crime and criminals" after he said in a live tv show that the isolation or incommunicado detention faced by Abdullah Öcalan, the leader of an illegal armed organization, should be lifted. Yanardağ was sentenced to 2 years and 6 months in prison and released on 4 October 2023.⁹

17. Journalist Dicle Müftüoğlu, co-chair of Dicle Fırat Journalists Association and editor at Mesopotamia Agency, has been in pre-trial detention since 3 May 2023. Müftüoğlu was arrested on the grounds of her travels, hotel accommodation records, phone calls with journalist colleagues, bank account transactions and witness statements. Due to these activities, a lawsuit was filed against Müftüoğlu on charges of "membership in an illegal organization" and "directing an illegal organization."¹⁰

18. Regarding the issuance of an arrest warrant, the "demonstration of material facts" introduced by the Law No. 7331/08.07.2021 in subparagraph d of paragraph 2 of Article 101 of the Code of Criminal Procedure (CCP) is not applied in practice, particularly in investigations and prosecutions conducted under the ATL. Only the right to appeal to the Criminal Courts of

⁷ <https://tgs.org.tr/cezaevindeki-gazeteciler/>

⁸ <https://m.bianet.org/bianet/ifade-ozgurlugu/267124-adalet-bakanligi-tutuklu-gazeteci-sayisi-icin-kamuoyunu-ilgilendirmeyen-bilgi-dedi>

⁹ <https://www.bbc.com/turkce/articles/cq5l0y9jj2lo>

¹⁰ <https://www.mlsaTürkiye.com/tr/dicle-mueftueoglu-bu-iddianame-karsi-savunma-yapmak-bile-basli-basina-bir-zuluemduer>

First Instance against pretrial detention and judicial control decisions was introduced by Law no.7331/08.07.2021 and started to be implemented as of 1 January 2022; it has not yet affected a difference in practice.

19. Contrary to the Government's claims, the practice is not in line with the Convention standards. The problems described in our previous Rule 9.2 submission continue to raise concern.

D. Altuğ Taner Akçam Group of Cases

20. In its Action Plan (para. 452-486), the Government stated that the amendments to Article 301 of the Turkish Penal Code brought it in line with Convention standards, narrowed the scope of application of the provision; that the opening 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.

21. Contrary to what the Government claims, prosecutors frequently use Article 301 of the TPC to silence criticism of the Government and State institutions. The Ministry of Justice's statistics for 2022 do not include separate data on Article 301 of the TPC, and the information is provided together with the statistics on Article 299 of the TPC. According to these statistics, in 2022, a total of 23,031 investigations were initiated under Articles 299-301 of the TPC, while 7,627 of these files resulted in dismissal, 6,769 were turned into public cases. According to the same statistics, a total of 7,600 court cases were filed under articles 299-301 of the TPC, of which 1,920 resulted in conviction and 2,016 in acquittal. The Committee must insist that the Government provide up-to-date and detailed disaggregated statistical data on criminal investigations and prosecutions, and comment on these data.

22. As an example of the prosecutions under Article 301 of the TPC, an indictment was issued against İHD Co-chair Lawyer Emire Eren Keskin, for the declaration titled "Recognise the genocide, ask for forgiveness, compensate for the genocide" made at İHD Istanbul Branch on 24 April 2021, on the Armenian Genocide; on the grounds that this declaration 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. The prosecution is still ongoing.¹¹ In addition, a lawsuit was filed against İHD's former Co-Chair, lawyer Öztürk Türkdoğan, under Article 301 of the TPC for the declaration titled "End the Denial of the Armenian Genocide for Justice and Truth" published on the website of İHD on 24 April 2017.¹² The systematic prosecution of the heads of associations for their statements shows that the ECtHR case law has been completely overruled in practice and that this article is being used as a tool of political pressure.

E. Artun and Güvener Group of Cases

23. In its Action Plan (para. 487-518), 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 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.

24. According to the statistics of the Ministry of Justice for 2020¹³, a total of 31,297 investigations were initiated under Article 299 of the TPC. A total of 31,297 investigations were initiated under Article 299 while 9,166 resulted in non-prosecution, 7,790 investigations were turned into public cases. According to the 2020 statistics, a total of 8,769 public prosecutions were initiated under Article 299 of the TPC. A total of 8,769 public cases were filed under this article, of which 3,325 resulted in conviction and 1,335 in acquittal. In the statistics of the Ministry of Justice for the year 2022, the statistics on Article 299 of the TPC were provided together with the statistics on Article 301 of the TPC.¹⁴ As a result, the implementation of Article 299 of the TPC starts with the automatic authorization procedure of the Minister of Justice, and prosecutors issue non-prosecution decisions only in a very small percentage of

¹¹ <https://www.dusun-think.net/haberler/hak-savunucularina-acilan-dava/>

¹² <https://www.ihd.org.tr/adalet-ve-hakikat-icin-ermeni-soykiriminin-inkarina-son/>

¹³ https://adlisicil.adalet.gov.tr/Resimler/SayfaDokuman/1692021162011adalet_ist-2020.pdf

¹⁴ See above para. 21.

investigation files, while the majority of them result in convictions and/or suspended sentences.

25. The number of lawsuits filed on the charge of insulting the President increased 19 times in 2023 compared to previous years. According to Doğruluk Payı's¹⁵ data, from 1986 until today, the number of defendants in cases of insulting the president under past presidents was 340 during Kenan Evren's term, 207 during Turgut Özal's term, 158 during Süleyman Demirel's term, 163 during Ahmet Necdet Sezer's term, 848 during Abdullah Gül's term, 6,033 during Recep Tayyip Erdoğan's first term, and 16,753 as of 2022 in his second term as president. It is observed that the first significant increase in the cases of insulting the President was seen during Abdullah Gül's term with an increase of 420 percent compared to the previous term. Erdoğan ranks first in the rate of increase compared to the previous terms, with the number of defendants increasing 19 times compared to his predecessor's term. During this period, the number of defendants prosecuted in cases of insulting the president increased by 611 percent compared to his predecessor Gül's term. Further, 1,377 minors were charged with insulting the president in 2022.¹⁶

26. In 2021, a lawsuit was filed against 7 members of the Workers Party of Turkey (Türkiye İşçi Partisi, TİP) for a press statement they made in Adana to draw attention to the vital challenges caused by the economic crisis, on charges of insulting the president. The prosecution is ongoing.¹⁷ Former Republican People's Party (Cumhuriyet Halk Partisi-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 in her social media posts in 2013. 4 years, 11 months and 20 days of the sentence was upheld by the Court of Cassation.¹⁸ Many investigations and prosecutions have been/are being carried out against İHD Co-Chair Eren Keskin and many members and executives of İHD due to their social media posts.¹⁹ İHD Co-Chair Eren Keskin and Reyhan Çapan were sentenced to 28,000 TL judicial fine in three separate criminal cases filed under

¹⁵ Doğruluk Payı is Türkiye's first fact-checking platform. As one of the founding advisory board members of the International Fact-Checking Network (IFCN), Doğruluk Payı creates thousands of content in many different genres, endeavoring to provide the public with better access to accurate information on every subject.

¹⁶ <https://www.dogrulukpayi.com/bulten/2018-yilinda-cumhurbaskanina-hakaretten-kac-kisi-sanik-oldu>

¹⁷ <https://www.mlsaTürkiye.com/tr/gecinemiyoruz-diyen-tiplilerin-cumhurbaskanina-hakaret-davasi-basladi>

¹⁸ <https://www.bbc.com/turkce/haberler-turkiye-61426730>

¹⁹ For detailed information, see: İHD, Human Rights Defense and Repression of İHD Report, 2021.

Article 299 of the TPC for publishing various political news and articles in *Özgür Gündem*, including information and comments on President Erdoğan.²⁰

27. According to the statistics of the Ministry of Justice for 2020, a total of 946,522 investigations were initiated under Article 125 of the TPC, 538,847 of which resulted in non-prosecution while 348,822 investigations turned into public cases. According to 2020 statistics, a total of 219,857 public cases were filed under Article 125 of the TPC, of which 48,911 resulted in conviction and 41,078 in acquittal. The statistics for the year 2022 on Article 125 of the TPC were presented together with the offences regulated under Articles 125-131 of the TPC, therefore, individual data on Article 125 of the TPC are not available for 2022.

28. 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 6/1-c of the TPC based on the statement titled “A Compulsory Response to the Minister of Interior Süleyman Soylu’s Statements Targeting İHD” published on İHD’s website²¹ 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. Türdoğan’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.

F. Işıkkırık Group of Cases

29. The Government stated in its Action Plan (para. 519-547) that on 26 October 2023, the Constitutional Court examined Article 220/6 of the TPC and cancelled the said article on the grounds that it was unforeseeable and therefore did not meet the qualifications of a law; that this decision was published in the *Official Gazette* of 8 December 2023 and would enter into

²⁰ <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/>

²¹ <https://www.ihd.org.tr/icisleri-bakani-suleyman-soylu-ile-ilgili-zorunlu-aciklama/>

force on 8 April 2024. However, the main problems highlighted in the *Işıkırık* case group remain.

30. Following the ECtHR's violation judgments 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. As stated above in the general comments section, the problem of interchangeable penal articles is growing.²²

31. In the application submitted to the UN Human Rights Committee by detained teacher 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 decision 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. The problems we noted in our previous Rule 9.2 submission on the case group remain.

IV. CONCLUSION AND RECOMMENDATIONS

32. General measures to prevent violations of the right to freedom of expression and effective investigations into cases have so far been insufficient.

33. 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

²² In the case of *Selahattin Demirtaş v. Türkiye* (App. 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 TCPC was controversial in meeting the legality requirement.

Committee of Ministers persist and have not been properly addressed by the Turkish authorities.

34. 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.

35. 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 §7 and 8, 299, 301 and 314 § 2 and 3 of the Turkish Penal Code, which penalize freedom of expression, be amended.
- Detailed data on the implementation of the relevant provisions of the Turkish Penal Code and the Anti-Terror Law, including information on investigations, prosecutions and convictions, must be annually published.²³ Examples where individuals have been convicted under Articles 6 and 7 of the Anti-Terror Law and Articles 125, 215, 216, 220 §7 and 8, 299, 301 and 314 § 2 and 3 of the Turkish Penal Code must be provided.

36. İHD requests the Committee of Ministers to examine and address the increasing use of interchangeable criminal provisions.

37. İHD calls on the Committee of Ministers to instruct the Secretariat to draft an interim decision if no tangible progress is made or detailed statistics are not provided by the next review.

38. 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.

²³ As the government arbitrarily changes the methodology for collecting data with each action plan, it is impossible to determine the actual 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.